No. _____

In The
Supreme Court of the United States

JOSEPH M. BECK, M.D., in his official capacity as Chairperson of the Arkansas State Medical Board, et al.,

Petitioners,

v.

LOUIS JERRY EDWARDS, M.D., et al.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Three questions are presented:

1. Should the viability rule imposed in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 503 U.S. 833 (1992), be revisited and overruled?

2. Should a state statute that restricts abortion after twelve weeks and a fetal heartbeat survive a facial constitutional challenge where that statute provides a reasonable amount of time for a woman to terminate her pregnancy and provides exceptions to the restriction for rape, incest, the health and life of the mother, and diagnosis of a lethal fetal disorder?

3. Should the fact that a state's safe haven statute eliminates a pregnant woman's burden of parenthood, thereby removing a central concern of the *Roe* Court, have any bearing on the constitutional analysis of a law that restricts abortion prior to viability?

PARTIES TO THE PROCEEDING

Petitioners: Joseph M. Beck II, M.D., Chairperson of the Arkansas State Medical Board, and his successors in office, in their official capacity; Omar Atiq, M.D., member of the Arkansas State Medical Board, and his successors in office, in their official capacity; Steven L. Cathey, M.D., member of the Arkansas State Medical Board, and his successors in office, in their official capacity; Jim Citty, M.D., member of the Arkansas State Medical Board, and his successors in office, in their official capacity; Bob Cogburn, M.D., officer and member of the Arkansas State Medical Board, and his successors in office, in their official capacity; William F. Dudding, M.D., member of the Arkansas State Medical Board, and his successors in office, in their official capacity; Verly Hodges, D.O., member of the Arkansas State Medical Board, and his successors in office, in their official capacity; Scott Pace, Pharm.D., J.D., officer and member of the Arkansas State Medical Board, and his successors in office, in their official capacity; John H. Scribner, M.D., member of the Arkansas State Medical Board, and his successors in office, in their official capacity; John Weiss, M.D., member of the Arkansas State Medical Board, and his successors in office, in their official capacity; Robert Breving Jr., M.D.,* member of the Arkansas State Medical Board, and his successors in office, in their official capacity; Rodney Griffin, M.D.,* member of the Arkansas State Medical Board, and his successors in office, in their official capacity; Larry D. Lovell,* member of the

PARTIES TO THE PROCEEDING – Continued

Arkansas State Medical Board, and his successors in office, in their official capacity; William L. Rutledge, M.D.,* member of the Arkansas State Medical Board, and his successors in office, in their official capacity. Petitioners were the defendants in the District Court and the appellants in the Court of Appeals.

* Modified to substitute the successor to the public office, named in his or her official capacity only, in the case below.

Respondents: Louis Jerry Edwards, M.D., on behalf of himself and his patients; Tom Tvedten, M.D., on behalf of himself and his patients. Respondents were the plaintiffs in the District Court and the appellees in the Court of Appeals.

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INTRODUCTION

In its recent abortion jurisprudence, this Court has repeatedly emphasized the State's *profound* interests – from conception to birth – in protecting the life of the unborn child, protecting the health of the mother, and upholding the integrity of the medical profession. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 876, 878 (1992);[1] *Gonzales v. Carhart*, 550 U.S. 124, 157-58 (2007). Indeed, "the evolution in the . . . Court's jurisprudence reflects its increasing recognition of states' profound interest in protecting unborn children." *MKB Management Corp. v. Stenehjem*, ___ F.3d ___, 2015 WL 4460405, *2 (8th Cir. July 22, 2015). At the same time, this Court has recognized that, under the Fourteenth Amendment, "it is a constitutional liberty of the woman to have some freedom to terminate her pregnancy." *Casey*, 505 U.S. at 869.

This case does not involve a challenge to either of these foundational principles of the Court's abortion jurisprudence. Rather, this case is about the impropriety of a judicially-imposed rule – free from any serious constitutional mooring – that sets in stone "viability" as the point before which the State's profound interests must give way to a woman's desire to terminate her pregnancy. Just as *Casey* reevaluated

[1] Unless otherwise indicated, all citations to *Casey* are citations to the plurality, and controlling, opinion of Justices Kennedy, O'Connor, and Souter.

the wisdom and constitutional necessity of the rigid trimester framework imposed by the Court in *Roe v. Wade*, 410 U.S. 113 (1973), it is now time for the Court to reevaluate the rigid viability rule imposed in *Casey*. *Cf. Casey*, 505 U.S. at 872 ("A framework of this rigidity was unnecessary and in its later interpretation sometimes contradicted the State's permissible exercise of its powers.").

The Court of Appeals below sharply criticized this Court's viability rule, noting that the rule constitutes an extra-constitutional judicial line-drawing exercise more appropriately left to the elected and accountable legislative branches of government. *See Edwards v. Beck*, 786 F.3d 1113, 1119 (8th Cir. 2015) (App. 10-11) ("To substitute its own preference to that of the legislature in this area is *not* the proper role of a court.") (emphasis in original); *MKB Management Corp.*, 2015 WL 4460405, *4 ("[T]his choice is better left to the states, which might find their interest in protecting unborn children better served by a more consistent and better marker than viability."). Unfortunately, this Court's current abortion jurisprudence not only elevates the arbitrary line of viability to constitutional significance, but also prohibits the states from contributing to the determination of when viability occurs. *See Colautti v. Franklin*, 439 U.S. 379, 388-89 (1979) (holding that viability can only be based on "the judgment of the attending physician on the particular facts of the case before him" and "neither the legislature nor the courts may proclaim" when viability occurs). This straight-jacket into which

the Court has bound the states is, at best, highly inconsistent with the Court's usual view that states have wide discretion to pass legislation where there is medical, scientific, and moral uncertainty. *See Gonzales*, 550 U.S. at 162-64. *See also Stenberg v. Carhart*, 530 U.S. 914, 968-70 (2000) (Kennedy, J., dissenting) (noting "the substantial authority allowing the State to take sides in a medical debate, even when fundamental liberty interests are at stake").

The Court of Appeals does not stand alone in criticizing the viability rule and calling for the Court to abandon this artificial stricture. Over 20% of states and the U.S. House of Representatives have recently passed legislation adopting the principle that the State's interest in protecting the lives of unborn children outweighs a woman's liberty to terminate her pregnancy when an unborn child is capable of experiencing pain, prior to viability as defined by this Court.[2] Other states have adopted the principle that the State's interest outweighs a woman's interest

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[2] *See* Ala. Code § 26-23B-5(a) (2011); Ariz. Rev. Stat. Ann. § 36-2159(b) (2012) (held unconstitutional by *Isaacson v. Horne*, 716 F.3d 1213 (9th Cir. 2013)); Ga. Code Ann. § 16-12-141(c) (2012); Idaho Code Ann. § 18-505 (2011) (held unconstitutional by *McCormack v. Hiedeman*, 900 F.Supp.2d 1128 (D. Idaho 2013)); Ind. Code § 16-34-2-1 (2013); Kan. Stat. § 65-6724(c) (2011); La. Rev. Stat. § 40:1299.30.1(E)(1) (2012); Neb. Rev. Stat. § 28-3,106 (2010); N.C. Gen. Stat. Ann. § 14-45.1 (2013); N.D. Cent. Code § 14-02.1 (2013); 63 Okla. Stat. Ann. § 1-745.5(A) (2011); Tex. Health & Safety Code Ann. § 171.044 (2013); Pain-Capable Unborn Child Protection Act, H.R. 1797, 113th Congress.

when an unborn child has a detectable fetal heartbeat and/or has reached a certain number of weeks of gestation, prior to viability as defined by this Court.[3] Moreover, some states retain their pre-*Roe* abortion restrictions,[4] and some states have enacted laws expressing the states' intent to restrict abortion if *Roe* is overturned.[5] That these sovereign states dispute the constitutional propriety of the viability rule

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[3] *See* Ark. Code Ann. § 20-16-1304; App. 60 (held unconstitutional by *Edwards v. Beck*, 786 F.3d 1113 (8th Cir. 2015) (App. 10-11)); N.D. Cent. Code § 14-02.1 (held unconstitutional by *MKB Management Corp. v. Stenehjem*, ___ F.3d ___, 2015 WL 4460405 (8th Cir. July 22, 2015)).

[4] *See* Linton, Paul Benjamin, J.D., *The Legal Status of Abortion in the States if* Roe v. Wade *is Overruled*, 23 Issues L. & Med. 3, 4 (2007) (summarizing state abortion laws prior to and after *Roe*; noting that most states' pre-*Roe* abortion laws have been repealed or struck down but that as many as 12 states "would have enforceable laws on the books that would prohibit most abortions in the event *Roe*, *Doe*, and *Casey* are overruled").

[5] *See, e.g.*, 720 Ill. Comp. Stat. Ann. 510/1 (if *Roe* is "ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated"); Ky. Rev. Stat. Ann. § 311.710(5) ("If . . . the United States Constitution is amended or relevant judicial decisions are reversed or modified, the declared policy of this Commonwealth to recognize and to protect the lives of all human beings regardless of their degree of biological development shall be fully restored."); Mo. Ann. Stat. § 188.010 ("It is the intention of the general assembly of the state of Missouri to grant the right to life to all humans, born and unborn, and to regulate abortion to the full extent permitted by the Constitution of the United States, decision of the United States Supreme Court, and federal statutes.").

further recommends that the Court revisit its viability jurisprudence.

The instant case, which involves a *facial challenge* to the Arkansas abortion law, presents an ideal vehicle for the Court to revisit its viability jurisprudence. Arkansas reasonably balances its profound interest in protecting the life of an unborn child against a woman's interest in terminating her pregnancy. Arkansas accomplishes this balance by: (1) allowing abortions in the first twelve weeks of gestation, which is when the vast majority of abortions take place;[6] (2) prohibiting physicians from performing abortions after twelve weeks of gestation and the detection of a fetal heartbeat, except in cases of rape, incest, danger to the life or health of the mother, or

[6] *See Gonzales*, 550 U.S. at 134 ("Between 85 and 90 percent of the approximately 1.3 million abortions performed each year in the United States take place in the first three months of pregnancy, which is to say the first trimester."). The Center for Disease Control's most recent Abortion Surveillance Report suggests that the percentage range identified in *Gonzales* in 2007 is accurate today, and suggests further that first trimester abortions are increasingly more common relative to later-term abortions. *See* Centers for Disease Control and Prevention, *Abortion Surveillance Report – United States, 2011* (November 28, 2014), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6311a1.htm (noting that 64.5% of abortions were performed within eight weeks of gestation and 91.4% of abortions were performed within 13 weeks of gestation; noting further that from 2002 to 2011, the percentage of abortions performed by eight weeks of gestation increased while the percentage of abortions performed after 13 weeks of gestation decreased).

diagnosis of a lethal fetal disorder; and (3) providing a safe haven statute that allows mothers to relinquish unwanted infants without consequence and thus removes the burden of unwanted parenthood and child care from pregnant women. While Arkansas law admittedly prohibits some pre-viability abortions, a woman has a reasonable amount of time to terminate her pregnancy in the first twelve weeks of gestation, and a woman can abandon her child after the child is born without consequence.

The Court should grant certiorari to revisit and overturn its unnecessary and constitutionally infirm viability rule. A State should be allowed to advance its profound interests in protecting the life of the unborn child, protecting the health of the mother, and upholding the integrity of the medical profession by enforcing a restriction on abortion prior to viability especially where, as here, a woman is given a reasonable amount of time to terminate her pregnancy and the State provides a safe haven statute allowing a woman to abandon an unwanted child carried to term. By overruling the viability rule, the Court can protect the individual liberty interest declared in *Roe* and *Casey* while simultaneously affording states the latitude to protect their profound interests.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (App. 1) is reported at

786 F.3d 1113. The opinion of the United States District Court for the Eastern District of Arkansas (App. 15) is reported at 8 F.Supp.3d 1091. The preliminary injunction of the District Court (App. 39) is reported at 946 F.Supp.2d 843.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on May 27, 2015. App. 12. The Court of Appeals denied rehearing on July 9, 2015. App. 55. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Constitution, Fourteenth Amendment, § 1 states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The relevant statutory provisions are reprinted in the appendix to this petition. App. 57-62.

STATEMENT OF THE CASE

The Arkansas General Assembly enacted the Human Heartbeat Protection Act into law in 2013. *See* Ark. Act 301 of 2013, *codified at* Ark. Code Ann. § 20-16-1301. App. 57-62. Act 301 provides that, prior to performing an abortion, a physician must perform an abdominal ultrasound test to determine if the fetus possesses a heartbeat. The law also provides that abortions shall generally not be performed in Arkansas in cases where a fetal heartbeat has been detected and the fetus has reached a gestational age of twelve weeks or more. Act 301 does not otherwise limit abortions, and it contains exceptions for rape, incest, the health and life of the mother, and diagnosis of a lethal fetal disorder. Arkansas law also provides a safe haven for women who choose to relinquish parental rights to a child within 30 days of a child's birth. *See* Ark. Code Ann. § 9-34-202.

Two Arkansas physicians who perform abortions challenged the constitutionality of Act 301 on behalf of themselves and their patients. The District Court determined that the provision restricting abortions after the detection of a fetal heartbeat and twelve weeks of gestation is unconstitutional under *Roe* and *Casey*. The Court of Appeals affirmed, explaining that it is bound by this Court's rule that states may not

prohibit abortions prior to viability. This Court should reverse the Court of Appeals. Arkansas's law provides a reasonable amount of time for a woman to terminate her pregnancy while furthering the State's profound interest in protecting the life of the unborn child, and it should therefore be upheld against a facial challenge.

A. Statutory Background

Act 301's principal features carefully balance several important interests, including the State's interest in protecting the lives of unborn children and the pregnant woman's individual liberty interest in terminating an unwanted pregnancy.

First, Act 301 contains provisions regarding medical tests used to determine the presence of the unborn child's heartbeat. Act 301 provides that "[a] person authorized to perform abortions under Arkansas law shall not perform an abortion on a pregnant woman before the person tests the pregnant woman to determine whether the fetus that the pregnant woman is carrying possesses a detectible heartbeat." Ark. Code Ann. § 20-16-1303(a); App. 58. Authorized healthcare providers must perform an "abdominal ultrasound test necessary to detect a heartbeat of an unborn human individual according to standard medical practice, including the use of medical devices as determined by standard medical practice." Ark. Code Ann. § 20-16-1303(b)(1); App. 59.

Second, Act 301 requires informed consent. If a fetal heartbeat is detected, the physician must inform the pregnant woman in writing that a heartbeat has been detected and tell the pregnant woman in writing of the statistical likelihood of bringing the unborn child to term. The woman must sign an acknowledgement that she has received this information. Ark. Code Ann. § 20-16-1303(d) & (e); App. 59-60.

Third, Act 301 generally prohibits abortions beyond twelve weeks of gestation if a fetal heartbeat is detected. Ark. Code Ann. § 20-16-1304; App. 60. The Arkansas State Medical Board must take disciplinary action against violating physicians' licenses, but no other sanctions are authorized. *Id.*

Fourth, Act 301 contains several exceptions to the general prohibition on abortions after twelve weeks and the detection of a fetal heartbeat. For example, the law does not apply to situations involving medical emergencies. Ark. Code Ann. § 20-16-1303(c)(1)(A)(ii); App. 59. In particular, Act 301 does not regulate any abortions that are necessary to protect the life or health of a pregnant woman, and it does not regulate any abortions where the fetus is diagnosed with a lethal fetal disorder. Act 301 also does not regulate abortions if the pregnancy is the result of rape or incest. Ark. Code Ann. § 20-16-1305; App. 61.

Fifth, Act 301 contains various provisions that further limit the law's scope. Act 301 explicitly does not subject females to criminal prosecution or civil

penalties. Ark. Code Ann. § 20-16-1306(1); App. 62. In fact, the law directly regulates only physicians, not pregnant women. Moreover, Act 301 does not prohibit the "sale, use, prescription, or administration of a measure, drug, or chemical designated for contraceptive purposes." Ark. Code Ann. § 20-16-1306(2); App. 62.

Finally, Arkansas law provides a safe haven for women who choose to relinquish parental rights to a child within 30 days of birth. *See* Ark. Code Ann. § 9-34-202. By allowing any woman to abandon an unwanted child without consequence, the State of Arkansas completely assumes a pregnant woman's burden of unwanted parenthood and child care.

B. Proceedings Below

In April 2013, two Arkansas physicians filed a complaint under 42 U.S.C. § 1983 against the members of the Arkansas State Medical Board, challenging the constitutionality of Act 301. The District Court preliminarily enjoined Act 301 in its entirety (App. 53-54), but it noted that the plaintiffs' constitutional challenge appeared to be limited to Act 301's prohibition of abortion at twelve weeks of gestation, when a fetal heartbeat is detected. The District Court invited the parties to present arguments regarding severability. App. 53. The parties addressed severability and the constitutionality of the informed consent provisions in their summary judgment submissions.

On March 14, 2014, the District Court entered its Memorandum Opinion and Order (App. 15) and Judgment (App. 37) in which it permanently enjoined the provision of Act 301 that prohibits abortion where a fetal heartbeat is detected and the fetus has attained twelve weeks of gestation; the provision requiring physician disclosure to a woman regarding the prohibition; and the provision providing for the revocation of a physician's medical license for violation of the prohibition (Ark. Code Ann. § 20-16-1303(d)(3); App. 60; and Ark. Code Ann. § 20-16-1304; App. 61). The District Court determined that the informed consent provisions (Ark. Code Ann. § 20-16-1303; App. 58-60) are constitutional and severable, and it granted the State's request for partial summary judgment affirming the informed consent provisions.

The Eighth Circuit Court of Appeals affirmed. App. 1-11. The Court of Appeals explained that, in *Casey*, this Court reaffirmed a woman's right to choose to have an abortion before viability and to obtain it without undue interference from the State. Following *Casey*, the Court of Appeals explained, the viability principle has been accepted as controlling by a majority of this Court's Justices. App. 5-6. "Like the Court in *Gonzales*," the Court of Appeals "assumed" the principles from *Casey* for the purposes of its opinion. App. 6 (citing *Gonzales*). The Court of Appeals affirmed the District Court because, "[b]y banning abortions after 12 weeks' gestation, the Act prohibits women from making the ultimate decision

to terminate a pregnancy at a point before viability." App. 7.

The Court of Appeals explained that, as an intermediate court, it was "*bound* by the Supreme Court's decisions in *Casey* and the 'assum[ption]' of *Casey*'s 'principles' in *Gonzales*." App. 7 (emphasis in original). However, the Court of Appeals made clear its view that "undeniably, medical and technological advances along with mankind's ever increasing knowledge of prenatal life since the Court decided *Roe v. Wade*, 410 U.S. 113 (1973) and *Casey* make application of *Casey*'s viability standard more difficult[.]" *Id*. Citing to *Isaacson v. Horne*, 716 F.3d 1213 (9th Cir. 2013), and Justice O'Connor's dissenting opinion in *City of Akron v. Akron Ctr. for Reprod. Health, Inc*., 462 U.S. 416 (1983), the Court of Appeals noted that viability varies among pregnancies; that advances in medical technology push later in pregnancy the point at which abortion is safer than childbirth while advancing earlier in gestation the point of fetal viability; that the point of viability is moving further back toward conception; and that the viability rule is on a collision course with itself. App. 8.

Continuing its criticism of the viability rule, the Court of Appeals explained that "we have witnessed in the four decades since the Court decided *Roe* how scientific advancements have moved the viability point back[,]" and "real-life events have proven the *individuality* of the viability determination to be true." App. 8-9 (emphasis in original). Because of

medical advancements over time and the individuality of the viability determination, according to the Court of Appeals, legislatures are best suited to make factual judgments in this area. App. 10. However, the viability rule forces legislatures to speculate about viability as a matter of constitutional law, and courts second-guess these legislative judgments and improperly substitute their own judgments for those of legislatures. App. 10-11.

The Court of Appeals denied Arkansas's petition for rehearing on July 9, 2015, without comment. App. 14.

A case regarding another state's regulation of abortion, *MKB Management Corp.*, was submitted to the same panel of the Court of Appeals on the same day as this case (January 13, 2015). In *MKB Management Corp.*, the Court of Appeals held that a North Dakota law prohibiting abortions of unborn children who possess detectable heartbeats was unconstitutional "[b]ecause United States Supreme Court precedent does not permit us to reach a contrary result[.]" 2015 WL 4460405, *1. The panel again noted that this Court was "presented with an opportunity to reaffirm *Casey*" in *Gonzales* but "chose instead merely to 'assume' *Casey*'s principles for the purposes of its opinion." *Id*. at *2. "This mere assumption may, as the State suggests, signal the Court's willingness to reevaluate its abortion jurisprudence." *Id*. However, because the Court "has yet to overrule the *Roe* and *Casey* line of cases[,]" the Court of Appeals considered itself "bound by those

decisions." *Id*. at *3. "Because there is no genuine dispute that [the North Dakota law] generally prohibits abortions before viability – as the Supreme Court has defined that concept – and because we are bound by Supreme Court precedent holding that states may not prohibit pre-viability abortions, we must affirm the district court's grant of summary judgment to the plaintiffs." *Id*. at *4.

In *MKB Management Corp.*, the Court of Appeals expressly contended that "good reasons exist for the Court to reevaluate its jurisprudence." 2015 WL 4460405, *4. First, "the Court's viability standard has proven unsatisfactory because it gives too little consideration to the 'substantial state interest in potential life throughout pregnancy.'" *Id*. (quoting *Casey*, 505 U.S. at 876). Under the viability standard, "the Court has tied a state's interest in unborn children to developments in obstetrics, not to developments in the unborn[,]" and "[t]his leads to troubling consequences for states seeking to protect unborn children." *Id*. For example, given the shift of viability toward conception over time, states in the 1970s lacked the power to ban abortion of a 24-week-old-fetus because that fetus did not satisfy the viability standard at that time, but today that same fetus is considered viable. "How it is consistent with a state's interest in protecting unborn children that the same fetus would be deserving of state protection in one year but undeserving of state protection in another is not clear." *Id*. "[T]his choice is better left to the states, which might find their interest in protecting unborn

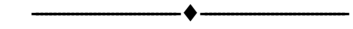
children better served by a more consistent and better marker than viability." *Id*.

According to the Court of Appeals, by taking this decision away from the states, this Court has removed the states' ability to account for advances in technology that have greatly expanded our knowledge of prenatal life, such as the fact that an unborn child develops sensitivity to external stimuli and to pain much earlier than was believed when *Roe* was decided. *MKB Management Corp.*, 2015 WL 4460405, *5 (citing cases). "Thus the Court's viability standard fails to fulfill *Roe*'s 'promise that the State has an interest in protecting fetal life or potential life.'" *Id*. (quoting *Casey*, 505 U.S. at 876). Medical and scientific advances demonstrate, as the Court has already acknowledged, that viability continues to occur earlier in pregnancy, and "[t]he viability standard will prove even less workable in the future." *Id*.

"Another reason for the Court to reevaluate its jurisprudence is that the facts underlying *Roe* and *Casey* may have changed." *MKB Management Corp.*, 2015 WL 4460405, *5. *Roe*'s assumption that the decision to abort a child will be made in close consultation with a woman's physician is challenged by evidence that women receive abortions without advance or follow-up consultations with physicians, that women may not be given information about the abortion procedure and possible complications, that abortion clinics may function like mills, and that women are often subject to coercion and pressure about the abortion decision. *Id*. *Roe*'s assumptions are

additionally challenged by evidence that abortion may have adverse consequences for the health and well-being of women who have abortions, including depression, anxiety, panic attacks, low self-esteem, and suicide ideation. *Id*. at *6. The Court of Appeals observed further that the pseudonymously named plaintiffs in *Roe* and *Doe v. Bolton*, 410 U.S. 179 (1973), both later sought relief from the judgments of their cases due to changed factual and legal circumstances. *Id*.

Finally, the Court of Appeals noted that North Dakota enacted "a law that permits parents to abandon unwanted infants at hospitals without consequence," thereby reducing "the burden of child care that the Court identified in *Roe*." *MKB Management Corp.*, 2015 WL 4460405, *6 (citing N.D. Cent. Code § 50-25.1-15; *Roe*, 410 U.S. at 153). Arkansas has a similar safe haven statute. *See* Ark. Code Ann. § 9-34-202. Although Arkansas cited its safe haven statute in its briefing and at oral argument, the Court of Appeals declined to address the issue in this case.



REASONS FOR GRANTING THE PETITION

The Court should grant certiorari because this case is an ideal vehicle for the Court to reevaluate the arbitrary, untenable, and constitutionally infirm viability rule. The Court should adopt a new standard governing the constitutionality of restrictions on abortion. Put simply, the judicially-imposed viability

rule goes far beyond what is necessary for the Court to protect the liberty interest it found in *Roe* and reaffirmed in *Casey*: "some freedom to terminate [a] pregnancy." *Casey*, 505 U.S. at 869. The Court should allow states to advance their profound interests – from conception to birth – in protecting the life of the unborn child, protecting the health of the mother, and upholding the integrity of the medical profession, where states simultaneously provide a reasonable amount of time for a woman to terminate her pregnancy.

As part of its reevaluation of the viability rule, the Court should consider that Arkansas Act 301 is constitutional in part because Arkansas's safe haven statute removes the burden of unwanted parenthood and child care from a pregnant woman. By allowing the abandonment of an unwanted infant, safe haven statutes reduce the weight of a pregnant woman's liberty interest in terminating her pregnancy. All fifty states and the District of Columbia have enacted safe haven statutes. The Court should reconsider its rigid viability rule in light of the universally adopted safe haven statutes.

I. The Court should grant certiorari because this case is an ideal vehicle for the Court to reevaluate the viability rule imposed in *Roe* and *Casey* and adopt a new standard governing the constitutionality of abortion regulations.

A. The viability rule is arbitrary and not constitutionally required.

The viability rule imposed in *Roe* and *Casey* represented the Court's attempt to guard a pregnant woman's liberty interest "to have some freedom to terminate her pregnancy." *Casey*, 505 U.S. at 869 ("And it falls to us to give some real substance to the woman's liberty to determine whether to carry her pregnancy to full term."). But this rigid rule is far beyond what is necessary to ensure that a woman has a reasonable amount of time to terminate her pregnancy, and it thereby improperly limits the prerogative of the states to advance what the Court recognizes are profoundly important interests.

The Court's justifications for the viability rule do not hold constitutional water. In *Casey*, the Court explained that because viability "is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb," it is also the time when "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." *Casey*, 505 U.S. at 870. This is simply a reformulation of *Roe*'s thesis that the point at which the State's interests become "compelling" is "at viability"

because "the fetus then presumably has the capacity of meaningful life outside the mother's womb." *Roe*, 410 U.S. at 164. In the decades since *Roe*, however, the Court has grown increasingly sensitive to the profoundly important interests of the State – throughout a woman's entire pregnancy – in protecting the life of the unborn child, protecting the health of the mother, and upholding the integrity of the medical profession. *See Casey*, 505 U.S. at 871, 876, 878; *Gonzales*, 550 U.S. at 157-58. The State's interest in fetal life does not begin at viability; rather, the State's interest begins at "the outset of pregnancy." *Casey*, 505 U.S. at 846. *See also Gonzales*, 550 U.S. at 126 ("[B]y common understanding and scientific terminology, a fetus is a living organism within the womb, whether or not it is viable outside the womb."). The State's interests are not dependent upon a *theoretical* time at which an unborn child could potentially survive outside the womb. The constitutional significance of the viability line is unsupported by law or logic and is untenable, especially in light of the Court's increasing recognition of the State's profound interest in protecting fetal life throughout a woman's entire pregnancy.

In *Casey*, the Court justified the viability rule in two other ways. The Court explained that the viability rule is fair because "[i]n some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child." *Id.*, 505 U.S. at 870. But that is no less true of any line drawn by a State where the

State also allows a woman a reasonable time period in which to obtain an abortion. This is not a valid reason to draw the line at viability as opposed to some earlier time. The Court also invoked *stare decisis* to justify its refusal to depart from the viability rule. *Id.* But while *stare decisis* might counsel against overruling the individual liberty interest found in *Roe* for a woman "to have some freedom to terminate her pregnancy," *Casey*, 505 U.S. at 869, the viability rule has no greater claim to precedential effect than *Roe*'s trimester framework overruled in *Casey*.

It is time for the Court to renounce the incoherent viability rule, and this case is a perfect vehicle for the Court to do so. Just as the Court's selection of viability as the line before which the State may not restrict abortion is in reality unrelated to the State's interest in protecting the unborn child from the outset of pregnancy, the viability rule is also not grounded in a pregnant woman's right to choose to terminate her pregnancy. The Court has never explained why viability is an important milestone from a pregnant woman's perspective – at least with respect to her having "some freedom to terminate her pregnancy." *Casey*, 505 U.S. at 869. The Court has, instead, proclaimed that viability is the standard because viability is the standard without explaining why this is so. *See*, *e.g.*, *Casey*, 505 U.S. at 869-70 ("[T]he line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy."); *Gonzales*, 550 U.S. at 146

("We assume the following principles for the purposes of this opinion. Before viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy.'") (quoting *Casey*, 505 U.S. at 879). Of course, if the Court draws the line at viability, then a woman will, as a result, have the right to terminate her pregnancy at any point prior to viability. But the same observation would be true if the Court selected any point in pregnancy, before or after viability.

The Court has also never explained why a viability rule should override the State's profound interest in restricting abortions prior to viability in order to protect the lives of unborn children. The Court has never sufficiently explained, for example, why a woman's right to choose to terminate her pregnancy is paramount until a fetus reaches viability, despite the Court's recognition that the State's interest in protecting the life of the fetus begins at the outset of pregnancy, when the life of the fetus begins.

In summary, the Court's viability rule is conclusory, arbitrary, and not constitutionally required, as numerous Justices and academic scholars have long noted. *See*, *e.g.*, *Thornburg v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 794 (1986) (White, J., dissenting) ("[T]he Court's choice of viability as the point at which the State's interest becomes compelling is entirely arbitrary."); *Akron*, 462 U.S. at 461 (O'Connor, J., dissenting) ("The choice of viability . . . is no less arbitrary than choosing any point before viability or any point afterward."); Beck,

Randy, *Gonzales, Casey, and the Viability Rule*, 103 NW. U. Law Rev. 249, 250 n.6 (2009) (quoting Justice Marshall, *Roe*'s author, in a cover memorandum to other Justices that accompanied a draft of the *Roe* majority opinion) ("You will observe that I have concluded that the end of the first trimester is critical. This is arbitrary, but perhaps any other selected point, such as quickening or viability, is equally arbitrary.").

B. The viability rule is outmoded.

Even if the viability rule had some constitutional grounding at the time it was first crafted, times have changed. *Roe* was decided over 40 years ago. Advances in medical technology and medical care, specifically as they relate to pregnancy and childbirth, demonstrate that the viability rule is outdated and unnecessary to protect a woman's right to choose to terminate her pregnancy via abortion.

Today, the vast majority of abortions are performed in the first trimester of pregnancy, and the earlier an abortion is performed, the safer it is for the health and life of the pregnant woman. *See Gonzales*, 550 U.S. at 134 ("Between 85 and 90 percent of the approximately 1.3 million abortions performed each year in the United States take place in the first three months of pregnancy[.]"). *See also* Centers for Disease Control and Prevention, *Abortion Surveillance Report – United States, 2011* (November 28, 2014), *available at*

http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6311a1.htm.

Meanwhile, advances in medical technology have made abortions more accessible while also revealing that a living fetus generally has a detectable heartbeat by the end of the first trimester. Much has been revealed about the development of the fetus since *Roe*, but the early presence of a fetal heartbeat is a singularly profound development. The presence of a fetal heartbeat could serve as a line that properly balances a woman's right to terminate her pregnancy and the State's profound interest in protecting and promoting fetal life. Of course, the way states go about drawing lines that strike the proper balance between different interests should remain with the elected representatives of the people where women have a reasonable amount of time to terminate unwanted pregnancies. Some states may determine that abortion should be generally legal until the very moment prior to birth; some states may decide that viability is the proper balance; some states may draw the line at the time when a fetus can feel pain; and others, like Arkansas, may determine that protecting the life of the unborn child outweighs a pregnant woman's interest in aborting the unborn child after detection of a fetal heartbeat at the end of the first trimester.[7]

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[7] As explained above, many states have already enacted statutes that adopt a principle other than viability for when a

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Act 301 strikes a reasonable and constitutional balance in a way that accounts for the significant changes to both the pregnant woman's interest and the State's interest since *Roe*. Act 301 allows a pregnant woman unfettered access to abortion for the entire first trimester, when 85-90% of abortions occur, while allowing the State to prohibit abortion thereafter where a fetal heartbeat is detected (with exceptions for rape, incest, the life and health of the mother, and a lethal fetal disorder). Moreover, as described in more detail below, another Arkansas statute allows for abandonment of unwanted infants

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state's interests outweigh a woman's liberty to terminate her pregnancy; many states have enforceable laws that would prohibit most abortions if allowed by this Court; and many states have enacted laws expressing their intent to regulate abortion differently if *Roe* is overturned. *See* FNs 2-4, *supra*. Many other states have enacted laws that protect a woman's right to choose abortion through viability or without limitation, even in the absence of the Court's viability rule. *See*, *e.g.*, Cal. Health & Safety Code § 123466 ("The state may not deny or interfere with a woman's right to choose or obtain an abortion prior to viability of the fetus, or when the abortion is necessary to protect the life or health of the woman."); Conn. Gen. Stat. § 19a-602(a) ("The decision to terminate a pregnancy prior to the viability of the fetus shall be solely that of the pregnant woman in consultation with her physician."); Md. Code Ann., Health-Gen. § 20-209(b) ("[T]he State may not interfere with the decision of a woman to terminate a pregnancy. . . ."); 22 Me. Rev. Stat. Ann. § 1598 ("It is the public policy of the State that the State not restrict a woman's exercise of her private decision to terminate a pregnancy before viability. . . ."); Wash. Rev. Code Ann. § 9.02.110 ("The state may not deny or interfere with a woman's right to choose to have an abortion prior to viability of the fetus, or to protect her life or health.").

after birth and thereby completely eliminates a pregnant woman's burden of unwanted parenthood and child care.

The balance struck by Arkansas is fairer, more reasonable, and more humane than the viability rule, which ignores many critically important developments since *Roe*. Perhaps more importantly, it is a balance crafted by an elected and accountable legislature and not by an unelected and unaccountable court. And because it provides a reasonable amount of time for a woman to terminate her pregnancy, this balance should, at the very least, survive a facial constitutional challenge. *See Gonzales*, 550 U.S. at 167-68 (noting the "heavy burden" for plaintiffs in a facial challenge and the availability of as-applied challenges for "discrete" circumstances); *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006) (emphasizing that "partial, rather than facial, invalidation is the required course" if a statute is valid as applied to some set of facts and invalid as applied to others).[8]

The Court should grant certiorari and review this case as the vehicle to overrule the outdated and arbitrary viability rule of *Roe* and *Casey*. The Court should adopt a new standard that properly reflects

[8] For example, in the rare event that a fetal anomaly (but not a lethal fetal disorder) was diagnosed after the twelve-week mark that might lead a woman to consider a late-term abortion, the woman could bring an as-applied challenge against Act 301 at that time.

and balances the State's profound interest in protecting the life of an unborn child against a woman's right to have some freedom to terminate her pregnancy. The State of Arkansas submits that the end of the first trimester (with the presence of a fetal heartbeat) strikes a reasonable balance between these competing interests. The Court should conclude that Act 301 is constitutional.

II. The Court should grant certiorari because this case is an ideal vehicle for the Court to consider the constitutionality of an abortion regulation in light of a safe haven statute that eliminates the burden of unwanted parenthood and child care.

The lower court's decision failed to address the State's argument that the burden on a pregnant woman under Act 301 must be understood in light of the Arkansas safe haven statute. Arkansas law provides a safe haven for women who choose to relinquish parental rights to a child within 30 days of birth. *See* Ark. Code Ann. § 9-34-202. In *Roe*, the Court concluded that a pregnant woman cannot be forced to carry an unwanted child to term at least in part because the pregnant woman cannot be forced to endure the heavy burden of unwanted parenthood:

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. *Maternity,*

> *or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.* In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

410 U.S. at 153 (emphasis added). The discussion of the pregnant woman's burden in *Roe* makes clear that a primary source of the pregnant woman's protected right to abortion is so that she may avoid unwanted *parenthood*, not so that she may avoid unwanted *pregnancy*.

Arkansas law remedies the burden of unwanted parenthood. It allows any pregnant woman to relinquish parental rights within 30 days of birth, and the State thereby completely assumes the pregnant woman's burden of parenthood. *See* Ark. Code Ann. § 9-34-202. Accordingly, even if abortions were prohibited in Arkansas, no pregnant woman would be forced to endure the burdens of "additional offspring" and "a distressful life and future[,]" or mental and physical health "taxed by child care[,]" or general distress associated with an "unwanted child," or "the problem of bringing a child into a family already unable,

psychologically and otherwise, to care for it." *Roe*, 410 U.S. at 153. The safe haven statute completely eliminates the pregnant woman's burden of parenthood.

The Court of Appeals failed to analyze the balance between a woman's right and the State's interest, and it did not even acknowledge the safe haven statute and its effect upon a pregnant woman's right to abortion under *Roe* and subsequent cases. Notably, all fifty states and the District of Columbia have laws authorizing a woman to relinquish a child up to a specified age without consequence.[9] The safe haven

[9] *See* Ala. Code § 26-25-1; Alaska Stat. § 11.81.500; Ariz. Rev. Stat. Ann. § 13-3623.01; Ark. Code Ann. § 9-34-202; Cal. Penal Code § 271.5 and Cal. Health & Safety Code § 1255.7; Colo. Rev. Stat. Ann. § 19-3-304.5; Conn. Gen. Stat. § 17a-58; 16 Del. Code § 907A; D.C. Code § 18-158; Fla. Stat. Ann. § 383.50; Ga. Code Ann. § 19-10A-1; Haw. Rev. Stat. § 709-902; Idaho Code Ann. § 39-8201; 325 Ill. Comp. Stat. Ann. 2/1; Ind. Code Ann. § 31-34-2.5-1; Iowa Code Ann. § 233.1; Kan. Stat. Ann. § 38-2282; Ky. Rev. Stat. Ann. § 216B.190; La. Child. Code Ann. art. 1151; 22 Me. Rev. Stat. Ann. § 4018; Md. Code Ann., Cts. & Jud. Proc. § 5-641; Mass. Gen. Laws Ann. 119 § 39 1/2; Mich. Comp. Laws Ann. § 712.1; Minn. Stat. Ann. § 145.902; Miss. Code Ann. § 43-15-201; Mo. Ann. Stat. § 210.950; Mont. Code Ann. § 40-6-401; Neb. Rev. Stat. § 28-705; Nev. Rev. Stat. Ann. § 432B.630; N.H. Rev. Stat. Ann. § 132-A:2; N.J. Stat. Ann. § 30:4C-15.5; N.M. Stat. Ann. § 24-22; N.Y. Soc. Serv. Law § 372.g; N.C. Gen. Stat. Ann. § 14-322.3; N.D. Cent. Code § 50-25.1-15; Ohio Rev. Code Ann. § 2151.3516; 10A Okla. Stat. Ann. § 1-2-109; Or. Rev. Stat. Ann. § 418.017; 23 Pa. Const. Stat. § 6501; R.I. Gen. Laws § 23-13.1; S.C. Code Ann. § 20-7-85; S.D. Codified Laws § 25-5A-27; Tenn. Code Ann. § 68-11-255; Tex. Fam. Code Ann. § 262.302; Utah Code Ann. § 62A-4a-802; 13 Vt. Stat. Ann. § 1303; Va. Code Ann. § 18.2-371.1; Wash. Rev. Code Ann. § 13.34.360;

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laws in effect nationwide completely relieve a pregnant woman of the burden of an unwanted child as identified and discussed in *Roe*.

This Court has not considered the impact of the unanimously adopted safe haven provisions upon a woman's right to abortion. The safe haven statutes independently eliminate the foundation of a woman's right to abortion as explained by this Court in *Roe*. Accordingly, the safe haven statutes strike at the foundation of the Court's abortion jurisprudence. The Court should grant certiorari to consider, for the first time, the constitutionality of state abortion regulation in light of safe haven statutes.

CONCLUSION

Cases involving abortion restrictions always strike at the balance between a pregnant woman's Fourteenth Amendment right to have some freedom to terminate her pregnancy and a State's profound interest in protecting the life of the unborn child. The Court's more recent abortion decisions have acknowledged a significant increase in the State's interest due to advances in medical technology and our ever-increasing understanding of the living, developing fetus. On the other side of the board, the woman's interest in terminating her pregnancy at any time

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W.Va. Code Ann. § 49-4-201; Wis. Stat. Ann. § 48.195; Wyo. Stat. Ann. § 14-11-101.

prior to viability has tempered considerably since *Roe*. Contraception and first-trimester medical abortions are increasingly accessible, and they are safer for a woman than later-term surgical abortions. And the safe haven statutes codified in all fifty states have completely eliminated the burden of an unwanted child after birth.

The decision of the Court of Appeals dutifully adopts this Court's rigid rule that any restriction on a pregnant woman's ability to obtain an abortion prior to viability is *per se* unconstitutional. The Court of Appeals plainly wanted to uphold Act 301, but felt powerless to do so under the Court's viability rule. Given the Court's failure to revisit the viability rule in *Gonzales*, the weighty issues and important developments set forth in this petition are unlikely to engender a future split among the circuits. Lower courts, like the District Court and the Court of Appeals here, will continue to feel bound by what they perceive as a *per se* viability rule until the Court revisits its rule. Percolation among the federal courts will not contribute to the ultimate resolution of the important federal questions presented. The Court should answer them now.

The petition for certiorari should be granted.

Respectfully submitted,

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October 2015

**Counsel of Record*

United States Court of Appeals
for the Eighth Circuit

No. 14-1891

Louis Jerry Edwards, M.D., on behalf of himself and his patients; Tom Tvedten, M.D., on behalf of himself and his patients

Plaintiffs-Appellees

v.

Joseph M. Beck, M.D., President of the Arkansas State Medical Board, and his successors in office, in their official capacity; Omar Atiq, M.D., officer and member of the Arkansas State Medical Board, and his successors in office, in their official capacity; Harold B. Betton, M.D., officer and member of the Arkansas State Medical Board, and his successors in office, in their official capacity; Steven L. Cathey, M.D., officer and member of the Arkansas State Medical Board, and his successors in office, in their official capacity; Jim Citty, M.D., officer and member of the Arkansas State Medical Board, and his successors in office, in their official capacity; Bob Cogburn, M.D., officer and member of the Arkansas State Medical Board, and his successors in office, in their official capacity; William F. Dudding, M.D., officer and member of the Arkansas State Medical Board, and his successors in office, in their official capacity; Roger Harmon, M.D., officer and member of the Arkansas State Medical Board, and his successors in office, in their official capacity; John E. Hearnsberger, II, M.D., officer and member of the

Arkansas State Medical Board, and his successors in office, in their official capacity; Verly Hodges, D.O., officer and member of the Arkansas State Medical Board, and his successors in office, in their official capacity; Scott Pace, Pharm.D., J.D., officer and member of the Arkansas State Medical Board, and his successors in office, in their official capacity; John H. Scribner, M.D., officer and member of the Arkansas State Medical Board, and his successors in office, in their official capacity; Sylvia D. Simon, M.D., officer and member of the Arkansas State Medical Board, and her successors in office, in their official capacity; John. Weiss, M.D., officer and member of the Arkansas State Medical Board, and his successors in office, in their official capacity

Defendants-Appellants

Curtis James Neeley, Jr.; Women Injured by Abortion; An Abortion Survivor; Liberty Council, Inc.; Concepts of Truth, Inc.

Amici on Behalf of Appellant(s)

Physicians for Reproductive Health; National Abortion Federation; American Public Health Association

Amici on Behalf of Appellee(s)

Appeal from U.S. District Court for the Eastern District of Arkansas – Little Rock

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Submitted: January 13, 2015
Filed: May 27, 2015
[Published]

Before SMITH, BENTON, and SHEPHERD, Circuit Judges.

PER CURIAM.

The Arkansas State Medical Board (the State) appeals from a summary judgment permanently enjoining certain sections of the Arkansas Human Heartbeat Protection Act. Ark. Code Ann. §§ 20-16-1301 to 1307 (2013). Having jurisdiction under 28 U.S.C. § 1291, this court affirms.

I.

The Act provides that a licensed physician "shall not perform an abortion on a pregnant woman before the person tests the pregnant woman to determine whether the fetus that a pregnant woman is carrying possesses a detectible heartbeat." Ark. Code Ann. § 20-16-1303(a) (footnote omitted). Further, a physician "shall not perform an abortion on a pregnant woman with the specific intent of causing or abetting the termination of the life of an unborn human individual whose heartbeat has been detected under § 20-15-1303 and is twelve (12) weeks or greater gestation." § 20-16-1304(a). If a physician violates section 1304, his or her medical license shall be revoked. § 20-16-1304(b). The Act provides exceptions to protect the life of the mother, for a pregnancy resulting from rape or incest, or for a medical emergency. § 20-16-1305. The Act requires informed disclosures about the existence of a heartbeat and the

probability of bringing the unborn to term. § 20-16-1303(d), (e).

Two Arkansas physicians, on behalf of themselves and their patients, challenged the constitutionality of the Act, seeking a permanent injunction. The district court[1] granted a temporary injunction. *Edwards v. Beck*, 946 F. Supp. 2d 843, 851 (E.D. Ark. 2013). The State moved for partial summary judgment, arguing the testing and disclosure provisions were valid and severable. The plaintiffs submitted affidavits that a fetus is generally not viable until 24 weeks' gestation, is never viable at 12 weeks, and, in all normally-progressing pregnancies, has a detectable heartbeat by 12 weeks.

The State left the plaintiffs' factual allegations uncontroverted. The only factual record presented in this case was by plaintiffs, the two-page declaration of Dr. Janet Cathey. Dr. Cathey stated that "[a]t twelve (12) weeks of pregnancy, a fetus cannot in any circumstance survive outside the uterus. Thus, a fetus at 12 weeks is not and cannot be viable." (Cathey Dec. at 2.) As the district court noted, "the State offered no competing evidence challenging Dr. Cathey's testimony or the statistical data referenced in Plaintiffs' brief." (Order at 8.) The district court granted summary judgment, permanently enjoining sections 20-16-1303(d)(3) and 20-16-1304.

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[1] The Honorable Susan Webber Wright, United States District Judge for the Eastern District of Arkansas.

Edwards v. Beck, 8 F. Supp. 3d 1091, 1102 (E.D. Ark. 2014).

The court granted summary judgment to the State on the rest of the Act, finding the testing and informed disclosures valid and severable. *See Webster v. Reproductive Health Services*, 492 U.S. 490, 519-20 (1989) (upholding Missouri's 20-week viability testing requirement); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 734-35 (8th Cir. 2008) (en banc) ("[W]hile the State cannot compel an individual simply to speak the State's ideological message, it can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion, even if that information might also encourage the patient to choose childbirth over abortion."). The State appeals the district court's grant of summary judgment and permanent injunction of sections 20-16-1303(d)(3) and 20-16-1304.

This court reviews summary judgment de novo, and a permanent injunction for abuse of discretion. *Roach v. Stouffer*, 560 F.3d 860, 864 (8th Cir. 2009).

In 1992, the Supreme Court "reaffirm[ed]" the "right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 846 (1992).[2]

[2] The other principles "reaffirm[ed]" in *Casey* include "a confirmation of the State's power to restrict abortions after fetal

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Since then, that principle has been "accepted as controlling" by a majority of the Court. *See Gonzales v. Carhart*, 550 U.S. 124, 156 (2007); *see also id.* at 187 (Ginsburg, J., dissenting) (recognizing that the Court "merely 'assume[d]' for the moment" the "continuing vitality" of the rule and criticizing the Court for not "retain[ing]" or "reaffirm[ing]" the principle). Like the Court in *Gonzales*, "[w]e assume the . . . principles [from *Casey*] for the purposes of this opinion." *Id.* at 146. A state also retains interests in fostering maternal health and protecting unborn life, which justify regulations that are not an undue burden on a woman's ability to terminate her pregnancy before viability. *Casey*, 505 U.S. at 877-78. A regulation is an undue burden if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877.

The State tries to frame the law as a regulation, not a ban, on pre-viability abortions because they are available during the first 12 weeks (and thereafter if within the exceptions). Whether or not "exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability."

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viability, if the law contains exceptions for pregnancies which endanger the woman's life or health" and "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." *Casey*, 505 U.S. at 846.

Id. at 879. 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. Because the State made no attempt to refute the plaintiffs' assertions of fact, the district court's summary judgment order must be affirmed. *See* Fed. R. Civ. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.") *and* (e)(2) ("If a party . . . fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the motion."). *See also Casey*, 505 U.S. at 874.

II.

As an intermediate court of appeals, this court is *bound* by the Supreme Court's decisions in *Casey* and the "assum[ption]" of *Casey*'s "principles" in *Gonzales*. *See Gonzales*, 550 U.S. at 146. However, undeniably, medical and technological advances along with mankind's ever increasing knowledge of prenatal life since the Court decided *Roe v. Wade*, 410 U.S. 113 (1973) and *Casey* make application of *Casey*'s viability standard more difficult and render more critical the parties' obligation to assure that the court has the benefit of an adequate scientific record in cases where the standard is applied.

"The Supreme Court has recognized that viability varies among pregnancies and that improvements in medical technology will both push later in pregnancy the point at which abortion is safer than childbirth and advance earlier in gestation the point of fetal viability." *Isaacson v. Horne*, 716 F.3d 1213, 1224 (9th Cir. 2013) (citing *Casey*, 505 U.S. at 860). The viability standard "is clearly on a collision course with itself." *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting). "As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception." *Id.* (O'Connor, J., dissenting).

And we have witnessed in the four decades since the Court decided *Roe* how scientific advancements have moved the viability point back. When *Roe* was decided, "[v]iability [was] usually placed at about seven months (28 weeks) but [could] occur earlier, even at 24 weeks." *Roe*, 410 U.S. at 160 (footnote omitted). But the joint opinion in *Casey* recognized "how time has overtaken some of *Roe*'s factual assumptions," including that "advances in neonatal care have advanced viability to a point somewhat earlier." *Casey*, 505 U.S. at 860 (citations omitted). And, in the present case, Dr. Janet Cathey, a board-certified obstetrician and gynecologist, averred that "viability generally is not possible until at least 24 weeks" but recognized that the "viability determination varies on an *individual basis*." (Emphasis added.) Indeed,

real-life events have proven the *individuality* of the viability determination to be true.

> Greater survival rates among pre-term infants born at earlier stages push back the viability line. In October, 2006, Amillia Taylor was born at twenty-one weeks and six days, and has thus far been resilient in the face of minimal odds of survival. This is the youngest fetus to have ever survived delivery, raising new questions about where the viability line should be drawn.

Kevin J. Mitchell, *Guarding the Threshold of Birth*, 20 Regent U. L. Rev. 257, 264 n.30 (2008) (citing Pat Wingert, *The Baby Who's Not Supposed to be Alive*, NEWSWEEK, Mar. 5, 2007, at 59, *available at* http://www.msnbc.msn.com/id/17304274/site/newsweek); *see also* Aida Edemariam, *Against All Odds*, Guardian (Feb. 20, 2007), *available at* http://www.theguardian.com/society/2007/feb/21/health.lifeandhealth (last visited April 28, 2015) ("There is something otherworldly about the picture that appeared around the world yesterday: two tiny brown-pink feet, almost translucent, poking through an adult's fingers. You had to look twice to be sure that they were indeed feet. They belong to Amillia Taylor, who was born in Miami last October, 21 weeks and six days after conception. She weighed less than 10oz at birth – not even as much as two ordinary bars of soap – and she was just 9 inches long. Amillia, who is expected to be discharged from hospital in the next couple of days, is officially the most premature baby ever to have survived.").

"Since *Roe* was decided in 1973, advances in medical and scientific technology have greatly expanded our knowledge of prenatal life." *Hamilton v. Scott*, 97 So. 3d 728, 742 (Ala. 2012) (Parker, J., concurring specially). The viability standard "is inherently tied to the state of medical technology that exists whenever particular litigation ensues." *City of Akron*, 462 U.S. at 458 (O'Connor, J., dissenting). As shown *supra*, states in the 1970s lacked the power to ban an abortion of a 24-week-old-fetus because that fetus would have not satisfied the viability standard of that time period. *See Roe*, 410 U.S. at 160 (placing viability at "seven months (28 weeks)"). Today, however, that same fetus would be considered "viable," and states would have the "power to restrict [such] abortions." *Casey*, 505 U.S. at 846.

Because a viability determination necessarily calls for a case-by-case determination and changes over time based on medical advancements, "legislatures are better suited to make the necessary factual judgments in this area." *City of Akron*, 462 U.S. at 458 (O'Connor, J., dissenting). Unfortunately, the viability standard "forces legislatures, as a matter of constitutional law, to speculate about what constitutes [viability] at any given time." *Id.* (O'Connor, J., dissenting). Courts are ill-suited to second-guess these legislative judgments. *See id.* (O'Connor, J., dissenting) ("Without the necessary expertise or ability, courts must then pretend to act as science review boards and examine those legislative judgments."). To substitute its own preference to that of

the legislature in this area is *not* the proper role of a court. *See* Federalist No. 78 ("It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it prove any thing, would prove that there ought to be no judges distinct from that body.").

This case underscores the importance of the parties, particularly the state, developing the record in a meaningful way so as to present a real opportunity for the court to examine viability, case by case, as viability steadily moves back towards conception.

* * * * * * *

The judgment is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 14-1891

Louis Jerry Edwards, M.D., on behalf of himself and his patients; Tom Tvedten, M.D., on behalf of himself and his patients

Plaintiffs-Appellees

v.

Joseph M. Beck, M.D., President of the Arkansas State Medical Board, and his successors in office, in their official capacity; Omar Atiq, M.D., officer and member of the Arkansas State Medical Board, and his successors in office, in their official capacity; Harold B. Betton, M.D., officer and member of the Arkansas State Medical Board, and his successors in office, in their official capacity; Steven L. Cathey, M.D., officer and member of the Arkansas State Medical Board, and his successors in office, in their official capacity; Jim Citty, M.D., officer and member of the Arkansas State Medical Board, and his successors in office, in their official capacity; Bob Cogburn, M.D., officer and member of the Arkansas State Medical Board, and his successors in office, in their official capacity; William F. Dudding, M.D., officer and member of the Arkansas State Medical Board, and his successors in office, in their official capacity; Roger Harmon, M.D., officer and member of the Arkansas State Medical Board, and his successors in office, in their official capacity; John E. Hearnsberger, II, M.D., officer and member of the

Arkansas State Medical Board, and his successors in office, in their official capacity; Verly Hodges, D.O., officer and member of the Arkansas State Medical Board, and his successors in office, in their official capacity; Scott Pace, Pharm.D., J.D., officer and member of the Arkansas State Medical Board, and his successors in office, in their official capacity; John H. Scribner, M.D., officer and member of the Arkansas State Medical Board, and his successors in office, in their official capacity; Sylvia D. Simon, M.D., officer and member of the Arkansas State Medical Board, and her successors in office, in their official capacity; John. Weiss, M.D., officer and member of the Arkansas State Medical Board, and his successors in office, in their official capacity

Defendants-Appellants

Curtis James Neeley, Jr.; Women Injured by Abortion; An Abortion Survivor; Liberty Council, Inc.; Concepts of Truth, Inc.

Amici on Behalf of Appellant(s)

Physicians for Reproductive Health; National Abortion Federation; American Public Health Association

Amici on Behalf of Appellee(s)

Appeal from U.S. District Court for the Eastern District of Arkansas – Little Rock (4:13-cv-00224-SWW)

JUDGMENT

Before SMITH, BENTON and SHEPHERD, Circuit Judges.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

May 27, 2015

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

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

LOUIS JERRY EDWARDS, M.D., on behalf of himself and his patients, ET AL.	*	
Plaintiffs	*	
V.	*	
JOSEPH M. BECK, M.D., President of the Arkansas State Medical Board, and his successors in office, in their official capacities, ET AL.	*	NO: 4:13CV00224 SWW
Defendants	*	

MEMORANDUM OPINION AND ORDER

Plaintiffs Louis Jerry Edwards and Tom Tvedten, physicians who provide abortion services at Little Rock Family Planning Services, Inc., bring this action under 42 U.S.C. § 1983 against members of the Arkansas State Medical Board (the "Board"), sued in their official capacities. Plaintiffs challenge the constitutionality of Arkansas Act 301 of the 2013 Regular Session of the 89th General Assembly of Arkansas, titled the Arkansas Human Heartbeat Protection Act, now codified at Ark. Code Ann. §§ 20-16-1301 through 1307. Before the Court are the State's motion for partial summary judgment (ECF Nos. 40, 41, 42); Plaintiffs' response in opposition and cross-motion for summary judgment (ECF Nos. 48, 49); the State's

response in opposition to Plaintiffs' cross-motion (ECF No. 52); the State's reply in support of the State's motion (ECF No. 51); and Plaintiffs' reply in support of their cross-motion (ECF No. 55). Also before the Court is an amicus brief filed by Concepts of Truth, Inc. (ECF No. 53), supporting the State's motion for partial summary judgment. After careful consideration, and for reasons that follow, the State's motion for partial summary judgment is granted, and Plaintiffs' cross-motion for summary judgment is granted in part and denied in part.

I.

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). As a prerequisite to summary judgment, a moving party must demonstrate "an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party has properly supported its motion for summary judgment, the non-moving party must "do more than simply show there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

The non-moving party may not rest on mere allegations or denials of his pleading but must come forward with 'specific facts showing a genuine issue for trial. *Id.* at 587. "[A] genuine issue of material fact

exists if: (1) there is a dispute of fact; (2) the disputed fact is material to the outcome of the case; and (3) the dispute is genuine, that is, a reasonable jury could return a verdict for either party." *RSBI Aerospace, Inc. v. Affiliated FM Ins. Co.*, 49 F.3d 399, 401 (8th Cir. 1995).

II.

Unless a pregnancy is the result of rape or incest or an abortion is necessary because of a medical emergency,[1] Act 301 imposes regulations on the performance of abortions in Arkansas, and it contains three operative provisions: a heartbeat testing requirement; a disclosure requirement; and a ban on abortions when a fetal heartbeat is detected and the fetus has reached twelve weeks' gestation.

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[1] The Act defines the term "medical emergency" as follows:

> "Medical emergency" means a condition in which an abortion is necessary:
>
> (A) To preserve the life of the 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, or when continuation of the pregnancy will create a serious risk of substantial and irreversible impairment of a major bodily function of the pregnant woman; or
>
> (B) Due to the existence of a highly lethal fetal disorder as defined by the Arkansas State Medical Board;

Ark. Code Ann. § 20-16-1302(6).

The heartbeat testing requirement provides that a physician authorized under Arkansas law to perform abortions,[2] "shall not perform an abortion on a pregnant woman before the [physician] tests the pregnant woman to determine whether the fetus . . . possesses a detectible heartbeat." Ark. Code Ann. § 20-16-1303(a). The Act further provides that the physician "shall perform an abdominal ultrasound test necessary to detect a heartbeat of an unborn human individual according to standard medical practice, including the use of medical devices as determined by standard medical practice." Ark. Code Ann. § 20-16-1303(b)(1). Act 301 requires that the aforementioned abdominal ultrasound test "shall be approved by the Arkansas State Medical Board[,]" Ark. Code Ann. § 20-16-1303(b)(2), and the Board is charged with adopting rules "based on standard medical practice for testing for the fetal heartbeat of an unborn individual." Ark. Code Ann. § 20-16-1303(c)(1)(A)(i).

The disclosure requirement provides that if a fetal heartbeat is detected in the course of the mandatory heartbeat test, the physician must inform the pregnant woman, in writing, of the following: (1) the

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[2] The term "physician" does not appear in Act 301. Instead, the Act refers to "a person authorized to perform abortions under Arkansas law." Ark. Code Ann. §§ 20-16-1303, 1304. However, Arkansas Department of Health regulations provide: "Only physicians who are currently licensed to practice medicine in Arkansas may perform abortions." Ark. Admin. Code 007.05.2-7.

fetus she is carrying possesses a heartbeat; (2) the statistical probability of bringing the fetus to term based on the fetus's gestational age; and (3) that an abortion is prohibited, under Ark. Code Ann. § 20-16-1304, if a heartbeat is detected and the gestational period is twelve weeks or more. *See* Ark. Code Ann. § 20-16-1303(d). The Act further requires that the pregnant woman shall sign a form acknowledging that she has received the foregoing information. *See* Ark. Code Ann. § 20-16-1303(e).

Finally, Act 301 bans an abortion where a fetal heartbeat is detected and the fetus has reached twelve weeks or greater gestational age. *See* Ark. Code Ann. § 20-16-1304(a). Unless a pregnancy is the result of rape or incest or an abortion is performed in response to a medical emergency, a physician who performs an abortion "with the specific intent of causing or abetting the termination of the life of an unborn individual whose heartbeat has been detected . . . and is twelve (12) weeks or greater gestation" is subject to license revocation, and the Board is charged with determining violations of the twelve-week abortion ban. *See* Ark. Code Ann. § 20-16-1304(b).

III.

Plaintiffs are physicians who provide pre-viability abortions in Arkansas at and after twelve weeks' gestation, and they filed this lawsuit charging that Act 301 is facially unconstitutional because

it bans abortions prior to fetal viability. Along with the complaint, Plaintiffs filed a motion seeking a preliminary injunction enjoining the Act's enforcement pending a final decision on the merits. Following a hearing held May 17, 2013, the Court determined that Plaintiffs had demonstrated each requisite for preliminary injunctive relief, including that they were likely to prevail with the claim that the twelve-week abortion ban violates the Constitution. The Court enjoined the State from enforcing Act 301, in its entirety, pending the resolution of this lawsuit. However, the Court notified the parties that in deciding the scope of a permanent injunction, it would consider whether to sever the impermissible twelve-week abortion ban from the heartbeat testing and disclosure measures and leave those portions of the statute intact.

On May 31, 2013, the State filed a motion for partial summary judgment, asserting that the heartbeat testing and disclosure provisions are constitutionally valid and severable from the twelve-week abortion ban. Plaintiffs responded with a cross-motion for summary judgment, seeking a permanent injunction barring the enforcement of Act 301 in its entirety.

IV.

The Court turns first to the twelve-week abortion ban. Plaintiffs contend that the ban is *per se* unconstitutional and must be permanently enjoined. The

State contends that Act 301 is constitutional in its entirety, but "recognizes the Court's determination that the prohibition of abortion after twelve weeks' gestation and the detection of a fetal heartbeat (with enumerated exceptions) has been and will be invalidated by the Court." ECF No. 42, at 6.

In 1973, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment guarantees a woman the right to choose whether to terminate a pregnancy. *See Roe v. Wade*, 410 U.S. 113, 93 S.Ct. (1973). However, this right is not absolute and is balanced by the State's interest in protecting the woman's health and the potential life of the fetus. *Id.* at 162, 93 S.Ct. at 731. After the fetus becomes viable, the State's interest in protecting its potential life becomes compelling enough in some circumstances to outweigh the woman's right to seek an abortion. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 845-846, 112 S.Ct. 2791, 2804 (1992). But before viability, "the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." *Id.*

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 845-846, 112 S.Ct. 2791, 2804 (1992), the Supreme Court reaffirmed the fundamental holdings of *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973), including that the line between a woman's interest in control over her destiny and body and the State's interest in promoting the life or potential life of the unborn is drawn at viability: "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. . . .” *Casey*, 505 U.S. at 870, 112 S.Ct. at 2817 (citing *Roe v. Wade*, 410 U.S. at 163, 93 S.Ct. at 731). The *Casey* Court noted that although the line of viability may come earlier with advances in neonatal care, the attainment of viability continues to serve as the critical factor.

The Supreme Court has also stressed that it is not the proper function of the legislature or the courts to place viability at a specific point in the gestation period: “The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician.” *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 64-65, 96 S.Ct. 2831, 2839 (1976).

Plaintiffs submit the sworn declaration of Janet Cathey, M.D., who is board-certified in the speciality of obstetrics and gynecology (“OBGYN”). *See* Cathey Dec., ECF No. 48-2. Dr. Cathey testifies that she began private practice in 1986, and she offers patients a full range of OBGYN services. Dr. Cathey’s declaration states, in pertinent part, as follows:

> Viability is the point in pregnancy at which there is a reasonable likelihood of sustained fetal survival outside the uterus. At twelve

> (12) weeks of pregnancy, a fetus cannot in any circumstance survive outside the uterus. Thus a fetus at 12 weeks is not and cannot be viable.
>
> While the viability determination varies on an individual basis and can only be made by a physician, viability generally is not possible until at least 24 weeks.
>
> Although in a normally-progressing pregnancy, fetal cardiac activity can be detected via vaginal ultrasound at approximately 6 weeks, it cannot be detected via abdominal ultrasound until several weeks later.
>
> In a normally-progressing pregnancy, fetal cardiac activity can be detected via abdominal ultrasound at 12 weeks. The detection of fetal cardiac activity at 12 weeks does not indicate viability.
>
> Prior to performing an abortion, a physician must determine the gestational age of the pregnancy. Early in pregnancy, abdominal ultrasound does not produce images that are sufficiently clear to permit accurate gestational dating. As a result, some other method of gestational dating, such as vaginal ultrasound, must be used.

Id., ¶¶ 3-8 (internal paragraph numbers omitted). In addition to Dr. Cathey's testimony, Plaintiffs point to Arkansas Department of Health statistics, published on the Department's public website, reporting that in 2011, twenty percent of abortions performed in

Arkansas took place at and after twelve weeks' gestation.[3]

Unless a pregnancy is the result of rape or incest or an abortion is necessary because of a medical emergency, Act 301 bans abortions where the pregnancy has progressed to twelve weeks and a fetal heartbeat is detected. Dr. Cathey's undisputed testimony shows that in a normally-progressing pregnancy, a fetal heartbeat can be detected at twelve weeks' gestation, and the State's own statistics show that twenty percent of abortions in Arkansas occur at or after twelve weeks. The State presents no evidence that a fetus can live outside the mother's womb at twelve weeks, and the State does not dispute Dr. Cathey's testimony that "a fetus at [twelve] weeks is not and cannot be viable" and that viability generally is not possible until at least twenty-four weeks.

Given Plaintiffs' uncontroverted evidence, the Court finds as a matter of law that the twelve-week abortion ban included in Act 301 prohibits previability abortions and thus impermissibly infringes a woman's Fourteenth Amendment right to elect to terminate a pregnancy before viability. Plaintiffs have demonstrated that they will suffer irreparable harm unless the State is permanently enjoined from

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[3] According to the statistics cited by Plaintiffs, 4,033 abortions took place in Arkansas in 2011, and 815 of those abortions occurred at or after 12 weeks gestation. *See* http://www.healthy.arkansas.gov/programsServices/healthStatistics/Documents/abortion/2011Itop.pdf (accessed May 20, 2013).

enforcing the twelve-week abortion ban set forth under Ark. Code Ann. § 20-16-1304(a). Without a permanent injunction, Plaintiffs will face license revocation for performing pre-viability abortions, and the twelve-week ban will prevent a woman's constitutional right to elect to have an abortion before viability.

In addition, the following provisions of Act 301, which clearly serve as integral components of the twelve-week ban, must be permanently enjoined: (1) the requirement that the physician inform the pregnant woman about the twelve-week abortion ban, *see* Ark. Code Ann. § 20-15-1303(d)(3), and (2) the mandate that a violation of the twelve-week ban, as determined by the Board, shall result in the revocation of the offending physician's medical license. *See* Ark. Code Ann. § 20-16-1304(b).

The Court turns to the remaining heartbeat testing and disclosure provisions. With the elimination of the twelve-week ban and those portions of the Act that incorporate the ban, the heartbeat testing provision requires that before a physician may perform an abortion, he or she must conduct an abdominal ultrasound examination to determine whether the fetus possesses a detectible heartbeat. *See* Ark. Code Ann. § 20-16-1303(b)(1). In the event that a fetal heartbeat is detected during the adominal ultrasound test, the disclosure provision requires that the physician inform the pregnant woman, in writing, (1) that the fetus possesses a heartbeat and (2) the statistical probability of bringing the fetus to term

based on the fetus's gestational age. *See* Ark. Code Ann. § 20-16-1303(d)(1)-(2).

The State maintains that the heartbeat testing and disclosure provisions are severable from the twelve-week ban and should remain intact as constitutional regulations aimed at furthering the State's legitimate interest in protecting potential human life. Plaintiffs argue that the remaining heartbeat testing and disclosure provisions cannot be separated from the impermissible twelve-week ban because they "operate to serve the ban and for no other purpose." ECF No. 48-3. Importantly, Plaintiffs do not argue that the heartbeat testing and disclosure measures impose an undue burden on a woman's right to choose or that they require the disclosure of information that is untruthful, misleading or not relevant to the decision to have an abortion.

Generally speaking, when confronting a constitutional flaw in a statute, a federal court must "try not to nullify more of a legislature's work than is necessary." *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 329, 126 S. Ct. 961, 967-968 (2006). It is preferable "to enjoin only the unconstitutional applications of a statute while leaving other applications in force, or to sever its problematic portions while leaving the remainder intact." *Id.*, 546 U.S. at 329, 126 S. Ct. at 967 (citations omitted).

Severability is a matter of state law, see *Russell v. Burris*, 146 F.3d 563, 573 (8th Cir.1998) (citing *Leavitt v. Jane L.*, 518 U.S. 137, 139, 116 S. Ct. 2068

(1996)). Under Arkansas law, "an act may be unconstitutional in part and yet be valid as to the remainder." *Ex Parte Levy*, 204 Ark. 657, 163 S.W.2d 529 (1942). In determining whether a constitutionally invalid portion of a legislative enactment is fatal to the entire legislation, the Supreme Court of Arkansas looks to "(1) whether a single purpose is meant to be accomplished by the act; and (2) whether the sections of the act are interrelated and dependent upon each other."[4] *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 872 S.W.2d 349, 357 (1994).

Plaintiffs argue that the General Assembly intended to accomplish a single purpose with Act 301: to ban abortions at the stage of pregnancy when a fetal heartbeat can be detected by an abdominal ultrasound examination. They maintain that Act 301's operative provisions are interrelated and interdependent and together serve the single, impermissible purpose of banning abortions at twelve weeks'

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[4] The well-established severability analysis applied by the Supreme Court of Arkansas comports with the mandate of Arkansas Code Annotated § 1-2-117, which provides:

> Except as otherwise specifically provided in this Code, in the event any title, subtitle, chapter, subchapter, section, subsection, subdivision, paragraph, item, sentence, clause, phrase, or word of this Code is declared or adjudged to be invalid or unconstitutional, such declaration or adjudication shall not affect the remaining portions of this Code which shall remain in full force and effect as if the portion so declared or adjudged invalid or unconstitutional was not originally a part of this Code.

gestation. Plaintiffs propose that the General Assembly designated abdominal ultrasound as the required method for fetal heartbeat detection solely for the purpose of determining whether the twelve-week ban applies. They contend that when the General Assembly drafted Act 301, it had in mind that "if a fetal heartbeat is detected via abdominal ultrasound, the pregnancy must be at least [twelve] weeks along." ECF No. 48-3, at 10 n. 8. According to Plaintiffs, the written disclosure requirement is intended to "inform patients of the rationale for the ban, not to provide patients with information to aid their decision-making process." ECF No. 48-3.

Act 301 expressly requires an abdominal ultrasound for the stated purpose of testing for a heartbeat, not for the purpose of determining gestational age. In accordance with the plain language of the statute, if a fetal heartbeat is detected during the abdominal ultrasound examination, the physician must inform the pregnant woman in writing that the fetus possesses a heartbeat and the statistical probability of bringing the unborn child to term based on gestational age. These informational disclosures are required regardless of whether the fetus has attained twelve weeks' gestation. Although a physician would by necessity determine the gestational age of the fetus as part of determining the statistical probability of bringing the fetus to term, the Act does not mandate a particular method for determining gestational age.

To determine the purpose of Act 301, the Court need look no further than its title, "AN ACT TO CREATE THE ARKANSAS HUMAN HEARTBEAT PROTECTION ACT; TO PROTECT UNBORN CHILDREN; AND FOR OTHER PURPOSES." *See Hobbs v. Jones*, 2012 Ark. 293, 2012 WL 2362712 (2012) (determining legislative purpose solely by reference to act's title and emergency clause).[5] The Court finds it clear that the General Assembly drafted Act 301 with a single purpose: to protect unborn children.[6]

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[5] In *Hobbs v. Jones*, 2012 Ark. 293, 2012 WL 2362712 (2012), the Supreme Court of Arkansas considered whether invalid portions of the Arkansas Method of Execution Act could be severed from other provisions. Under the first prong of the severability test, the Court found that the clear purpose of the Act was to provide the procedures by which the State may execute a capital defendant, sentenced to death by lethal injection. The Court determined the purpose of the Act solely by reference to its title and emergency clause. The Court stated: "We need look no further than the act itself. Its title states that it is '[a]n act to clarify the existing procedures for capital punishment by lethal injection; and for other purposes'; its subtitle is '[t]o clarify the existing procedures for capital punishment by lethal injection.' " *Hobbs*, 2012 Ark. 293, 17, 2012 WL 2362712, 9 (2012).

As for the inclusion of the phrase "and for other purposes" included in the Act's title, as noted by Plaintiffs, the Arkansas Supreme Court has long held that "[t]he concluding clause, 'and for other purposes,' means that any other purposes not enumerated, but found in the body of the act, would be purposes of a like nature with those already mentioned." ECF No. 48-3, at 11 n. 9 (citing *Nixon v. Allen*, 234 S.W. 45, 47 (Ark. 1921)).

[6] The Supreme Court has explained that *Roe v. Wade* "implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion. . . ." *Maher v. Roe*, 432 U.S. 464, 474, 97 S.Ct. 2376, 2382 (1977).

When the purpose of a legislative act is "'to accomplish a single object only, and some of its provisions are void, the whole must fail, unless sufficient remains to effect the object without the aid of the invalid portion.'" *Ex parte Levy*, 204 Ark. 657, 163 S.W.2d 529, 531 (1942) (emphasis added) (quoting Cooley's Constitutional Limitations (6th Ed.)). Important to the question of severability is "whether the portion of the act remaining is complete in itself and capable of being executed wholly independent of that which was rejected." *Id.*, 316 Ark. at 268, 872 S.W.2d at 358.

Plaintiffs assert several arguments against severance. First, they argue that the General Assembly "only required information to be provided to women subject to the ban" and "sought to create a unitary law that bans abortion care after a certain point in pregnancy." ECF No. 48-3, at 9. This argument is without merit. The plain language of the statute provides that the disclosures must be given when, and only when, a heartbeat is detected via abdominal ultrasound, but the twelve-week abortion ban applies when (1) a heartbeat is detected via abdominal ultrasound *and* (2) and the fetus is "twelve weeks or greater gestation." Ark. Code Ann. § 20-16-1304(a).

Second, Plaintiffs note that the disclosure provision references the twelve-week abortion ban by requiring disclosure that "an abortion is prohibited under § 20-16-1304." However, the Court has determined that this particular disclosure must be stricken as an integral component of the twelve-week

ban. The crucial question that remains is whether the heartbeat testing and disclosure portions of the Act are sufficient to accomplish the purpose of protecting unborn children.

Third, Plaintiffs contend that the unintended, practical consequence of Act 301 is that women seeking an abortion at an early stage of pregnancy will be forced to undergo an abdominal ultrasound and a vaginal ultrasound.[7] Plaintiffs present no evidence that such is the case. Dr. Cathey testifies that a physician must determine gestational age before an abortion procedure. She further testifies that at the early stages of pregnancy, "an abdominal ultrasound does not produce images that are sufficiently clear to permit accurate gestational dating" and that "as a result[,] some other method of gestational testing, such as vaginal ultrasound, must be used." Cathey Dec., ECF No. 48-2, ¶ 8. Dr. Cathey does not state, as Plaintiffs suggest, that before performing an early-term abortion, a physician will necessarily utilize a vaginal ultrasound for gestational dating. The State acknowledges that if a fetal heartbeat has been detected by abdominal ultrasound, the physician will

[7] Plaintiffs argue that by requiring heartbeat testing via abdominal ultrasound, Act 301 creates an incentive for women to delay an abortion procedure to later in the pregnancy when only a single ultrasound examination would be necessary. According to Plaintiffs, this unintended consequence "further demonstrates that the purpose of the abdominal ultrasound . . . is to determine whether the ban applies, not to ascertain information to aid the decision making process. . . ." ECF No. 55, at 9.

be required to calculate the probable gestational age of the fetus as part of providing informational disclosures, but nothing in the Act requires that a physician perform a vaginal ultrasound examination to determine gestational age.[8]

Fourth, Plaintiffs note that Act 301 lacks a severability clause, which, they argue, suggests a legislative intent to pass the Act as a whole. The absence of a severability clause is a factor to consider, but it is not determinative. *See Berry v. Gordon*, 237 Ark. 547, 865-866, 376 S.W.2d 279, 288 (1964) ("It goes almost without saying that there has never been any requirement that an act must have a severability clause before an invalid section can be found to be separable from the rest of the act."). "If the part which remains after the defective portion is severed is capable of carrying out the purpose of the legislature, the courts will have little difficulty in finding the legislative intent to make separable, even if no separability clause has been included." *Id.* (citations omitted).

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[8] The Court notes that under the informed consent provision of the Arkansas Woman's Right to Know Act, codified at Ark. Code Ann. §§ 20-16-901 through 908, before the day of an abortion, a physician must tell the woman seeking an abortion the "probable gestational age of the fetus." *See* Ark. Code Ann. § 20-16-901. The Woman's Right to Know Act further provides that " '[p]robable gestational age of the fetus' means what in the judgment of the physician will with reasonable probability be the gestational age of the fetus at the time the abortion is planned to be performed." Ark. Code Ann. 20-16-902(9).

Fifth, Plaintiffs assert that Act 301's testing and disclosure requirements duplicate requirements of existing state law, and they contend that such duplication is evidence that the residual provisions were not intended to operate without the twelve-week ban. Plaintiffs cite Arkansas Code § 20-16-602, which provides: "All physicians who use ultrasound equipment in the performance of an abortion shall inform the woman that she has the right to view the ultrasound image of her unborn child before an abortion is performed." Plaintiffs also point to the Arkansas Woman's Right to Know Act, codified at Ark. Code Ann. §§ 20-16-901 through 908, which requires physicians to provide certain information to women before an abortion. Plaintiffs fail to cite a single Arkansas statute that duplicates the specific fetal heartbeat testing and disclosure provisions set forth under Act 301.

After careful consideration, the Court finds that the remaining heartbeat testing and disclosure requirements are independently capable of furthering the stated purpose of Act 301, to protect unborn children, and that they are severable from the unconstitutional twelve-week ban and the requirement of license revocation for a physician who performs an abortion banned under the Act. The State, from the inception of a pregnancy, maintains its own interest in protecting the life of a fetus that may become a child, and the Supreme Court has recognized that the disclosure of truthful information about fetal development is relevant to a woman's decision-making process and is rationally related to

the State's interest in protecting the unborn. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 882-883, 112 S.Ct. 2791, 2823-2824 (1992). States may further the "legitimate goal of protecting the life of the unborn" through "legislation aimed at ensuring a decision that is mature and informed, even when in doing so the State expresses a preference for childbirth over abortion." *Casey*, 505 U.S. at 883, 112 S. Ct. at 2824.

For the reasons stated, the Court will permanently enjoin the enforcement of the following portions of the Arkansas Human Heartbeat Protection Act, which is codified at Ark. Code Ann. §§ 20-16-1301 through 1307: (1) Ark. Code Ann. § 20-16-1304(a), which prohibits abortions where a fetal heartbeat is detected and the fetus has attained twelve weeks' gestation; (2) Ark. Code Ann. § 20-16-1304(b), which requires revocation of the medical license of a physician who performs an abortion in violation of Ark. Code Ann. § 20-16-1304(a); and (3) Ark. Code Ann. § 20-16-1303(d)(3), which requires that a physician inform the pregnant woman that an abortion is prohibited under Ark. Code Ann. § 20-16-1304(a). All remaining provisions of the Act remain in effect.[9]

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[9] The Court's decision leaves intact Ark. Code Ann. § 20-16-1301(8), which reads: " 'Viability' means a medical condition that begins with a detectible heartbeat." The Court notes that the foregoing statement conveys that viability "begins" with a heartbeat; it does not declare that viability is *fully achieved* with the advent of a heartbeat. Such a declaration would undoubtedly

(Continued on following page)

V.

IT IS THEREFORE ORDERED that Plaintiffs' cross-motion for summary judgment (ECF No. 48) is GRANTED IN PART AND DENIED IN PART, and Defendant's motion for partial summary judgment (ECF No. 40) is GRANTED. Plaintiffs' motion is granted to the extent that the State is permanently enjoined from enforcing the following provisions of the Arkansas Human Heartbeat Protection Act: (1) Ark. Code Ann. § 20-16-1304(a), which prohibits abortions where a fetal heartbeat is detected and the fetus has attained twelve weeks' gestation; (2) Ark. Code Ann. § 20-16-1304(b), which requires revocation of the medical license of a physician who performs an abortion in violation of Ark. Code Ann. § 20-16-1304(a); and (3) Ark. Code Ann. § 20-16-1303(d)(3), which requires that a physician inform

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contravene the Supreme Court's determination that viability in a particular case is a matter for medical judgment, and it is attained when, in the judgment of the attending physician on the particular facts of the case at hand, that there is a reasonable likelihood of sustained survival outside of the womb. In any event, the Court need not pass on the import or validity of Act 301's definition of the term "viability." Whether the definition set forth under § 20-16-1301(8) might be used to interpret other state statutes or regulations is a matter for Arkansas courts and is not at issue in this case. This Court "'is not empowered to decide . . . abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it.'" *Webster v. Reproductive Health Services*, 492 U.S. 490, 507, 109 S.Ct. 3040, 3050 (1989) (quoting *Tyler v. Judges of Court of Registration*, 179 U.S. 405, 409, 21 S.Ct. 206, 208 (1900)).

the pregnant woman that an abortion is prohibited under Ark. Code Ann. § 20-16-1304(a). All other provisions of the Arkansas Human Heartbeat Protection Act remain in effect. Judgment shall be entered accordingly.

IT IS SO ORDERED THIS 14th DAY OF MARCH, 2014.

/s/Susan Webber Wright
UNITED STATES DISTRICT JUDGE

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

LOUIS JERRY EDWARDS, M.D., on behalf of himself and his patients, ET AL.	*	
Plaintiffs	*	
V.	*	
JOSEPH M. BECK, M.D., President of the Arkansas State Medical Board, and his successors in office, in their official capacities, ET AL.	*	NO: 4:13CV00224 SWW
Defendants	*	

JUDGMENT

Consistent with the Memorandum Opinion and Order that was entered on this day, it is CONSIDERED, ORDERED, and ADJUDGED that this case is DISMISSED, and the relief sought is GRANTED IN PART AND DENIED IN PART. Defendants are enjoined from enforcing the following provisions of Arkansas Act 301 of the 2013 Regular Session of the 89th General Assembly of Arkansas, titled the Arkansas Human Heartbeat Protection Act: (1) Ark. Code Ann. § 20-16-1304(a), which prohibits abortions where a fetal heartbeat is detected and the fetus has attained twelve weeks' gestation; (2) Ark. Code Ann. § 20-16-1304(b), which requires revocation of the medical license of a physician who performs an abortion

in violation of Ark. Code Ann. § 20-16-1304(a); and (3) Ark. Code Ann. § 20-16-1303(d)(3), which requires that a physician inform the mother that an abortion is prohibited under Ark. Code Ann. § 20-16-1304(a). All other portions of the Arkansas Human Heartbeat Protection Act remain in effect.

IT IS SO ORDERED THIS 14th DAY OF MARCH, 2014.

/s/Susan Webber Wright
UNITED STATES DISTRICT JUDGE

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

LOUIS JERRY EDWARDS, M.D., on behalf of himself and his patients, ET AL.	*	
Plaintiffs	*	
V.	*	NO: 4:13CV00224 SWW
JOSEPH M. BECK, M.D., President of the Arkansas State Medical Board, and his successors in office, in their official capacities, ET AL.	*	
Defendants	*	

ORDER

Plaintiffs Louis Jerry Edwards and Tom Tvedten, physicians who provide abortion services at Little Rock Family Planning Services, Inc., bring this action under 42 U.S.C. § 1983 against members of the Arkansas State Medical Board (the "Board"), sued in their official capacities. Plaintiffs challenge the constitutionality of Arkansas Act 301 of the 2013 Regular Session of the 89th General Assembly of Arkansas, titled the Arkansas Human Heartbeat Protection Act ("Act 301" or "Act."), and they seek declaratory and injunctive relief to prevent its enforcement. Along with the complaint, Plaintiffs filed a motion for a preliminary injunction that would enjoin the Board from enforcing any provision of the Act

pending resolution of this lawsuit (ECF Nos. 4, 5). The State filed a response opposing preliminary injunctive relief (ECF Nos. 18, 19), and Plaintiffs filed a reply (ECF No. 30).

Following a hearing held on May 17, 2013, the Court stated findings of fact and conclusions of law from the bench and granted Plaintiffs' motion for a preliminary injunction. In accordance with Rule 52(a)(2) of the Federal Rules of Civil Procedure, the Court now reaffirms the findings of fact and conclusions of law stated from the bench.

I.

Act 301 amends Arkansas law governing abortions, and it will become effective on August 16, 2013.[1] *See* Act 301, § 1 (to be codified at Ark. Code

[1] The Arkansas Constitution provides that the people have ninety days after adjournment of a legislative session to file a referendum petition and that a legislative act will not become effective during that period. *See* Ark. Const. amend. 7; *see also Fulkerson v. Refunding Bd. of Arkansas*, 201 Ark. 957, 147 S.W.2d 980 (1941). However, if a legislative act is necessary for the "preservation of the public peace, health and safety that a measure shall become effective without delay, and such necessity shall be stated" in the act, the act becomes effective immediately and remains in effect until there is an adverse vote upon referral. *See* Ark. Const. amend. 7.

Because Act 301 contains no emergency clause and no specified effective date, it will become effective on the ninety-first day after adjournment *sine die* of the 2013 General Assembly, which is May 17, 2013. *See* House Concurrent Resolution 1003, 89th

(Continued on following page)

Ann. §§ 20-16-1301 through 1307). The Act governs the conduct of physicians authorized under Arkansas law to perform abortions,[2] and it provides that such a person "shall not perform an abortion on a pregnant woman before the person tests the pregnant woman to determine whether the fetus . . . possesses a detectible heartbeat." Act 301, § 20-16-1303(a). The Act specifies that a physician "shall perform an abdominal ultrasound test necessary to detect a heartbeat of an unborn human individual according to standard medical practice, including the use of medical devices as determined by standard medical practice." *Id.*, § 20-16-1303(b)(1).

If a fetal heartbeat is detected in the course of the mandatory test, the physician must inform the pregnant woman in writing (1) that the fetus she is carrying possesses a heartbeat; (2) the statistical probability of bringing the unborn individual to term based on the gestational age; and (3) that an abortion is prohibited if a heartbeat is detected and the gestational period is twelve weeks or more. *See id.*, § 20-16-1303(d). Additionally, the Act provides that the pregnant woman shall sign a form acknowledging

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General Assembly, Reg. Session, § (e). The ninety-first day after May 17, 2013 is August 16, 2013.

[2] The term "physician" does not appear in Act 301. Instead, the Act refers to "a person authorized to perform abortions under Arkansas law." Act 301, §§ 20-16-1303, 1304. However, Arkansas Department of Health regulations provide: "Only physicians who are currently licensed to practice medicine in Arkansas may perform abortions." Ark. Admin. Code 007.05.2-7.

that she has received the foregoing information. *See id.*, § 20-16-1303(e). Act 301 assigns the defendant Board several duties, including the tasks of adopting rules for fetal heartbeat testing and determining violations of the Act.

In addition to requiring heartbeat testing and informational disclosures, if applicable, before an abortion, Act 301 bans abortions where a fetal heartbeat is detected and the fetus has reached twelve weeks gestational age. Unless a pregnancy is the result of rape or incest, or an abortion is performed to save the life of the mother or in response to a medical emergency, a physician who performs an abortion "with the specific intent of causing or abetting the termination of the life of an unborn individual whose heartbeat has been detected . . . and is twelve (12) weeks or greater gestation" is subject to license revocation. Act 301, § 20-16-1303.

Finally, Arkansas law prohibits the abortion of a "viable fetus," unless necessary to preserve the life or health of the woman or the pregnancy is the result of rape or incest. *See* Ark. Code Ann. 20-16-705. Currently, Arkansas law defines a "viable fetus" as "a fetus which can live outside of the womb," Ark. Code Ann. § 20-16-702(3), and provides that "a fetus shall be presumed not to be viable prior to the end of the twenty-fifth week of pregnancy." Ark. Code Ann. § 20-16-703. Act 301, however, defines "viability" as "a medical condition that begins with a detectible heartbeat." Act 301, § 20-16-1302(8).

Plaintiffs seek a declaratory judgment that Act 301 violates the Fourteenth Amendment of the United States Constitution, and they ask the Court to enjoin enforcement of the Act by way of preliminary and permanent injunctive relief. Plaintiffs specifically challenge Act 301's ban on abortions starting at twelve weeks of pregnancy.

Along with the motion for a preliminary injunction, each plaintiff submitted a sworn declaration stating that the services he provides at Little Rock Family Planning Services include "abortion care at and after 12 weeks of pregnancy." ECF No. 5 (Attach. Decl.). Plaintiffs state that absent an injunction enjoining enforcement of Act 301, they will have no choice but to turn away patients who are in need of abortion services. According to Plaintiffs, Act 301 presents them with an untenable choice: "to face license revocation for continuing to provide abortion care in accordance with their best medical judgment, or to stop providing the critical care their patients seek." ECF No., ¶ 19 (Compl.).

II.

In determining whether to issue a preliminary injunction under Rule 65(a) of the Federal Rules of Civil Procedure, a court must consider four factors: (1) the threat of immediate irreparable harm to the movant; (2) the balance between this harm and the injury that granting the injunction will inflict on other litigants; (3) the probability that movant will

succeed on the merits; and (4) the public interest. *Dataphase Systems, Inc. v. C.L. Systems, Inc.*, 640 F.2d 109, 113 (8th Cir.1981). A preliminary injunction is an extraordinary remedy, and the party seeking injunctive relief bears the burden of proving all the *Dataphase* factors. *See Watkins Inc. v. Lewis*, 346 F.3d 841, 844 (8th Cir. 2003) (citing *Gelco Corp. v. Coniston Partners*, 811 F.2d 414, 418 (8th Cir.1987)).

Likelihood of Success on the Merits

Normally, a litigant seeking a preliminary injunction need only show a "fair chance" of succeeding on the merits. However, where a preliminary injunction is sought to enjoin implementation of a duly enacted state statute, a district court must make a threshold finding that the plaintiff is "likely to prevail on the merits," that there is a greater than fifty percent likelihood of prevailing on the merits. *See Planned Parenthood of Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732-733 (8th Cir. 2008) (en banc).

Plaintiffs contend that Act 301 is unconstitutional on its face because it bans abortions prior to viability. In 1973, the Supreme Court held that the Due Process Clause of the Fourteenth Amendment guarantees a woman the right to choose whether to terminate a pregnancy. *See Roe v. Wade*, 410 U.S. 113, 93 S.Ct. (1973). However, this right is not absolute and is balanced by the state's interest in protecting the woman's health and the potential life of the fetus.

Id. at 162, 93 S.Ct. at 731. After the fetus becomes viable, the State's interest in protecting its potential life becomes compelling enough in some circumstances to outweigh the woman's right to seek an abortion. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 845-846, 112 S.Ct. 2791, 2804 (1992). But before viability, "the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." *Id.* The State can impose regulations aimed at ensuring a thoughtful and informed choice, but only if such regulations do not unduly burden the right to choose. *Casey*, 505 U.S. at 872, 112 S.Ct. at 2818.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 845-846, 112 S.Ct. 2791, 2804 (1992), the Supreme Court reaffirmed the fundamental holdings of *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705 (1973) – including the standard that the line between a woman's interest in control over her destiny and body and the state's interest in promoting the life or potential life of the unborn is drawn at viability – "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. . . ." *Casey*, 505 U.S. at 870, 112 S.Ct. at 2817 (citing *Roe v. Wade*, 410 U.S., at 163, 93 S.Ct., at 731). The *Casey* Court noted that although the line of viability may come earlier with

advances in neonatal care, the attainment of viability continues to serve as the critical factor.[3]

The Eighth Circuit has adopted the "undue-burden test" for facial challenges to abortion laws. *See Planned Parenthood v. Miller*, 63 F.3d, 1452, 1457-58 (8th Cir. 1995). Under that standard, an abortion law is unconstitutional on its face if "in a large fraction of the cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 845-846, 112 S.Ct. 2791, 2804 (1992); *see also Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1456-58 (8th Cir.1995).

With their motion for a preliminary injunction, Plaintiffs submitted the sworn declaration of Janet Cathey, M.D., who is board-certified in the speciality of obstetrics and gynecology ("OBGYN"). *See* ECF No. 5 (Attach. Decl.). Dr. Cathey testifies that she began private practice in 1986, and she offers her patients a full range of OBGYN services. Dr. Cathey's declaration states, in pertinent part, as follows:

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[3] The Supreme Court has also stressed that it is not the proper function of the legislature or the courts to place viability at a specific point in the gestation period: "The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician." *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 64-65, 96 S.Ct. 2831, 2839 (1976).

> Viability is the point in pregnancy at which there is a reasonable likelihood of sustained fetal survival outside the uterus. At twelve (12) weeks of pregnancy, a fetus cannot in any circumstance survive outside the uterus. Thus a fetus 12 weeks is not and cannot be viable.
>
> While the viability determination varies on an individual basis and can only be made by a physician, viability is generally not possible until at least 24 weeks.
>
> In a normally-progressing pregnancy, fetal cardiac activity is detectible by abdominal ultrasound at 12 weeks. The detection of fetal cardiac activity at 12 weeks does not indicate viability.

Id., ¶¶ 3-5 (internal paragraph numbers omitted). In addition to Dr. Cathey's testimony, Plaintiffs point to Arkansas Department of Health statistics, published on the Department's public website, reporting that 20% of abortions performed in Arkansas in 2011 took place at and after 12 weeks gestation.[4]

The parties presented no additional evidence during the May 17 hearing, and the State offered no competing evidence challenging Dr. Cathey's testimony

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[4] According to the statistics cited by Plaintiffs, 4,033 abortions took place in Arkansas in 2011, and 815 of those abortions occurred at or after 12 weeks gestation. *See* http://www.healthy.arkansas.gov/programsServices/healthStatistics/Documents/abortion/2011Itop.pdf (accessed May 20, 2013).

or the statistical data referenced in Plaintiffs' brief. However, the State argued that Plaintiffs failed to show the percentage of women who would not fall within one of the exceptions to Act 301's abortion ban. According to the State, under the Supreme Court's decision in *Gonzales v. Carhart*, 550 U.S. 124, 127 S. Ct. 1610 (2007), Plaintiffs can attack the constitutionality of Act 301 only with an "as-applied"[5] challenge. The Court disagrees.

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[5] Plaintiffs challenge Act 301 on its face, not as applied to a specific party or circumstance. "An as-applied challenge consists of a challenge to a statute's application only as-applied to the party before the court." *Republican Party of Minn., Third Congressional Dist. v. Klobuchar*, 381 F.3d 785, 790 (8th Cir. 2004) (citing *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 758-59, 108 S.Ct. 2138 (1988)). "If an as-applied challenge is successful, the statute may not be applied to the challenger, but is otherwise enforceable." *See id.*

Under the standard generally applicable to facial challenges, the proponent must establish that "no set of circumstances exists under which the [statute] would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). However, the Eighth Circuit has joined every other circuit which has decided the issue by adopting the "undue-burden" standard enunciated by the plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 845-846, 112 S.Ct. 2791, 2804 (1992), as controlling precedent in abortion cases. *See Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 530 F.3d 724, 734 n.8 (8th Cir. 2008) (citing *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1456 n. 7 (8th Cir.1995) (recognizing the plurality opinion "as the Supreme Court's definitive statement of the constitutional law on abortion")).

In this case, Plaintiffs challenge the constitutionality of a law that, with limited exceptions, prohibits all abortions, regardless of the method employed, where the pregnancy has progressed to twelve weeks and a fetal heartbeat is detected. In *Gonzales*, however, the Supreme Court upheld a federal abortion ban that prohibited only one type of abortion procedure – referred to in the Court's decision as an "intact D & E" abortion. The plaintiffs in *Gonzales* challenged the method ban on several grounds, including that it lacked an exception allowing the banned procedure where necessary to preserve the health of the mother. Noting medical and scientific evidence documenting significant disagreement and uncertainty as to whether the method ban created a significant health risk, the Supreme Court rejected the plaintiffs' facial attack. The Court further opined that the proper means to consider a constitutional challenge in the context of medical uncertainty was an "as-applied" challenge, showing that in discrete and well-defined instances, the prohibited abortion method would be necessary for the health of the mother. *See Gonzales*, 550 U.S. at 167, 127 S. Ct. at 1638. The Court noted: "In an as-applied challenge, the nature of the medical risk can be better quantified and balanced than in a facial attack." *Gonzales*, 550 U.S. at 167, 127 S. Ct. at 1639.

According to Plaintiffs, *Gonzales* requires that Plaintiffs come forward with case-specific examples showing that Act 301 would deny a pre-viability abortion. However, the State's own statistics show

that 20% of abortions in Arkansas occur at or after twelve weeks, and the Court will not presume that in all cases, women in that category could obtain an abortion under one of Act 301's narrow exceptions, which are limited to cases in which the pregnancy is the result of rape or incest, an abortion is performed to save the life of the mother, or in cases of a medical emergency.[6] Furthermore, an abortion law cannot pass muster on the ground that it would impose no burden to some or even the majority of women who would seek an abortion. The *Casey* Court noted:

> The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. For example, we would not say that a law which requires a newspaper to print a candidate's

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[6] Act 301 defines "medical emergency" as a condition in which an abortion is necessary:

> (A) To preserve the life of the 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, or when continuation of the pregnancy will create a serious risk of substantial and irreversible impairment of a major bodily function of the pregnant woman; or
>
> (B) Due to the existence of a highly lethal fetal disorder as defined by the Arkansas State Medical Board.

Act 301, § 1 (to be codified at Ark. Code Ann. § 20-16-1302(6)).

> reply to an unfavorable editorial is valid on its face because most newspapers would adopt the policy even absent the law. The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.

Casey, 505 U.S. at 894, 112 S.Ct. at 2829 (1992).

Plaintiffs have shown that Act 301 more than likely prohibits pre-viability abortions in a large fraction of relevant cases. Act 301 equates fetal viability with a 12-week gestational age and a fetal heartbeat, and it bans abortions according to that definition. However, controlling Supreme Court precedent, which this Court has a duty to follow, provides that viability 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. . . ." *Casey*, 505 U.S. at 870, 112 S.Ct. at 2817 (citing *Roe v. Wade*, 410 U.S., at 163, 93 S.Ct., at 731). The Court finds that Plaintiffs have carried their burden to show that they are likely to prevail with their claim that Act 301's prohibition of abortions at twelve weeks gestation, when a fetal heartbeat is detected, impermissibly infringes a woman's Fourteenth Amendment right to chose [sic] to terminate a pregnancy before viability.

Threat of Irreparable Harm

The Court finds that Plaintiffs have shown that they and their patients will be subjected to the threat of irreparable injury in the absence of a preliminary injunction. Without an injunction enjoining enforcement of Act 301, Plaintiffs will face license revocation for performing pre-viability abortions. *See Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action*, 558 F.2d 861, 867 (8th Cir. 1977) ("Planned Parenthood's showing that the ordinance interfered with the exercise of its constitutional rights and the rights of its patients supports a finding of irreparable injury."). Additionally, because Act 301 would prohibit abortions that come within the pre-viability time frame, Plaintiffs' patients face an imminent threat to their ability to exercise the constitutional right to choose to terminate a pregnancy.

Balance of Harm

Considering the substantial impact that Act 301 would have on a woman's right to choose, the balance of hardships tips in Plaintiffs' favor. Maintaining the status quo pending litigation will not deprive the State of its ability to enforce current laws aimed at protecting women's health and the potential life of the fetus. Act 301 provides that if the law is held unconstitutional, the effective date will be tolled until the law is upheld, and the State's current laws governing abortions will remain in effect. *See* Act 301, § 2-16-1307.

Public Interest

Whether the grant of a preliminary injunction furthers the public interest in this case is largely dependent on the likelihood of success on the merits because the protection of constitutional rights is always in the public interest. *See Phelps-Roper v. Nixon*, 509 F.3d 480, 485 (8th Cir.2007). Accordingly, the Court finds that the public interest is best served by granting a preliminary injunction.

III.

Having determined that Plaintiffs have met their burden to show that each requisite for a preliminary injunction is met, the Court will grant Plaintiffs' motion. The Court notes that Plaintiffs seek to enjoin the enforcement of all provisions of Act 301, but Plaintiff's complaint indicates that their constitutional challenge is limited to the Act's abortion ban and does not seek invalidation of the provisions requiring fetal heartbeat testing and informational disclosures. However, for reasons stated at the preliminary injunction hearing, the Court will grant a preliminary injunction enjoining enforcement of the entire Act, and the Court will entertain the parties' arguments regarding severability.

IT IS THEREFORE ORDERED that Plaintiffs' motion for a preliminary injunction (ECF No. docket entry #4) is GRANTED. Defendants are enjoined from enforcing or otherwise implementing Arkansas Act 301 of the 2013 Regular Session of the 89th

General Assembly of Arkansas, titled the Arkansas Human Heartbeat Protection Act.

IT IS FURTHER ORDERED that Plaintiffs have up to and including May 28, 2013 in which to file a response to the motion to intervene submitted by Concepts of Truth, Inc. (ECF Nos. 20, 21, 22).

IT IS SO ORDERED THIS 23RD DAY OF MAY, 2013.

/s/Susan Webber Wright
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 14-1891

Louis Jerry Edwards, M.D., on behalf of himself and his patients and Tom Tvedten, M.D., on behalf of himself and his patients

Appellees

v.

Joseph M. Beck, M.D., President of the Arkansas State Medical Board, and his successors in office, in their official capacity, et al.

Appellants

Curtis James Neeley, Jr., et al.

Amici on Behalf of Appellant(s)

Physicians for Reproductive Health, et al.

Amici on Behalf of Appellee(s)

Appeal from U.S. District Court for the Eastern District of Arkansas – Little Rock (4:13-cv-00224-SWW)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

The motion seeking leave to file an amicus brief in support of en banc petition filed by Mr. Curtis James Neeley, Jr. is denied as moot.

July 09, 2015

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

Ark. Code Ann. § 20-16-1301

§ 20-16-1301. Title

This subchapter shall be known and may be cited as the "Arkansas Human Heartbeat Protection Act".

Ark. Code Ann. § 20-16-1302

§ 20-16-1302. Definitions

As used in this subchapter:

(1) "Contraceptive" means a device, drug, or chemical that prevents fertilization;

(2) "Fetus" means the human offspring developing during pregnancy from the moment of fertilization and includes the embryonic stage of development;

(3) "Heartbeat" means cardiac activity, the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac;

(4) "Human individual" means an individual organism of the species Homo sapiens;

(5) "Major bodily function" includes without limitation functions of the immune system, normal cell growth, and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions;

(6) "Medical emergency" means a condition in which an abortion is necessary:

(A) To preserve the life of the 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, or when continuation of the pregnancy will create a serious risk of substantial and irreversible impairment of a major bodily function of the pregnant woman; or

(B) Due to the existence of a highly lethal fetal disorder as defined by the Arkansas State Medical Board;

(7) "Pregnancy" means the human female reproductive condition that begins with fertilization when the female is carrying the developing human offspring and is calculated from the first day of the last menstrual period of the human female; and

(8) "Viability" means a medical condition that begins with a detectible fetal heartbeat.

Ark. Code Ann. § 20-16-1303

§ 20-16-1303. Testing for heartbeat

(a) A person authorized to perform abortions under Arkansas law shall not perform an abortion on a pregnant woman before the person tests the pregnant woman to determine whether the fetus that the pregnant woman is carrying possesses a detectible heartbeat.

(b) (1) A person authorized to perform abortions under Arkansas law shall perform an abdominal ultrasound test necessary to detect a heartbeat of an unborn human individual according to standard medical practice, including the use of medical devices as determined by standard medical practice.

(2) Tests performed under subdivision (b)(1) of this section shall be approved by the Arkansas State Medical Board.

(c) (1) The Arkansas State Medical Board shall adopt rules:

(A) (i) Based on standard medical practice for testing for the fetal heartbeat of an unborn human individual.

(ii) Rules adopted under this subdivision (c)(1) shall specify that a test for fetal heartbeat is not required in the case of a medical emergency; and

(B) To define, based on available medical evidence, the statistical probability of bringing an unborn human individual to term based on the gestational age of the unborn human individual possessing a detectible heartbeat.

(d) If a fetal heartbeat is detected during the test required under this section, the person performing the test shall inform the pregnant woman in writing:

(1) That the unborn human individual that the pregnant woman is carrying possesses a heartbeat;

(2) Of the statistical probability of bringing the unborn human individual to term based on the gestational age of the unborn human individual possessing a detectible heartbeat; and

(3) An abortion is prohibited under § 20-16-1304.

(e) If a heartbeat has been detected, the pregnant woman shall sign a form acknowledging that she has received the information required under subsection (d) of this section.

Ark. Code Ann. § 20-16-1304

§ 20-16-1304. Prohibitions

(a) A person authorized to perform abortions under Arkansas law shall not perform an abortion on a pregnant woman with the specific intent of causing or abetting the termination of the life of an unborn human individual whose heartbeat has been detected under § 20-16-1303 and is twelve (12) weeks or greater gestation.

(b) A violation of this section as determined by the Arkansas State Medical Board shall result in the revocation of the medical license of the person authorized to perform abortions under Arkansas law.

Ark. Code Ann. § 20-16-1305

§ 20-16-1305. Exemptions

(a) A person does not violate this subchapter if the person:

(1) Performs a medical procedure designed to or intended to prevent the death of a pregnant woman or in reasonable medical judgment to preserve the life of the pregnant woman;

(2) (A) Has undertaken an examination for the presence of a heartbeat in the fetus utilizing standard medical practice; and

(B) The examination does not reveal a heartbeat; or

(3) Has been informed by a medical professional who has undertaken the examination for fetal heartbeat that the examination did not reveal a fetal heartbeat.

(b) This subchapter does not apply to:

(1) An abortion performed to save the life of the mother;

(2) A pregnancy that results from rape under § 5-14-103 or incest under § 5-26-202; or

(3) A medical emergency.

Ark. Code Ann. § 20-16-1306

§ 20-16-1306. Interpretation

This subchapter does not:

(1) Subject a pregnant female on whom an abortion is performed or attempted to be performed to any criminal prosecution or civil penalty; or

(2) Prohibit the sale, use, prescription, or administration of a measure, drug, or chemical designed for contraceptive purposes.

Ark. Code Ann. § 20-16-1307

§ 20-16-1307. Tolling of effective date

If a state or federal court of competent jurisdiction voids a provision of this subchapter as unconstitutional, the effective date of that provision shall be tolled until that provision has been upheld as valid by an appellate tribunal.
