No. 12-16670

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL A. ISAACSON, M.D.; WILLIAM CLEWELL, M.D; HUGH MILLER, M.D.,

Plaintiffs-Appellants,

v.

TOM HORNE, Attorney General of Arizona, in his official capacity; WILLIAM (BILL) MONTGOMERY, County Attorney for Maricopa County, in his official capacity; BARBARA LAWALL, County Attorney for Pima County, in her official capacity; ARIZONA MEDICAL BOARD; LISA WYNN, Executive Director of the Arizona Medical Board, in her official capacity,

Defendants-Appellees.

On appeal from the United States District Court for the District of Arizona

No. 2:12-cv-01501-JAT-PHX

RESPONSE OF ARIZONA STATE DEFENDANTS-APPELLEES TO PLAINTIFFS-APPELLANTS' MOTION FOR STAY PENDING APPEAL AND JOINDER IN THE RESPONSE OF DEFENDANT-APPELLEE WILLIAM MONTGOMERY

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INTRODUCTORY STATEMENT

On behalf of Defendants-Appellees Tom Horne, Arizona Attorney General, and Lisa Wynn, Executive Director of the Arizona Medical Board, in their official capacities, and the Arizona Medical Board, undersigned counsel join in the Response filed on behalf of Defendant William (Bill) Montgomery, Maricopa County Attorney. Although these Defendants-Appellees agree with the positions taken by Mr. Montgomery, they want this Court to be aware of their positions on several of the issues now before the Court and therefore filed this Response to Plaintiffs-Appellants' Emergency Motion.

ARGUMENT

I. Plaintiffs Have Not Met Their Burden for Stay Pending Appeal.

Plaintiffs are to be granted a stay pending appeal only if they have "made a ***strong*** showing that [they are] likely to succeed on the merits." *Humane Soc'y of U.S. v. Gutierrez*, 527 F.3d 788, 789 (9th Cir. 2008) (emphasis added). Under this standard, Plaintiffs are not entitled to a stay. Plaintiffs say that they have made "an irrefutable showing that they are likely to succeed on the merits of their claim," Emergency Motion at 2, but this is simply not the case. To the contrary, the district court concluded not only that Plaintiffs did not establish a high likelihood of success, but further ruled that "Plaintiffs ***cannot*** succeed on the merits of their

claim that H.B. 2036 is unconstitutional." Order, *Isaacson v. Horne*, No. CV-12-01501-PHX-JAT (July 30, 2012) ("Order") at 14 (emphasis added).

Plaintiffs appear to argue that this standard should be relaxed because they "seek to preserve the status quo," Emergency Motion at 7, but this is directly contrary to Ninth Circuit precedent. *See Golden Gate Restaurant Ass'n v. City and County of San Francisco*, 512 F.3d 1112, 1116 (9th Cir. 2008) ("Maintaining the status quo is not a talisman."). Preservation of the status quo is not among the factors regulating the issuance of a stay. *Id*. (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). Consequently, Plaintiffs' motion should be denied.

II. The District Court Correctly Concluded that H.B. 2036 Is a Regulation.

The district court ruled that H.B. 2036 is not a ban on abortion prior to viability, but a regulation. Plaintiffs conclude that this is error. Emergency Motion at 11. Plaintiffs are legally wrong. Plaintiffs suggest that by tagging a measure as a "ban" the State is entirely forbidden from regulation. But this is argument by assertion and contrary to the Supreme Court's holding in *Gonzales v. Carhart*, 550 U.S. 124 (2007). There, the Supreme Court, considering a facial challenge, concluded that a measure that prohibited certain procedures remained a regulation reviewable under the Court's substantial obstacle analysis. *Id.* at 156 ("The question is whether the Act, measured by its text in this facial attack, imposes a substantial obstacle to . . . previability . . . abortions."). Thus, the

Gonzales Court held that an "Act is not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman's health, given the availability of other abortion procedures that are considered safe alternatives." Here, the district court correctly found that the Arizona law, on its face, provides numerous avenues for those who seek abortions. Arizona statute defines "abortion" such that it does not include any means to "save the life or preserve the health of the unborn child, to preserve the life or health of the child after a live birth, to terminate an ectopic pregnancy or remove a dead fetus." H.B. 2036 § 3 (to be codified as A.R.S. § 36-2151(1)). Furthermore, H.B. 2036 provides for a medical emergency exception that permits abortion to avert a pregnant woman's death or serious risk of substantial and irreversible impairment of a major bodily function. *Id*. (to be codified at A.R.S. § 36-2151(6)). Finally, the legislation "allows for abortions up to and including 20 weeks gestational age." Order at 9.

Plaintiffs' arguments to the contrary are unavailing. First, Plaintiffs suggest that because certain procedures (such as termination of an ectopic pregnancy) are not defined as "abortions," such procedures cannot be included in determining whether this is a regulation. This is mere wordplay, because functionally such procedures can continue. Second, Plaintiffs argue that the district court should not have considered the vast avenues still available for abortions prior to twenty

weeks. But Plaintiffs have simply misread *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). There, in concluding that a law requiring spousal notification was unconstitutional, the Court carefully explained that it focused on a particular subset of the population of women for whom the requirement was a significant obstacle because of threats to their safety. 505 U.S. at 893-94. Here, in contrast, Plaintiffs have not identified any subset of pregnant women who face a particular burden. The statute on its face provides for abortions before and after twenty weeks and is thus a regulation. It is only by reading out the language that the Legislature included that the Plaintiffs "ban" argument can be sustained.

III. The Court Should Defer to the Findings of the Legislature Which Were Confirmed by the District Court.

The State may "use its voice and its regulatory authority to show its profound respect for the life within the woman." *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007). Further, it is beyond dispute that regulatory considerations "are within the legislative competence when the regulation is rational and in pursuit of legitimate ends." *Id.* at 166; *see also Stenberg v. Carhart*, 530 U.S. 914, 968 (2000) (Kennedy, J., dissenting) ("The legislatures of the several States have superior factfinding capabilities [while] the Court is not suited to be the Nation's ex officio medical board with powers to approve or disapprove medical and operative practices and standards throughout the United States.") (internal quotation marks and citation omitted).

Yet Plaintiffs argue that the "state's asserted interests" are invalid under *Casey*. *See* Emergency Motion at 15. In this case, the district court found that the Legislature made numerous findings "in promulgating section 7 of H.B. 2036 and the purposes for the legislation." Order at 10. Furthermore, the court made numerous findings respecting the fact that unborn children can feel pain, including that, by 20 weeks, "sensory receptors develop all over the child's body and the children have a full complement of pain receptors." *Id.* at 14. Given the nature of abortion procedures and the findings respecting the unborn child's ability to feel pain, the court concluded that "the State has shown a legitimate interest in limiting abortions past 20 weeks gestational age." Furthermore, the Court found that the Legislature had an express concern for the health of women, who face the highest instance of complications after twenty weeks of gestation, and concluded this was an additional interest. *Id.*

Plaintiffs do not dispute these findings, but claim that they are irrelevant. But the Supreme Court has recognized that deference to the factual findings of the Legislature is appropriate because to hold otherwise would grant a veto to any professional who disagrees with the regulation in issue. *Gonzales*, 550 U.S. at 165 ("Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts."). Contrary to Plaintiffs' claims that the factual determinations are irrelevant, "[t]his traditional rule is

consistent with *Casey*, which confirms the State's interest in promoting respect for human life at all stages in the pregnancy." *Id*. at 163. Thus, at its core, Plaintiffs' argument turns on a misinterpretation of *Casey*, which "struck a balance. . . central to its holding" that "the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn" through regulations. *Id.* at 146 (second quotation from *Casey*, 505 U.S. at 877). Because the district court recognized the Legislature's valid concerns and findings in reviewing H.B. 2306, Plaintiffs are not entitled to a stay pending appeal.

CONCLUSION

For the foregoing reasons, Plaintiffs' Emergency Motion should be denied.

Respectfully submitted this 1st day of August, 2012.

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CERTIFICATE OF SERVICE

I certify that on August 1, 2012, I electronically filed the foregoing with the Clerk of the Court for the United Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system:

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