IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

AMY BRYANT, M.D., M.S.C.R.; BEVERLY GRAY, M.D.; ELIZABETH DEANS, M.D., on behalf of themselves and their patients seeking abortions; and PLANNED PARENTHOOD SOUTH ATLANTIC, on behalf of itself, its staff, and its patients seeking abortions, Plaintiffs, v. JIM WOODALL, in his official capacity as District Attorney ("DA") for Prosecutorial District ("PD") 15B; ROGER ECHOLS, in his official capacity as DA for PD 14; ELEANOR E. GREENE, M.D., M.P.H, in her official capacity as President of the North Carolina Medical Board; RICK BRAJER, in his official capacity as Secretary of the North Carolina Department of Health and Human Services; and their employees, agents, and successors, Defendants.	)	CIVIL ACTION Case No. 1:16-CV-01368

PLAINTIFFS' OBJECTION TO MEMORANDUM OPINION AND ORDER

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INTRODUCTION

Plaintiffs respectfully object to the Memorandum Opinion and Order ("Order") granting Defendants' Rule 56(d) Motion. Mem. Op. & Order, ECF No. 31. This case involves a challenge to a North Carolina law that bans all abortions after the twentieth week of pregnancy, except in a medical emergency. *See* N.C. Gen. Stat. §§ 14-44, 14-45, 14-45.1 ("the 20-week ban"). The 20-week ban is clearly unconstitutional under decades of binding Supreme Court precedent holding that states may not prohibit abortion prior to viability and wrest from a woman the ultimate decision of whether to end a previability pregnancy. Numerous courts around the country have struck down similar state laws, including those that ban abortion after the twentieth week of pregnancy. Nevertheless, the Order allows Defendants to conduct discovery on issues that are legally immaterial; none of the discovery permitted can transform this unconstitutional law into a valid one.

Plaintiffs are physicians at prominent North Carolina hospitals and a medical provider that offer a range of reproductive care to their patients, including previability abortions. Critically, Plaintiffs seek only as-applied relief—they challenge the application of the 20-week ban only to their patients with previability pregnancies. Plaintiffs moved for summary judgment on the single claim that, by prohibiting their patients from obtaining previability abortions, the 20-week ban imposes an unconstitutional undue burden under the Fourteenth Amendment. Instead of responding to Plaintiffs' summary judgment motion, Defendants seek discovery on issues that are immaterial under well-settled law.

The Court should overturn the Order because it suffers from three key legal errors.

First, the Order erroneously treats this case as a facial challenge, granting discovery on "whether any fetuses between 20 and 26 weeks in North Carolina meet the definition of 'viable' adopted by the Supreme Court, and, if so, how many and when." But whether "any" fetus is viable during these weeks of pregnancy is not legally material because Plaintiffs only seek to block the ban *as applied* to their patients with previability pregnancies and only until 24 weeks.[1] Under binding Supreme Court precedent, viability is a case-by-case determination that must be made by a physician, and a state may not pick one factor, such as gestational age, as the single determinant of when viability occurs. The ban violates these well-established principles and is therefore unconstitutional, and the discovery permitted in the Order cannot alter that conclusion.

Second, the Order improperly grants discovery on fetal pain and the safety of abortion after twenty weeks even though the Supreme Court has made clear that *no* state interest is strong enough to justify a ban on abortion before viability. As other courts have found, binding precedent controls this issue. Indeed, the Order itself acknowledges that discovery on these issues "appears to hold a lesser likelihood of ultimately affecting the disposition of Plaintiffs' summary judgment motion than discovery into viability-related matters."

Third, because of North Carolina abortion reporting laws that require Plaintiffs to report all abortions they perform to the Department of Health and Human Services,

[1] Contrary to the Order, no Plaintiff seeks to perform abortions after 24 weeks from a woman's last menstrual period ("lmp").

Defendants already have in their possession all the information they seek that is legally material to Plaintiffs' standing. Defendants' proposed discovery on standing is nothing more than a fishing expedition to obtain, *inter alia*, confidential and sensitive information about why women seek abortions in North Carolina.

In sum, the discovery the Order permits is not material to the legal issues in this case. The Court should reverse the Order and deny Defendants' Rule 56(d) motion or, in the alternative, significantly narrow the scope of discovery.

QUESTION PRESENTED

1. Did the Magistrate Judge err in granting Defendants' Rule 56(d) Motion to conduct discovery on (1) viability, (2) fetal pain, (3) whether post-20 week abortions pose any greater health risks to pregnant women than earlier abortions, and (4) standing where, because of binding precedent, the discovery sought is immaterial to the claim before the Court or, in the case of standing, all material information is already in Defendants' possession?

STATEMENT OF FACTS

Plaintiffs are physicians at the University of North Carolina and Duke and a not-for-profit healthcare provider, all of whom provide a range of reproductive care to their patients, including previability abortions. Mem. Supp. Pls.' Mot. Summ. J. 3, ECF No. 14.[2] Because of the ban, Plaintiffs have turned away patients who need a previability

[2] In this Objection, Plaintiffs' citations to court documents that have been filed in this case refer to the page number of the original document, not the ECF pagination.

abortion after twenty weeks and would provide previability abortion after twenty weeks but for the 20-week ban. Mem. Supp. Pls.' Mot. Summ. J. 3–4; Decl. Bryant Supp. Pls.' Mot. Summ. J. Ex. 1 (Bryant Decl.), ECF No. 13-1 ¶¶ 14, 18, 19; Decl. Black Supp. Pls.' Mot. Summ. J. Ex. 2 (Black Decl.), ECF No. 13-2 ¶¶ 6-7; Decl. Gray Supp. Pls.' Mot. Summ. J. Ex. 3 (Gray Decl.), ECF No. 13-3 ¶¶ 7, 9, 10. Plaintiffs therefore challenged the 20-week ban "*as applied*" to women seeking previability abortions after the twentieth week of pregnancy. Compl. for Injunctive & Declaratory Relief ¶ 2, ECF No. 1 (emphasis added) (filed November 30, 2016).

After filing their Complaint, Plaintiffs sought summary judgment on the single claim that the 20-week ban is unconstitutional under the Fourteenth Amendment because it imposes an undue burden on their patients by prohibiting previability abortions. Pls.' Mot. Summ. J., ECF No. 13 (filed December 14, 2016). As Plaintiffs stated in sworn declarations, viability typically occurs at approximately 24 weeks from a woman's last menstrual period ("lmp"), but can also occur later. Mem. Supp. Pls.' Mot. Summ. J. 4; Bryant Decl. ¶¶ 15, 17; Gray Decl. ¶ 8. Plaintiffs only seek to provide previability abortions, and no Plaintiff seeks to provide abortions after 24 weeks lmp. Mem. Supp. Pls.' Mot. Summ. J. 3–4; Compl. for Decl. & Injunctive Relief ¶¶ 7–10.

Following agreed upon extensions for Defendants, Defendants filed a Rule 56(d) Motion requesting additional time to develop evidence and to conduct discovery ("the Motion"). Verified Mot. of Defs. for an Order Deferring Any Further Briefing On & Postponing Any Hearing or Decision on Pls.' Mot. for Summ. J. Until Defs. Have Had an

Opportunity to Conduct Limited, Expedited Disc. & to Gather Documents & Evidence Necessary to Allow Them to Respond to Pls.' Summ. J. Mot. [hereinafter "Defs.' Mot."] 1–3, ECF No. 21. Inaccurately claiming that Plaintiffs were seeking facial relief, Defendants sought additional time to develop evidence on three issues: (1) "when viability begins"; (2) alleged fetal pain during post-20 week abortions; and (3) the risks to women of abortion after twenty weeks; they also sought discovery on Plaintiffs' standing. *Id.* at 12.

Plaintiffs opposed the Motion, reiterating that they "only seek relief as applied to previability abortions," and explained that the proposed discovery was immaterial to their claim because Defendants "do not and cannot claim that they will provide the Court with evidence that all fetuses reach viability immediately after the twentieth week of pregnancy," when the ban begins to operate. Pls.' Opp. to Defs.' Mot. 1, 5–6, ECF No. 27. In their reply, Defendants then claimed, for the first time, that they intend to "attempt to obtain evidence, *inter alia*, that *all* post-twenty week abortions involve a viable fetus." Defs.' Reply Supp. Mot. 2, ECF No. 28 (emphasis added).

Defendants make this assertion despite their admission, in their Answer, that "the moment of fetal viability varies from pregnancy to pregnancy, within limitations, depending on various factors." Answer to Compl. ¶ 27, ECF No. 20. Defendants also concede that some fetuses are never viable. *Id*. at ¶ 28.

The Magistrate Judge granted the Motion on April 7, 2017, allowing Defendants to conduct discovery until June 6, 2017 on the following issues:

> (1) whether any fetuses between 20 and 26 weeks in North Carolina meet the definition of "viable" adopted by the Supreme Court, and, if so, how many and when; (2) whether fetuses between 20 and 26 weeks experience pain and, if so, when and to what degree; (3) whether abortions of fetuses between 20 and 26 weeks pose any greater health risks to pregnant women than abortions of fetuses before 20 weeks and, if so, when and to what degree; and (4) Plaintiffs' standing to bring this action.

Mem. Op. & Order 20. Defendants then have until July 6, 2017 to respond to Plaintiffs' Motion for Summary Judgment. *Id.* Plaintiffs now timely object to the Order.

STANDARD OF REVIEW

The District Court reviews a Magistrate Judge's determination of a non-dispositive motion under a "clearly erroneous or contrary to law" standard. *See* 28 U.S.C. § 636(b)(1)(A); *see also* Fed. R. Civ. P. 72(a). Discovery motions are non-dispositive and thus subject to this standard. *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 951 F. Supp. 1211, 1212–13 (M.D.N.C. 1996) (reviewing Magistrate Judge's discovery order under Rule 72(a)'s "contrary to law or clearly erroneous" standard).

Although "Magistrate Judges are generally afforded great deference in discovery rulings due to the 'fact-specific character of most discovery disputes[,]' . . . . a district court *must* vacate a Magistrate Judge's order that is clearly erroneous or contrary to law." *N.C. State Conference v. McCrory*, No. 1:13CV658, 2015 WL 12683665, at *3 (M.D.N.C. Feb. 4, 2015) (emphasis added) (quoting *In re Outsidewall Tire Litig.*, 267 F.R.D. 466, 470 (E.D. Va. 2010)); *see also Wachovia Bank, Nat'l Ass'n v. Deutsche Bank Tr. Co. Ams.*, 397 F. Supp. 2d 698, 699 (W.D.N.C. 2005) ("If proper objections are made, a district court 'shall consider such objections and *shall* modify or set aside any portion of the magistrate

judge's order found to be clearly erroneous or contrary to law.'" (emphasis added) (quoting Fed. R. Civ. P. 72(a)). The Fourth Circuit has held that "clearly erroneous" and "contrary to law" are not synonymous. "'[C]ontrary to law' indicates plenary review of legal conclusions." *Ada Liss Grp. (2003) Ltd. v. Sara Lee Corp.*, No. 1:06CV610, 2014 WL 4370660, at *2 (M.D.N.C. Aug. 28, 2014) (quoting *PowerShare, Inc. v. Syntel, Inc.*, 597 F. 3d 10, 15 (1st Cir. 2010)). Accordingly, the Court reviews a Magistrate Judge's legal determinations de novo. *Id.*; *Bruce v. Hartford*, 21 F. Supp. 3d 590, 594 (E.D. Va. 2014) ("For questions of law 'there is no practical difference between review under Rule 72(a)'s contrary to law standard and [a] de novo standard.' . . . The Court will therefore review the factual portions of the Magistrate Judge's order under the clearly erroneous standard, but will review legal conclusions to determine if they are contrary to law." (citations omitted)).

LEGAL STANDARD FOR RULE 56(d) MOTIONS

A Rule 56(d) motion should be granted only when "a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition" to a summary judgment motion. Fed. R. Civ. P. 56(d). A Rule 56(d) motion should be denied if "the additional evidence sought for discovery would not have by itself created a genuine issue of material fact sufficient to defeat summary judgment." *Ingle ex rel. Estate of Ingle v. Yelton*, 439 F.3d 191, 195 (4th Cir. 2006) (quoting *Strag v. Bd. of Trs.*, 55 F.3d 943, 954 (4th Cir. 1995)) (addressing predecessor to Rule 56(d)). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or

unnecessary will not be counted." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986). The court should decide if there is a sufficient basis for allowing discovery based on whether the Rule 56(d) affidavit "particularly specifies legitimate needs for further discovery." *Nguyen v. CNA Corp*., 44 F.3d 234, 242 (4th Cir. 1995).

Additionally, a court granting a Rule 56(d) motion should limit discovery to facts that are legally material to the case. *See, e.g.*, *Richard v. Leavitt*, 235 F. App'x 167, at *1 (4th Cir. 2007) (upholding denial of motion for discovery pursuant to Rule 56(d) predecessor on the basis that plaintiff "failed to identify relevant information or demonstrate that information relevant to his claim actually existed"); *see also Ray v. Am. Airlines, Inc.*, 609 F.3d 917, 923–24 (8th Cir. 2010) (affirming denial of motion for discovery pursuant to Rule 56(d) predecessor where information sought would not have raised issue of material fact); *Allno Enters., Inc. v. Balt. Cty.*, 10 F. App'x. 197, 203–04 (4th Cir. 2001) (affirming denial of plaintiff's request for formal discovery where plaintiff was able to collect the information on its own and where some of the information sought was not material to plaintiff's as applied challenge). None of the cases cited in the Order suggest a different legal standard for evaluating the Motion;[3] they simply concern facts

[3] *See McCray v. Md. Dep't of Transp.*, 741 F.3d 480, 484, 487 (4th Cir. 2014) (vacating denial of Rule 56(d) motion in a Title VII employment discrimination case where employee lacked information about employment decisions "essential to her claim"); *see also In re PHC, Inc. S'holder Litig.*, 762 F.3d 138, 145 (1st Cir. 2014) (vacating denial of Rule 56(d) motion in a merger case in which discovery was relevant and movants' "case turns so largely on their ability to secure evidence within the possession of defendants" (citation omitted)); *Greater Balt. Ctr. for Pregnancy Concerns, Inc v. Mayor & City Council of Balt.*, 721 F. 3d 264, 271, 280 (4th Cir. 2013) (en banc) (vacating denial of discovery in a

where the additional discovery sought was material to the legal claim at issue.[4]

ARGUMENT

I. The Order Grants Discovery on Issues That Are Immaterial to Plaintiffs' As-Applied Challenge to the 20-Week Ban

A. Under Binding Supreme Court Precedent, Laws That Prohibit Previabiltiy Abortion Are Unconstitutional and States May Not Dictate Viability Based on Gestational Age

The Supreme Court has held repeatedly, in a line of unbroken precedent, that a state

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first amendment challenge to city regulation governing limited-pregnancy centers where information about the operation of such centers was necessary to evaluate the regulation); *CenTra, Inc. v. Estrin*, 538 F.3d 402, 421, 423 (6th Cir. 2008) (reversing denial of Rule 56(f)—Rule 56(d) predecessor—motion in case alleging breach of contract, breach of fiduciary duties, and legal malpractice where discovery was needed to evaluate alleged use of confidential information); *Doe v. Abington Friends Sch.*, 480 F.3d 252, 258 (3d Cir. 2007) (vacating denial of Rule 56(f) motion in Americans with Disabilities Act case when discovery was necessary to develop the "mixed question of law and fact" of whether a religious exemption applied where no appellate court had fully examined such exemption); *Burlington N. Santa Fe R.R. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reservation*, 323 F.3d 767, 774 (9th Cir. 2003) (affirming denial of Rule 56(f) motion as to discovery that would be "futile" and vacating denial only as to issues that were probative of whether tribes could tax railroad for land use); *Wichita Falls Office Assocs. v. Banc One Corp, et al.*, 978 F.2d 915, 920 (5th Cir. 1992) (reversing denial of discovery on issues "germane" to suit to determine rights under building lease).

[4] The Order points out that Plaintiffs' counsel have argued in other cases that discovery may be appropriate before ruling on a summary judgment motion. Mem. Op. & Order 7–9. Those cases involved different legal claims and facts. *See Greater Balt. Ctr. for Pregnancy Concerns, Inc.*, 721 F.3d at 271 (finding summary judgment on first amendment claims was improper in a challenge to a city ordinance regulating limited-service pregnancy centers); *Willis v. Town of Marshall*, 426 F.3d 251, 261, 269 (4th Cir. 2005) (finding summary judgment on equal protection claim was improper where town banned plaintiff from attendance at future town concerts on basis of her allegedly lewd dancing but affirming summary judgment on first amendment and substantive and procedural due process claims). Plaintiffs' argument here is simply that, in this case, Defendants have not met their Rule 56(d) burden of showing that the additional evidence sought would create a genuine issue of material fact.

may not ban abortion prior to viability. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) ("Before viability, the State's interests are not strong enough to support a prohibition of abortion."); *Roe v. Wade*, 410 U.S. 113, 163–64 (1973); *accord Isaacson v. Horne*, 716 F.3d 1213, 1217, 1221 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 905 (2014) (stating the Supreme Court has been "unalterably clear regarding one basic point": "a woman has a constitutional right to choose to terminate her pregnancy before the fetus is viable"). Indeed, the Supreme Court reaffirmed that crucial legal principle less than one year ago. *See Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2299 (2016) (reaffirming that provision of law is constitutionally invalid if it bans abortion "before the fetus attains viability" (quoting *Casey*, 505 U.S. at 878)); Pls. Opp. to Defs.' Mot. 2–4; Mem. Supp. Pls.' Mot. Summ. J. 7–8 (citing numerous cases so holding). Based on this clear precedent, every federal appellate court or state high court faced with a law prohibiting abortions before viability, with or without exceptions, has ruled that it violates the Fourteenth Amendment, including laws that banned abortions after 20 weeks; the Supreme Court has affirmed or denied *certiorari* in each one of those cases it has been asked to review. *See* Pls. Opp. to Defs.' Mot. 4 n.1 (citing numerous cases so holding); Mem. Supp. Pls.' Mot. Summ. J. 7–8 (same); *see e.g. Isaacson*, 716 F. 3d at 1217.

Further, binding precedent establishes that viability is a case-by-case determination that must be made by a physician, and that a state may not dictate when viability occurs based on a single factor such as gestational age. "[I]t is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a

specific point in the gestation period. The time when viability is achieved may vary with each pregnancy." *Colautti v. Franklin*, 439 U.S. 379, 396–97 (1979) (quoting *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 64 (1976)). Further, "the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician." *Id.* (quoting *Danforth*, 428 U.S. at 64). As the Supreme Court has explicitly stated:

> Because [viability] may differ with each pregnancy, neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability—be it weeks of gestation or fetal weight or any other single factor—as the determinant of when the State has a compelling interest in the life or health of the fetus.

Id. at 388–89. "State regulation . . . must allow the attending physician 'the room he needs to make his best medical judgment.'" *Id.* at 397 (quoting *Doe v. Bolton*, 410 U.S. 179, 192 (1973)); *Isaacson*, 716 F.3d at 1223 (holding that since *Roe*, the Supreme Court and lower federal courts have repeated over and over again that "viability—not gestational age—remains the 'critical point'" (quoting *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 529 (1989) (O'Connor, J., concurring))).[5]

Citing *Colautti*, the Order states that case law has permitted states to "place some limits on the range within which doctors may exercise their judgment about viability." Mem. Op. & Order 14. This is simply incorrect. Contrary to the Order, *Colautti* supports

[5] Indeed, Defendants "admit that the moment of fetal viability varies from pregnancy to pregnancy, within limitations, depending on various factors." Answer to Compl. ¶ 27.

rather than undermines Plaintiffs' argument, holding that states may not dictate where the point of viability lies. *Colautti*, 439 U.S. at 396.

The Supreme Court's decision in *Webster v. Reproductive Health Services* does not hold otherwise. *See* 492 U.S. at 519–20. To the extent that the Order construes *Webster* as abrogating *Colautti*, that reading is incorrect. In *Webster*, the Court upheld a state law requiring that, in certain circumstances, physicians perform specified medical tests "designed to determine viability." *Id.* at 519. The Court did not read the statute as removing the final determination of viability from a physician; rather, it held that, in some circumstances, the required tests "are useful to making subsidiary findings as to viability." *Id.*at 514; *see also id.* at 529 (O'Connor, J. concurring in part and in judgment) (similarly construing the statute to apply as to subsidiary findings); *Isaacson*, 716 F.3d at 1223 (recognizing that "while *Webster* . . . upheld a law requiring doctors to test for viability from twenty weeks gestational age on, it did not alter the principle that viability—not gestational age—remains the 'critical point'" (citation omitted) (quoting *Webster*, 492 U.S. at 519–20, 529)). Under this binding precedent, the discovery granted by the Order cannot "create[] a genuine issue of material fact sufficient to defeat summary judgment." *Ingle ex rel. Estate of Ingle*, 439 F.3d at 195 (quoting *Strag*, 55 F. 3d at 943).

The Order likewise misconstrues *Isaacson* and, in doing so, mischaracterizes Plaintiffs' burden in this as-applied challenge. It is correct that the parties in *Isaacson* "d[id] not dispute that the 20–week line Arizona ha[d] drawn is three or four weeks prior to viability." Mem. Op. & Order 12 (quoting *Isaacson*, 716 F. 3d at 1233 (Kleinfeld, S.J.,

concurring)). However, the Order incorrectly interprets this factual distinction to mean that *Isaacson*'s holding is limited to instances in which "a State concedes that *all* of the abortions prohibited by a law involve non-viable fetuses." *Id.* at 12 n.6 (emphasis added); *see also id*. ("Isaacson did not determine that Supreme Court precedent mandates the invalidation of a state law if 99.99% (but not "all") of the abortions it restricts involve viable fetuses, because .01% (i.e., "some") of the restricted abortions involve non-viable fetuses."). But *Isaacson* held that "a State may not prohibit *any woman* from making the ultimate decision to terminate her pregnancy before viability" and nothing in the opinion limited that holding to the particular facts of that case. *Isaacson*, 716 F.3d at 1227 (quoting *Casey*, 505 U.S. at 879)). *Isaacson* therefore supports Plaintiffs' claim that the 20-week ban is unconstitutional as applied to previability abortion.

Because the state may not ban previability abortion and may not dictate that a single factor, including gestational age, is determinative of viability, the discovery permitted in the Order is immaterial as a matter of law in this as-applied challenge.

B. Alternatively, Any Discovery Permitted Should be Narrowed to the Only Conceivably Material Fact in This Case

Assuming, arguendo, that discovery is granted, the Court should narrow the scope of discovery to the only conceivably material fact in this case: whether Defendants can support their contention that *all* fetuses attain viability after the twentieth week. *See MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d. 768, 773 n.4 (8th Cir. 2015), *cert. denied*, 136 S. Ct. 981 (2016) (affirming order limiting discovery to the "central issue" of viability in a challenge to a ban on previability abortions at 6 weeks with exceptions).

In their Motion, Defendants initially sought to develop evidence on "when viability begins" in order to show that "fetal viability is now known to occur *before* the point identified by the plaintiffs in their experts' affidavits," e.g., 24 weeks. Defs.' Mot. 12. However, when faced with Plaintiffs' response (as set forth in the Complaint) that they seek only as-applied relief allowing them to provide *previability* abortions, rendering the ban unconstitutional under binding case law, Defendants altered their position on reply. For the first time, Defendants asserted that they intend to "attempt to obtain evidence" that "all post-twenty week abortions involve a viable fetus." Defs.' Repl. Supp. Mot. 2; *see also* Pls.' Opp. to Defs.' Mot. 5–6.

The Order appears to recognize that Defendants cannot substantiate this factual assertion concerning viability because Defendants admitted in their Answer that some fetuses are never viable. *See supra*, at 5. Nevertheless, the Order permits discovery on whether "any fetuses" are viable between 20 and 26 weeks. *See* Mem. Op. & Order 12 n.6 (characterizing Defendants' assertions that they will "attempt to obtain evidence, inter alia, that **all** post-twenty week abortions involve a viable fetus" as "hyperbole" and noting conflict with Defendants' admission that some fetuses are never viable). This decision was legal error, and the Court should overturn the Order.

For these reasons, should the Court decide to allow some discovery on viability, it should be limited to whether Defendants can substantiate their contention that *all* fetuses after the twentieth week of pregnancy are viable.

II. This Court Should Follow Supreme Court Precedent Establishing That No State Interest Is Strong Enough to Ban Abortion Before Viability

A state may not ban abortion prior to viability *regardless of the justifications it asserts*. "Before viability, the State's interests are not strong enough to support a prohibition of abortion . . . . Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate a pregnancy before viability." *Casey*, 505 U.S. at 846, 879; *see also supra*, at 9–10. The Supreme Court has specifically considered and rejected whether other state interests, including maternal health, could justify a ban on abortion prior to viability. For example, in *Roe*, the Court assumed that the risks of pregnancy increase as the pregnancy advances. 410 U.S. at 150. Nevertheless, the Court held that the State lacks interests sufficient to justify a ban on abortion prior to viability. *Id*. at 163–64; *see also Danforth*, 428 U.S. at 79 (striking down, notwithstanding State's assertion that an alternative method was safer, ban on then-dominant abortion method because it "inhibit[s] the vast majority of abortions after the first 12 weeks"). Thus, the facts Defendants seek to develop during discovery would not warrant reconsideration of the Supreme Court's clear precedent. As the Court stated in *Casey*, medical and scientific advancements occurring subsequent to *Roe* "have no bearing on the validity of *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 . . . ban." 505 U.S. at 860. For these reasons, in reviewing a nearly identical law to the one at issue here, the Ninth Circuit declined to review any evidence on fetal pain or the safety of abortion, recognizing that where a ban prevents previability abortion, the case is

"fully controlled by binding precedent." *Isaacson*, 716 F.3d at 1220, 1229 (declining to address defendants' factual assertions regarding fetal pain and the safety of abortion where a 20-week ban prevented previability abortions).

In light of this clear Supreme Court precedent, discovery on fetal pain and the safety of abortion after twenty weeks cannot create an issue of *material* fact regarding whether the 20-week ban is constitutional as applied to previability abortions. *See Strag*, 55 F.3d at 953−54. Thus, the discovery permitted in the Order simply cannot alter the outcome in this case. The Order itself acknowledges that Defendants' pursuit of discovery on these issues "appears to hold a lesser likelihood of ultimately affecting the disposition of Plaintiffs' summary judgment motion than discovery into viability-related matters." Mem. Op. & Order 17. Despite this recognition, the Order grants this discovery on these immaterial issues.

However, the Supreme Court has been clear that lower courts must apply the law as it exists and leave to the Supreme Court itself the decision whether it is willing to re-examine its own precedent. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) (citing *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989)); *U.S. v. Danielczyk*, 683 F.3d 611, 615, 619 (4th Cir. 2012) (recognizing that "lower courts should not conclude that the Supreme Court's 'more recent cases have, by implication, overruled [its] earlier precedent'"). Because there is binding precedent on point, the discovery sought

by Defendants is not material.[6]

Finally, to the extent that the Order relies on *Gonzales v. Carhart*, 550 U.S. 124 (2007), that case is inapposite. *Gonzales* did not address a total ban on abortion several weeks prior to viability, but instead examined a ban on an uncommon *method* of abortion that left the most commonly used method of abortion in the second trimester available. *Id.* at 134. *Gonzales* does not support Defendants' request for discovery; rather, it reaffirmed that a state may not ban abortion prior to viability. *See id.* at 146 (assuming that "[b]efore viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy'" (quoting *Casey*, 505 U.S. at 879 (plurality opinion))).[7]

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[6] The Order cites *Edwards v. Beck*, 786 F.3d 1113 (8th Cir. 2015), *cert. denied*, 136 S. Ct. 895 (2016), for the proposition that it is appropriate to grant Defendants' Rule 56(d) motion. *See* Mem. Op. & Order 17. However, the Order ignores that whatever views the Eighth Circuit expressed in *dicta* in *Edwards*, it applied binding precedent to strike down a ban on abortion at 12 weeks. *Edwards*, 786 F.3d at 1119.

[7] The Order relies on the "potential mutability" of the law, stating "unfavorable precedent does not necessarily mean that [Defendants] ha[ve] no reasonable grounds for [litigating an issue]." Mem. Op. & Order 18. However, the Order does not cite to any case law addressing the propriety of discovery where there is "potential mutability"; rather, it relies on out of circuit precedent addressing whether claims are frivolous under Fed. R. Civ. P. 11. *See Baker v. Windsor Republic Doors*, No. 1:06-CV-01137, 2009 WL 2461383, at *6 (W.D. Tenn. Aug. 10, 2009), *aff'd*, 414 F. App'x 764 (6th Cir. 2011) (holding a claim "may not be frivolous [per Rule 11] when a reasonable and good faith argument can be made for a change in the existing law"). Further, in contrast to the unbroken line of binding precedent governing the issues here, the Rule 11 cases cited in the Order involve legal issues on which there is a circuit split, an issue of first impression, and previous sharp changes in law. *See Christiansburg Garment Co. v. Equal Employ't Opportunity Comm'n*, 434 U.S. 412, 423 (1978) (holding suit was not "unreasonable or meritless" because the decision turned on an issue of first impression); *Babyage.com, Inc. v. Ctr. for Envtl. Health*, 90 F. Supp. 3d 348, 357–58 (M.D. Pa. 2015) (holding commerce clause claim was not so "patently unmeritorious or frivolous" as to warrant sanctions beyond dismissal for lack of jurisdiction where "jurisprudence has undergone sharp changes"); *Baker*, 2009 WL

III. The Order Grants Discovery That Does Not Test Standing in Any Legally Material Way

Defendants claim they need discovery to test whether Plaintiffs have standing for three reasons: 1) Plaintiffs, purportedly, bring a facial challenge; 2) no post-20 week procedures were reported in 2016; and 3) the information sought by discovery is solely in Plaintiffs' possession. Defs.' Mot. 10–11. But none of these reasons hold up. First, as discussed above, Plaintiffs have not brought a facial challenge; they have brought an *as applied* challenge to the 20-week ban. Compl. for Injunctive & Declaratory Relief ¶ 2. Second, that no post-20 week procedures were done in 2016 is not surprising given that the ban went into effect on January 1, 2016. *Id.* at ¶ 20. Plaintiffs are challenging the ban precisely because it prohibits them from providing these procedures. Finally, the only legally material information Defendants seek on standing is already in their possession. Because of North Carolina's abortion reporting laws, Defendants have access to reporting forms submitted to Defendant Department of Health and Human Services that include information on abortions provided by Plaintiffs from 2014–2016. *See* Pls.' Opp. to Defs.' Mot. 9–10; Ex. 1 to Pls. Opp. to Defs.' Mot., ECF No. 27-1.

The other discovery Defendants seek on standing is nothing more than a fishing expedition. For example, Defendants seek information on the number of women who requested abortion services from Plaintiffs and the reasons given by women for each

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2461383, at *6 (holding claim was not frivolous where there was a "significant circuit split"). These cases apply a separate legal standard and are not applicable when unbroken Supreme Court precedent governs the underlying legal issues. *See supra*, at 9–10.

abortion requested. Defs.' Mot. 11. These requests do not test Plaintiffs' standing; rather, they seek only to expose sensitive information about the medical decisions of women who have sought access to or exercised the constitutionally protected right to abortion and impose an unnecessary burden on Plaintiffs and the institutions at which they provide medical services. For these reasons, the Court should decline to grant Defendants discovery on standing.

CONCLUSION

Bans on abortion prior to viability are clearly unconstitutional under forty years of Supreme Court precedent. In contravention of this precedent, the Order improperly granted discovery on immaterial issues. For the above reasons, Plaintiffs request this Court reverse the Order.

RESPECTFULLY SUBMITTED this 21st day of April, 2017.

/s/ Genevieve Scott

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of April, 2017, I electronically filed the foregoing Plaintiffs' Objection to Memorandum Opinion and Order with the clerk of the court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record who have appeared in the case.

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