NO. 14-1891

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOSEPH M. BECK, et al. — Appellants

v.

LOUIS JERRY EDWARDS, et al. — Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

THE HONORABLE SUSAN WEBBER WRIGHT
UNITED STATES DISTRICT COURT JUDGE

APPELLEES' ANSWERING BRIEF

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STATEMENT ON ORAL ARGUMENT

Appellees concur with Appellants' position that "the matters to be decided by this Court . . . will not be clarified by oral argument," State's Br. at i, and that oral argument is therefore unnecessary in this case.

STATEMENT OF THE CASE

This is an appeal by the members of the Arkansas State Medical Board ("Appellants" or "the State") from a summary judgment decision by the United States District Court for the Eastern District of Arkansas permanently enjoining enforcement of Ark. Code Ann. §20-16-1301, -1303, -1304 ("Act 301"), which imposes a ban on abortion care starting at 12 weeks of pregnancy, with only very narrow exceptions. (App. 16-17)[1] The State agreed below that "summary judgment is appropriate because there are no material facts in dispute." Defs.' Br. Supp. Mot. Partial Summ. J. at 5 n.3 (D. Ct. Doc. No. 42, May 31, 2013); *see also* State's Br. at i ("The matters to be decided by this Court are questions of law . . . ."). As the District Court found, Appellees' evidence was "uncontroverted," and specifically, "the State d[id] not dispute [Appellees' expert] 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." (App. 73

[1] In addition to enjoining the ban at Ark. Code Ann. § 20-16-1304(a), the District Court also enjoined Ark. Code Ann. § 20-16-1304(b), which requires Appellants to revoke the license of a physician who violates the ban, and Ark. Code Ann. § 20-16-1303(d)(3), which requires the physician to inform the patient that abortion is prohibited under the ban. (App. 80-81) The State has appealed all of those rulings. The District Court also granted the State's motion for partial summary judgment, severing and upholding certain disclosure requirements in the Act. *Id.* Appellees have not appealed that ruling.

(quoting Decl. of Janet Cathey, M.D., July 18, 2013 ("Cathey Decl.") ¶ 4 (App. 65))[2]

Act 301 bans abortion beginning at 12 weeks of pregnancy if fetal cardiac activity "has been detected under § 20-16-1303." *See* Ark. Code Ann. § 1304(a). (App. 17) Section 1303 in turn requires, *inter alia*, that prior to providing abortion care, a physician "shall perform an abdominal ultrasound test" to determine whether cardiac activity is present. Ark. Code Ann. § 1303(b)(1). (App. 16-17) If it is present, the physician must inform the patient in writing that the abortion care she seeks "is prohibited under § 20-16-1304." Ark. Code Ann. § 1303(d)(3). (App. 17) The uncontroverted evidence is that unless a miscarriage has already occurred, fetal cardiac activity is present—and detectable via abdominal ultrasound—in all normally-progressing pregnancies by 12 weeks. *See* Cathey Decl. ¶ 7 (App. 65); Answer ¶ 15 (App. 53).

Thus, Act 301 outright bans abortion starting at 12 weeks. At that point, it allows a woman to obtain an abortion only under three narrow exceptions: when it is necessary to save her life; when her pregnancy results from rape or incest as defined by Arkansas law; or in a medical emergency as defined by Act 301. *See*

[2] Viability is the point in a pregnancy at which "there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support," *Colautti v. Franklin*, 439 U.S. 379, 388 (1979); *accord* Cathey Decl. ¶ 4 (App. 65), and it is uncontroverted that viability does not occur until months after the Act's 12-week cut-off. Cathey Decl. ¶ 4. (App. 65)

Ark. Code Ann. § 20-16-1305(b). (App. 18) A violation of the ban "shall result in the revocation of the medical license of the person authorized to perform abortions under Arkansas law." Ark. Code Ann. § 1304(b). (App.17)

Appellees Louis Jerry Edwards, M.D., and Tom Tvedten, M.D., both physicians licensed to practice medicine in Arkansas, provide pre-viability abortion care at and after 12 weeks of pregnancy. Decl. of Louis Jerry Edwards, M.D., Apr. 15, 2013 ¶¶ 1-3 (App. 19); Decl. of Tom Tvedten, M.D., Apr. 15, 2013 ¶¶ 1-3 (App. 20). On behalf of themselves and their patients, the physicians filed this lawsuit, claiming that Act 301 violates the Fourteenth Amendment and decades of binding Supreme Court precedent. Complaint at ¶¶ 1-2, 21. (App. 13)

SUMMARY OF ARGUMENT

For more than 40 years, the Supreme Court has repeatedly held that, before viability, states lack the power to ban abortion and wrest from a woman the ultimate decision of whether to continue a pregnancy—*regardless* of the particular interests asserted by the state, and *regardless* of whether the state includes exceptions to the ban. This Court does not have the authority to overturn this precedent, and the State's arguments to the contrary should be roundly rejected. Under this unbroken line of Supreme Court precedent, Act 301 is clearly unconstitutional as a ban on pre-viability abortion, and the District Court's decision should be affirmed.

ARGUMENT

I. The District Court Correctly Held that the Ban Is Unconstitutional.

The District Court correctly held that Act 301 unconstitutionally bans abortion care at a pre-viability point in pregnancy and correctly rejected the State's argument that it is merely a permissible regulation. (App. 73) In doing so, the District Court faithfully applied decades of explicit, unbroken Supreme Court precedent. *See* App. 70-74.

Relying on the Due Process Clause of the Fourteenth Amendment, the Supreme Court has held repeatedly and unequivocally that a state may not ban abortion prior to viability. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (joint opinion of O'Connor, Kennedy and Souter, JJ.) ("Before viability, the State's interests are not strong enough to support a prohibition of abortion . . . ."); *Roe v. Wade*, 410 U.S. 113, 163-65 (1973).

In *Roe*, the Supreme Court recognized that the right to privacy, "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . encompass[es] a woman's decision whether or not to terminate her pregnancy." *Roe*, 410 U.S. at 153. It went on to carefully balance that right against states' interests in protecting potential life, and ultimately concluded that a state may not ban abortion at any point prior to viability. *Id.* at 164-65.

In *Casey*, the Court reaffirmed these principles, 505 U.S. at 845-46, pointedly reiterating "*Roe*'s central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban . . . ." *Id.* at 860; *see also id.* at 870-71 ("[T]he line should be drawn at viability . . . . The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce."). Indeed, before viability, the Constitution forbids not only banning abortion outright, but also imposing any undue burden, meaning any "substantial obstacle in the path of a woman[]" seeking abortion care. *Id.*at 877.

There is no merit to the State's attempts to portray Act 301 as "not a blanket ban," State's Br. at 12, and therefore constitutional. Indeed, the Supreme Court has explicitly rejected each of the arguments that the State makes to defend Act 301.

- First, the Supreme Court has flatly foreclosed the State's reliance on the fact that Act 301 allows a woman to access care if she comes under one of the Act's three narrow exceptions (for life-saving abortions, medical emergencies, and rape and incest). *See* State's Br. at 11-12. "Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the

ultimate decision to terminate her pregnancy before viability." *Casey*, 505 U.S. at 879. Hence, "[u]nder the bright-line viability rule the United States Supreme Court established in *Roe* and affirmed in *Casey*, a state may not ban abortions at any point prior to viability, and a statute's exceptions cannot save it." *MKB Mgmt. Corp. v. Burdick*, 954 F. Supp. 2d 900, 911 (D.N.D. 2013) (striking down ban at 6 weeks with narrow exceptions), *appeal docketed*, No. 14-2128 (8th Cir. May 15, 2014).

- Second, the Supreme Court has likewise foreclosed the State's reliance on the fact that the majority of women obtaining abortion care do so before 12 weeks. State's Br. at 11, 15. As the *Casey* Court explained, striking down a law that obstructed access for just 1% of women seeking abortions:

> 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 . . . . The proper focus of constitutional inquiry is the group for whom the law is a restriction.

Casey, 505 U. S. at 894. The group for whom Act 301 is a restriction is women seeking pre-viability abortion care starting at 12 weeks who do not fall under one of the three exceptions. For every woman in that group, Act 301 is an unconstitutional ban.

- Third, the State also gains nothing in insisting that the ban "furthers legitimate State interests," State's Br. at 16, for the Supreme Court has declared that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle." *Gonzales v. Carhart*, 550 U.S. 124, 145 (2007) (quoting *Casey*, 505 U.S. at 846); *accord Casey*, 505 U.S. at 877.
- Fourth, the State's attempt to frame Act 301 as a regulation with the "incidental effect" of making it merely more difficult or expensive to obtain an abortion, State's Br. at 13-14, is not credible. For the relevant group of patients, Act 301 is an absolute (and therefore necessarily a substantial) obstacle. As the U.S. Court of Appeals for the Tenth Circuit observed of Utah's attempts to justify a ban at 20 weeks, "[t]he State's arguments . . . are disingenuous and unpersuasive because they are grounded on its continued refusal to accept governing Supreme Court authority holding that . . . until viability is actually present the State may not prevent a woman from choosing to abort." *Jane L. v. Bangerter*, 102 F.3d 1112, 1118 (10th Cir. 1996).

In conformity with this oft-reaffirmed, bright-line rule, since *Roe*, not a single ban on pre-viability abortion care has survived constitutional challenge—

whether the ban applied at 0 weeks, 6 weeks, 12 weeks, or 20 weeks. As the U.S. Court of Appeals for the Ninth Circuit recently held in striking a ban at 20 weeks with exceptions for medical emergencies:

> [T]he Supreme Court case law concerning the constitutional protection accorded women with respect to the decision whether to undergo an abortion has been unalterably clear . . . : a woman has a constitutional right to choose to terminate her pregnancy before the fetus is viable.

Isaacson v. Horne, 716 F.3d 1213, 1217 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 905 (2014); *see also Jane L.*, 102 F.3d at 1117-18 (striking down ban at 20 weeks with narrow exceptions); *Sojourner T. v. Edwards*, 974 F.2d 27, 30 (5th Cir. 1992) (same as to ban throughout pregnancy); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1374 (9th Cir. 1992) (same); *MKB Mgmt. Corp.*, 954 F. Supp. 2d at 903 (striking down ban on "abortion if a 'heartbeat' has been detected, thereby banning abortions beginning at approximately six weeks of pregnancy, with limited exceptions"); *McCormack v. Hiedeman*, 900 F. Supp. 2d 1128, 1150-51 (D. Idaho 2013) (striking down ban at 20 weeks with narrow exceptions), *appeal docketed*, No. 13-35401 (9th Cir. May 8, 2013); *DesJarlais v. State, Office of Lieut. Gov.*, 300 P.3d 900, 904 (Alaska 2013) (invalidating proposed pre-viability ban on all abortions with exception for "necessity"); *In re Initiative Petition No. 395, State Question No. 761*, 286 P.3d 637, 637-38 (Okla. 2012) (invalidating proposed definition of fertilized egg as "person" under due process clause), *cert. denied sub nom. Personhood Okla. v. Barber*, 133 S. Ct. 528

(2012); *Wyo. Nat'l Abortion Rights Action League v. Karpan*, 881 P.2d 281, 287 (Wyo. 1994) (ruling proposed ban on abortions would be unconstitutional); *In re Initiative Pet. No. 349, State Question No. 642*, 838 P.2d 1, 7 (Okla. 1992) (striking from ballot as violative of U.S. Constitution initiative petition that would have enacted ban on abortion throughout pregnancy with narrow exceptions).

Under binding Supreme Court precedent, Arkansas's ban must likewise fall.

II. *Gonzales v. Carhart* and *Planned Parenthood v. Rounds* Confirm that Act 301 Is Unconstitutional Because It Bans Abortion Before Viability.

Contrary to the State's argument, the Supreme Court's decision in *Gonzales v. Carhart* and this Court's decision in *Planned Parenthood v. Rounds*, 686 F.3d 889 (8th Cir. 2012), cannot save Act 301's unconstitutional ban on pre-viability abortion. *See* State's Br. at 19-21. Instead, these two cases support the District Court's conclusion that the ban is invalid and must be enjoined.

Gonzales in no way altered the core constitutional principle, established in *Roe* and reaffirmed in *Casey*, that viability is the earliest point at which the State may ban abortion. Indeed, in *Gonzales*, the Supreme Court reiterated that "[b]efore 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." 550 U.S. at 145 (quoting *Casey*, 505 U.S. at 846).

The question before the Supreme Court in *Gonzales* was not the validity of a ban on abortion, but the validity of a prohibition on one *method* of abortion. *Id.* at 146-47. The Court upheld the regulation at issue because it affected only one type of abortion procedure used occasionally later in pregnancy and specifically did "*not* proscribe" the most common procedure used at that stage of pregnancy. *Id.* at 164 (emphasis added); *see also id.* at 165 (stating that "Act allows . . . a commonly used and generally accepted method, so it does not construct a substantial obstacle to the abortion right"). For that reason, although the regulation considered in *Gonzales* applied both before and after viability, *id.* at 156, it determined only how, not whether, a woman could obtain an abortion. Thus, unlike the ban in Act 301, the regulation at issue in *Gonzales* did not deny *any* woman the ability to terminate a pregnancy at any point before viability.

Ignoring the Supreme Court's explicit language and the holding in the case, the State nevertheless argues that *Gonzales* somehow undermined the balance struck by *Casey* because it recognized the State's interest in promoting respect for human life at all stages of pregnancy. State's Br. at 22 (citing *Gonzales*, 550 U.S. at 163). But as the Supreme Court stated, while the government may indeed "use its voice and its regulatory authority to show its profound respect for the life within the woman," it may do so *if and only if* such actions do not "strike at the right itself." *Gonzales*, 550 U.S. at 157-58. Further, in *Gonzales*, the Supreme Court

specifically accepted the principle, re-affirmed in *Casey*, that no state interest, even the interest in potential life, is strong enough to justify a prohibition on abortion before viability. *See id.* at 145; *see also supra* p. 9.

Thus, nothing in *Gonzales* changes the constitutional rule that at all points before viability, whether it be 6, 12 or 20 weeks, it is a woman, and not the State, who holds the authority to decide whether or not she will continue her pregnancy.

Similarly, nothing in *Rounds* calls into question the District Court's conclusion that a ban on abortion before viability is unconstitutional. As discussed *infra* in Section III, this Court does not have the power to alter Supreme Court precedent, and thus its decisions could not under any circumstance change the basic constitutional principle that the State cannot ban abortion at any point prior to viability.

But in any event, *Rounds* simply has no bearing on this case. *Rounds* did not concern a ban on abortion. Rather, it evaluated a South Dakota regulation that required certain disclosures before a woman can obtain an abortion, 686 F.3d. at 892; that did not prohibit any abortion at any point in pregnancy, *id.*; and that thus simply could not be more different from the ban in Act 301.

Further, nothing in *Rounds* supports the State's suggestion that, because of unspecified "new scientific evidence," this Court should hold that the viability line is no longer relevant in evaluating the ban in Act 301. *See* State's Br. at 20. To

the contrary, this Court in *Rounds* recognized and applied *Casey*'s undue burden standard as the constitutional benchmark for pre-viability abortion regulations, including the requirement that an informed consent regulation "be calculated to inform a woman's free choice, not hinder it." 686 F.3d at 906 (citing *Casey*, 505 U.S. at 877); *see also id.* at 893. This Court upheld the South Dakota regulation only after concluding that it met that standard. *Id.* at 906.

By contrast, the ban in Act 301 would not only "hinder" "a woman's free choice" to terminate a pre-viability pregnancy, it would eliminate it for nearly every woman starting at 12 weeks. Thus, the District Court correctly concluded that Act 301's ban at a pre-viability point in pregnancy is unconstitutional under *Casey*, and this Court should affirm that decision.

III. This Court Does Not Have the Power to Reconsider Binding Supreme Court Precedent.

The State claims that over 40 years of Supreme Court precedent is irrelevant because "[t]he viability standard announced in *Roe* should be revisited and overturned." State's Br. at 24. There is no basis for revisiting the viability line established by *Roe* and *Casey*, but even if there were, this Court does not have the power to engage in such "revisiting." Instead, this Court is bound by Supreme Court precedent unless and until the Supreme Court itself expressly overturns it.

Only the Supreme Court may overturn one of its precedents. *See United States v. Hatter*, 532 U.S. 557, 567 (2001); *State Oil Co. v. Khan*, 522 U.S. 3, 20

(1997); *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989). In *Rodriguez de Quijas*, for example, the Supreme Court overturned one of its prior cases, but explained that it would have been error for a lower court to have done so:

> We do not suggest that the Court of Appeals on its own authority should have taken the step of renouncing [the prior case]. If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

490 U.S. at 484; *accord Hatter*, 532 U.S. at 567; *State Oil Co.*, 522 U.S. at 20. Under this bedrock judicial principle, *Roe* and *Casey* constitute controlling authority in this case.

Moreover, the Supreme Court itself has explained that the core holding of *Roe* and *Casey* command continued adherence under the doctrine of *stare decisis*:

> An entire generation has come of age free to assume *Roe*'s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions; no erosion of principle going to liberty or personal autonomy has left *Roe*'s central holding a doctrinal remnant; *Roe* portends no developments at odds with other precedent for the analysis of personal liberty; and no changes of fact have rendered viability more or less appropriate as the point at which the balance of interest tips.

Casey, 505 U.S. at 860-61; *see also generally id*. at 854-70. These conclusions apply with equal force today, and the Supreme Court has noted that *stare decisis* is especially important where, as here, "the Court decides a case in such a way as to

resolve the sort of intensely divisive controversy reflected in *Roe*." *Id.* at 866. In such a case, the Supreme Court's decision "calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution." *Id.* at 867. Such a case is rare, and "requires an equally rare precedential force to counter the inevitable efforts to overturn it and thwart its implementation." *Id.*

Notwithstanding these clear pronouncements, the State claims that this Court should abandon the viability line established by *Roe* and *Casey* because "[t]he vast majority of abortions today are performed in the first eight weeks of pregnancy . . . and the earlier an abortion is performed, the safer it is for the health and life of the pregnant woman." State's Br. at 24. Even aside from this Court's duty to follow binding Supreme Court precedent, this argument has no merit. The facts the State asserts have always been true, have always been known to the Supreme Court, and have never justified an outright ban.[3] Moreover, the State's attempt to justify the ban in Act 301 by relying on the greater safety of abortion earlier in pregnancy fundamentally misconstrues the constitutional right, which guarantees that it is for

[3] Indeed, in *Roe*, the Supreme Court assumed that second-trimester abortion could be riskier for women than childbirth (a fact that is no longer true today), and that fact was the basis for its conclusion that state interests in regulating abortion to protect women's health became compelling at the end of the first trimester. 410 U.S. at 163. Nevertheless, the Supreme Court held in *Roe* that states lack sufficient interests to justify a ban on abortion before viability, *see id.* at 163-64, and reconfirmed that holding in *Casey*. *See* 505 U.S. at 860.

a woman, and not the State, to weigh medical risks and other equally important factors to determine whether to continue her pre-viability pregnancy. *Casey*, 505 U.S. at 852. The State's reliance on a claimed concern for maternal health to support Act 301's ban on pre-viability abortion—even were it credible in the absence of a health exception in the ban—is thus foreclosed by precedent binding on this Court.

CONCLUSION

For the reasons set forth above, this Court should affirm the District Court's grant of summary judgment.

Respectfully submitted July 10, 2014.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 3,736 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point Times New Roman font.

3. The electronic files comprising this brief and filed with the Court have been scanned and are virus-free, as set forth in Eighth Circuit Rule 28A(h)(2).

Dated: July 10, 2014

/s/ Susan Talcott Camp
Susan Talcott Camp

CERTIFICATE OF SERVICE

I, Susan Talcott Camp, do hereby certify that on July 10, 2014, I electronically submitted the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eight Circuit via the CM/ECF system. I further certify that, once this brief has been accepted for filing by the Clerk, I will mail bound paper copies of this brief, via UPS, to the Clerk of the Court, and to the following:

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