



Lynn Fitch
ATTORNEY GENERAL

CIVIL LITIGATION DIVISION

January 30, 2020

Lyle W. Cayce, Clerk
United States Court of Appeals
for the Fifth Circuit
F. Edward Herbert Building
600 S. Maestri Place
New Orleans, LA 70130-3408

RE: *Jackson Women's Health Org. v. Dobbs*, No. 19-60455

Dear Mr. Cayce:

Pursuant to Fed. R. App. P. 28(j), Defendants-Appellants write to address this Court's opinion in *Jackson Women's Health Org. v. Dobbs*, No. 18-60868, reported at 945 F.3d 265 (5th Cir. Dec. 13, 2019) ("*JWHO I*") issued after briefing closed in this appeal. In *JWHO I*, a panel of this Court affirmed the District Court's order enjoining the enforcement of 2018 Miss. H.B. 1510, the 15-week abortion law. This Court denied Defendants-Appellants' petition for en banc rehearing on January 17, 2020.

JWHO I held that H.B. 1510 is categorically unconstitutional because it bars abortions after 15-weeks, before the point of fetal viability, and thus would "ban" some pre-viability abortions. *JWHO I* further held the District Court did not err in refusing to apply the undue burden test, or in precluding development of an evidentiary record on any issue other than the point of fetal viability. 945 F.3d at 272-74.

Defendants-Appellants acknowledge that a panel of this Court cannot overturn another panel's prior decision absent an intervening change in controlling law. *Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008). The state law challenged in this appeal, S.B. 2116, bars abortions once a fetal heartbeat has been detected, which may occur as early as six weeks,

and before the point of fetal viability.

Defendants-Appellants concede that application of the *JWHO I* panel's decision is presently binding with respect to the District Court's preliminary injunction prohibiting S.B. 2116's enforcement. However, Defendants-Appellants intend to seek certiorari review of the *JWHO I* panel decision from the Supreme Court. Defendants-Appellants contend that their good faith arguments raised here and in *JWHO I* demonstrate application of the prior panel's opinion to S.B. 2116 would only propagate the errors of *JWHO I*, and reserve those arguments, as well as all others presented in this appeal, as may be necessary for preservation purposes upon seeking further appellate review.

Sincerely,

s/Paul E. Barnes

Paul E. Barnes

Wilson D. Minor

Special Assistant Attorneys General

STATE OF MISSISSIPPI

OFFICE OF THE ATTORNEY GENERAL

Post Office Box 220

Jackson, MS 39205

Telephone: (601) 359-4072

Counsel for Defendants-Appellants