Appeal No. 12-16670

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL A. ISAACSON, M.D., *et al*.,
Plaintiffs-Appellants,

v.

TOM HORNE, *et al*.,
Defendants-Appellees.

On Appeal From The United States District Court
For The District Of Arizona
Civil Action No. 2:12-cv-01501-JAT-PHX
The Honorable James A. Teilborg, Judge

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CORPORATE DISCLOSURE STATEMENT

The Plaintiffs-Appellants in this matter are individual physicians, and therefore no corporate disclosure statement is necessary.

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JURISDICTIONAL STATEMENT

I. District Court Jurisdiction. The District Court possessed jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3).

II. Court of Appeals Jurisdiction. This Court possesses jurisdiction under 28 U.S.C. § 1292(a)(1). This appeal is timely under Fed. R. App. P. 4(a)(1)(A). The District Court entered its Order and grant of final judgment in favor of Defendants (here, "Appellees" or the "State") and against Plaintiffs (here, "Appellants" or the "Physicians") on July 30, 2012. The Physicians filed a notice of appeal the same day. (ER 017-018.)

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the District Court erred in holding that Arizona's ban on abortion beginning at 20 weeks of pregnancy, as applied to pre-viability abortions, does not violate the Fourteenth Amendment of the United States Constitution.

PERTINENT STATUTES AND CONSTITUTIONAL PROVISIONS

Ariz. Rev. Stat. § 36-2151(4)

"Gestational age" means the age of the unborn child as calculated from the first day of the last menstrual period of the pregnant woman.

Ariz. Rev. Stat. § 36-2159

§ 36-2159. Abortion; gestational age; violation; classification; statute of limitations

A. Except in a medical emergency, a person shall not perform, induce or attempt to perform or induce an abortion unless the physician or the referring physician has first made a determination of the probable gestational

age of the unborn child. In making that determination, the physician or referring physician shall make any inquiries of the pregnant woman and perform or cause to be performed all medical examinations, imaging studies and tests as a reasonably prudent physician in the community, knowledgeable about the medical facts and conditions of both the woman and the unborn child involved, would consider necessary to perform and consider in making an accurate diagnosis with respect to gestational age.

B. Except in a medical emergency, a person shall not knowingly perform, induce or attempt to perform or induce an abortion on a pregnant woman if the probable gestational age of her unborn child has been determined to be at least twenty weeks.

C. A person who knowingly violates this section commits a class 1 misdemeanor.

D. A physician who knowingly violates this section commits an act of unprofessional conduct and is subject to license suspension or revocation pursuant to title 32, chapter 13 or 17.

E. In addition to other remedies available under the common or statutory law of this state, any of the following individuals may file a civil action to obtain appropriate relief for a violation of this section:

1. A woman on whom an abortion has been performed in violation of this section.

2. The father of the unborn child if the father is married to the mother at the time she received the abortion, unless the pregnancy resulted from the father's criminal conduct.

3. The maternal grandparents of the unborn child if the mother was not at least eighteen years of age at the time of the abortion, unless the pregnancy resulted from either of the maternal grandparent's criminal conduct.

F. A civil action filed pursuant to subsection E of this section shall be brought in the superior court in the county in which the woman on whom the abortion was performed resides. Relief pursuant to this subsection includes the following:

1. Money damages for all psychological, emotional and physical injuries resulting from the violation of this section.

2. Statutory damages in an amount equal to five thousand dollars or three times the cost of the abortion, whichever is greater.

3. Reasonable attorney fees and costs.

G. A civil action brought pursuant to this section must be initiated within six years after the violation occurred.

H. A woman on whom an abortion is performed or induced in violation of this section may not be prosecuted under this section or for conspiracy to commit a violation of this section.

Relevant Provisions of Ariz. Rev. Stat. § 36-2301.01

A. A physician shall not knowingly perform an abortion of a viable fetus unless:

1. The physician states in writing before the abortion is performed that the abortion is necessary to preserve the life or health of the woman, specifying the medical indications for and the probable health consequences of the abortion. The physician shall attach a copy of this statement to any fetal death report filed pursuant to § 11-593 or fetal death registration filed pursuant to § 36-329, subsection C.

. . . .

B. This section does not apply if there is a medical emergency.

C. As used in this section and § 36-2301.02:

1. "Abortion" means the use of an instrument, medicine or drug or other substance or device with the intent to terminate a pregnancy for reasons other than to increase the probability of a live birth, to preserve the life or health of the child after live birth, to terminate an ectopic pregnancy or to remove a dead fetus. Abortion does not include birth control devices or oral contraceptives.

2. "Medical emergency" means a condition that, on the basis of the physician's good faith clinical judgment, so complicates a pregnancy as to necessitate the immediate abortion of the pregnancy to avoid the

woman's death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.

3. "Viable fetus" means the unborn offspring of human beings that has reached a stage of fetal development so that, in the judgment of the attending physician on the particular facts of the case, there is a reasonable probability of the fetus' sustained survival outside the uterus, with or without artificial support.

United States Constitution, Fourteenth Amendment, Section 1

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.

STATEMENT OF THE CASE

In April of 2012, the State of Arizona enacted House Bill 2036 (the "Act"). One provision of the Act prohibits abortions after 20 weeks of pregnancy. The only exception to this ban is for narrowly defined "medical emergencies." The Act subjects physicians to criminal, regulatory, and civil penalties. (ER 084.) The Act's effective date was August 2, 2012.

The Act's ban on abortion at and after 20 weeks of pregnancy includes abortions where the fetus is not viable. This is an appeal from a decision that, ignoring clear Supreme Court precedent, upheld the Act as applied to pre-viability abortions.

The Physicians, three board-certified obstetrician-gynecologists practicing in Arizona, filed this case on behalf of themselves and their patients, in the District

Court of Arizona on July 12, 2012. (ER 055-093.) The Physicians assert the single claim that the Act violates the Fourteenth Amendment rights of women seeking to terminate pre-viable pregnancies at or after 20 weeks.[1] The Physicians sought declaratory and injunctive relief and, the same day, filed a motion for a preliminary injunction against enforcement of the ban as applied to pre-viability procedures. Pursuant to an order of the District Court, (Teilborg, J.), Defendants filed responsive pleadings, and the matter was set for oral argument on July 25, 2012. While the other Defendants opposed preliminary injunctive relief, Defendant Barbara Lawall, the Pima County Attorney, supported it. (ECF No. 23, Pima County Attorney's Response to Plaintiffs' Motion for Preliminary Injunction (July 19, 2012).) Prior to the hearing, Defendant William Montgomery, the Maricopa County Attorney, filed a motion to dismiss, which was argued along with the motion for preliminary injunction.

On July 30, 2012, the District Court denied the motion for preliminary injunction and the motion to dismiss. (ER 002-016.) Consolidating the preliminary injunction hearing with a trial on the merits *sua sponte*, the District Court also denied the Physicians' request for declaratory and permanent injunctive

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[1] The Act bans abortions starting at 20 weeks, without distinguishing between pre-viability and post-viability procedures. The Physicians challenge the Act only as applied to pre-viability abortions; they assert no claims against the Act as applied to abortions after viability, which none of the Physicians performs. (ER 057-058 ¶¶ 7-9.)

relief. (ER 015-016.) A final judgment in favor of the State and dismissing the action was entered that same day. (ER 001.)

On July 30, 2012, the Physicians filed a notice of appeal with the District Court and an emergency motion for an injunction pending appeal with this Court. (ER 017-018.) On August 1, 2012, this Court granted the Physicians' emergency motion and ordered expedited briefing.

STATEMENT OF FACTS

I. THE CHALLENGED STATUTE.

Under the Act,

> A. Except in a medical emergency, a person shall not perform, induce or attempt to perform or induce an abortion unless the physician or the referring physician has first made a determination of the probable gestational age of the unborn child . . . .
>
> B. Except in a medical emergency, a person shall not knowingly perform, induce or attempt to perform or induce an abortion on a pregnant woman if the probable gestational age of her unborn child has been determined to be at least twenty weeks.

(ER 084.) "Gestational age" is defined as "the age of the unborn child as calculated from the first day of the last menstrual period of the pregnant woman." Ariz. Rev. Stat. § 36-2151(4).

Under the Act, a woman may obtain an abortion at or after 20 weeks only if she is experiencing a "medical emergency," defined as:

> a condition that, on the basis of the physician's good faith clinical judgment, so complicates the medical condition of a pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible impairment of a major bodily function.

Ariz. Rev. Stat. § 36-2151(6).

Violation of the Act is a Class 1 misdemeanor, punishable by up to six months imprisonment. Ariz. Rev. Stat. § 36-2159(C); Ariz. Rev. Stat. § 13-707(A)(1). A violation also constitutes unprofessional conduct, which is grounds for suspension or revocation of a physician's medical license. Ariz. Rev. Stat. § 36-2159(D).

Longstanding Arizona law permits abortion until viability, and prohibits it thereafter unless necessary to preserve a woman's life or health. *See* Ariz. Rev. Stat. § 36-2301.01(A)(1) (prohibiting "knowingly perform[ing] an abortion of a viable fetus unless . . . the abortion is necessary to preserve the life or health of the woman").[2]

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[2] "'Viable fetus' means the unborn offspring of human beings that has reached a stage of fetal development so that, in the judgment of the attending physician on the particular facts of the case, there is a reasonable probability of the fetus' sustained survival outside the uterus, with or without artificial support." Ariz. Rev. Stat. § 36-2301.01(C)(3).

The undisputed record establishes that the ban reaches pregnancy terminations prior to viability and that viability for a healthy fetus occurs at approximately 23 to 24 weeks at the earliest. (ER 052 ¶ 15; ER 027 ¶ 10;[3] ER 031 ¶ 17 ("viability has . . . been pushed back . . . to 23 and 24 weeks").) (*Cf.* ER 011 ("viability differs from woman to woman and 23 to 24 weeks gestational age is, on average, the attainment of viability").) There is therefore no dispute that the Act prohibits, *inter alia,* abortions in instances in which the fetus is not viable. No other fact is relevant to the merits of the Physicians' single claim. The remaining facts appearing below merely illustrate the ban's impact.

II. THE PHYSICIANS, THEIR PATIENTS, AND THE EFFECT OF THE BAN.

The Physicians are deeply committed to providing their patients with the reproductive health care they need, including pre-viability pregnancy terminations at or after 20 weeks. Dr. Isaacson provides a wide range of reproductive health care services at Family Planning Associates, a private medical practice in Phoenix. (ER 050 ¶¶ 6, 7.) Drs. Clewell and Miller are perinatologists – also called maternal-fetal medicine specialists. In Phoenix and Tucson, respectively, they provide a wide range of largely hospital-based prenatal care, high-risk pregnancy

[3] The relevant text of these declarations is contained in the Excerpts of Record. (ER 019-054.) The curriculum vitae accompanying these declarations are found at ECF No. 2, Plaintiffs' Motion for Preliminary Injunction and Expedited Consideration, or in the Alternative, for a Temporary Restraining Order, Exhibit 1, Exhibit A and Exhibit 2, Exhibit A.

management care, and labor and delivery services for women seeking to carry high-risk pregnancies to term. (ER 036 ¶ 1; ER 025 ¶¶ 1, 2; ER 057 ¶ 9.)

The Physicians terminate pregnancies at and after 20 weeks only when the fetus is not viable – either because it has not yet become viable or because it has a lethal condition such that it will never become viable. (ER 050 ¶ 7; ER 039-040 ¶¶ 10, 12.) Their patients who terminate at this point in pregnancy do so for a number of reasons, but most do so because continuation of the pregnancy poses a threat to their health, because they are experiencing pregnancy failure, or because the fetus has been diagnosed with a serious or lethal medical condition. (ER 051-052 ¶¶ 11-13; ER 037-039 ¶¶ 6-9.)

For some women, continuation of the pregnancy exacerbates a pre-existing medical condition, or the pregnancy itself generates medical risk. (ER 052 ¶ 13; ER 041-042 ¶ 16.) To give just a few examples, the Physicians have ended pre-viability pregnancies at or after 20 weeks for women with pulmonary hypertension and severe cardiac disease, whose cardiovascular status worsened as the pregnancy progressed, and who terminated to avoid risking irreversible heart damage; for women with breast cancer who needed immediate cancer treatment that posed serious risks to the fetus; for women with or at risk of developing serious infections related to the pregnancy; and for women experiencing pregnancy loss such as advanced cervical dilation and placental abruption (where the placenta

detaches from the wall of the uterus) with serious bleeding. (ER 052 ¶ 14; ER 041-042 ¶¶ 16, 17.) Many of these patients struggled desperately to carry their pregnancies at least until the fetus became viable, only to see their conditions worsen such that they ultimately decided that the diminishing prospects for a live birth no longer justified the escalating risks to their own health. (ER 052 ¶ 14; ER 041-042 ¶¶ 16, 17; ER 025-026 ¶¶ 3, 4.) Many of the conditions that may threaten a pregnant woman's health would not constitute medical emergencies under the Act. (*See* ER 043-046 ¶¶ 20-26; ER 025-026 ¶¶ 4, 5; ER 053 ¶ 20.) *See also* n.6, *infra*.

Particularly for these patients, pre-viability abortion after 20 weeks is safer than carrying to term and giving birth. (ER 039-040 ¶ 11; ER 022 ¶ 7.) For the Physicians' many patients with underlying medical conditions or pregnancy complications "who face greatly elevated risks from pregnancy[,] . . . it is irrefutable that termination is safer, including after 20 weeks." (ER 026 ¶ 6.)[4]

Other of the Physicians' patients seek abortions at or after 20 weeks because the fetus has been diagnosed with a serious problem. (ER 053 ¶ 21; ER 040-041 ¶¶ 14, 15.) Some of these fetal conditions – particularly those that are structural as

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[4] As the District Court noted, the Arizona legislature found that the risk of abortion increases as pregnancy advances, (*see* ER 004), but the legislature made no finding, and there is no evidence in the record, that this risk ever becomes greater than the risk of carrying to term and giving birth.

opposed to chromosomal – cannot be detected until a woman undergoes a detailed obstetrical ultrasound, including a detailed anatomical examination. (ER 051-052 ¶ 12; ER 040 ¶ 13; ER 027 ¶ 9.) These examinations are typically performed after 18 weeks, when the fetus has developed to the point where such structural anomalies can be seen, but they may have to be performed later. This happens when, for example, the patient is obese, which makes the ultrasound too hard to read at 18 weeks, or the patient needed to be referred to a specialist for testing and, then, for formulation of a definitive diagnosis. (ER 051-052 ¶ 12; ER 040 ¶ 13; ER 027 ¶¶ 9, 10.)

The severe fetal anomalies that have led the Physicians' patients to seek abortion care at or after 20 weeks include anencephaly, a significant malformation or absence of the brain, which results in death before or soon after birth; renal agenesis, the absence of kidneys, which leads to death before or shortly after birth; severe structural anomalies such as limb-body wall complex, in which the organs are often outside the body cavity; severe heart defects; and neural tube defects such as encephalocele (the protrusion of brain tissue through an opening in the skull), and severe hydrocephaly (severe accumulation of excessive fluid that almost completely destroys the brain). (ER 040-041 ¶¶ 14, 15.)

The Act would gravely harm such patients. A woman who receives a diagnosis of fetal anomaly near 20 weeks will be rushed to make a decision

without time to gather information and fully consult with her family, her pastor, and others she trusts. (ER 045-046 ¶ 25; ER 027-028 ¶¶ 9-11.) As Dr. Clewell explained:

> It is inappropriate to rush a patient in making this decision. Usually the diagnosis has come like a "bolt from the blue," in that the family had no suspicion of the problem prior to the ultrasound or other test. The woman and her family are in a moment of crisis and grief, and deserve the time they need to make their decision.

(ER 045-046 ¶ 25.)[5]

The ban would also force some women to carry to term against their will after learning, at or after 20 weeks, that their fetuses had lethal anomalies. Some women who receive this devastating diagnosis decide to remain pregnant, but for others, "the prospect of remaining pregnant is agonizing. It means being asked, for months, 'When are you due?' and 'Are you having a girl or a boy?' and a myriad of other, normally supportive questions, which in their terrible situation serve as constant reminders of the fact that their baby will not survive." (ER 026-027 ¶ 8.)

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[5] In determining that it would be "extremely rare to find a condition that could be diagnosed after" but not before 20 weeks, (ER 011-012), the District Court relied entirely on a declaration that mentioned tests that may indeed be performed before 20 weeks, but that omitted any mention of the detailed obstetrical ultrasounds necessary to detect and definitively diagnose many structural anomalies. (*See id.* (citing Declaration of Allan T. Sawyer, M.D. ¶ 12).) As Dr. Clewell explained, "As the Director of Obstetrical Ultrasound at one of Arizona's premiere teaching hospitals, with a Level III Perinatal Center, I can say with certainty that not all fetal anomalies can be diagnosed before 20 weeks." (ER 027 ¶ 9.)

In the cases of all such patients described above, the Act presents physicians with an untenable choice: to face criminal prosecution for continuing to provide medical care in accordance with their best medical judgment, or to stop providing the critical care their patients seek.

STANDARD OF REVIEW

The Physicians appeal from the District Court's Order denying declaratory and permanent injunctive relief on their claim that the Act violates the Fourteenth Amendment by prohibiting abortions prior to viability. (ER 015-016.) The sole issue on appeal is the constitutionality of the Act as applied to pre-viability abortions. This Court "review[s] a statute's constitutionality de novo." *United States v. Henry*, __ F.3d __, No. 11-30181, 2012 WL 3217255, at *4 (9th Cir. Aug. 9, 2012). *See also Wright v. Incline Village General Improvement Dist.*, 665 F.3d 1128, 1133 (9th Cir. 2011) ("We review a district court's legal determinations, including constitutional rulings, *de novo.* A district court's determinations on mixed questions of law and fact that implicate constitutional rights are also reviewed *de novo.*" (quoting *Berger v. City of Seattle*, 569 F.3d 1029, 1035 (9th Cir. 2009)) (en banc) (further citation omitted).

SUMMARY OF ARGUMENT

The Act violates clear United States Supreme Court precedent that prohibits the State from banning abortions at any point at which the fetus is not viable. This

constitutional limit applies regardless of what exceptions the ban may provide, and regardless of what interests the State may assert to justify it. The right to terminate pregnancy prior to viability is a core principle of the constitutional protection afforded to women under the Fourteenth Amendment. The Act plainly violates this core right, and is *per se* unconstitutional.

The District Court erred in rejecting the Physicians' claim that the ban is unconstitutional as applied to pre-viability procedures. The fundamental flaw in the District Court's reasoning is its conclusion that *Gonzales v. Carhart* permits the State to prohibit abortions at a point prior to viability. To the contrary, nothing in *Gonzales* undermines or even calls into question the ongoing validity of this straightforward rule of law: at no point before fetal viability may the State wrest from the woman the ultimate decision of whether or not to continue her pregnancy.

The District Court improperly analyzed the Act, which is an abortion *ban*, as a mere abortion *regulation*, subject to review under the undue burden test. The court then compounded its error in applying that test by concluding – implausibly – that the absolute obstacle inherent in the ban did not pose a substantial obstacle for women seeking abortion care.

This Court should reverse the Order and judgment of the District Court and direct it to enter a judgment declaring the Act to be unconstitutional as applied to pre-viability abortions, and a permanent injunction prohibiting Defendants-

Appellees, their employees, agents, and successors from enforcing the Act as applied to such medical care.

ARGUMENT

I. UNDER SUPREME COURT PRECEDENT, ARIZONA CANNOT PROHIBIT ABORTION AT ANY POINT PRIOR TO VIABILITY.

Under controlling United States Supreme Court precedent, the State of Arizona cannot prohibit abortions at any point prior to viability. The Court first announced this straightforward rule in *Roe v. Wade*, 410 U.S. 113 (1973), and subsequently reaffirmed it without alteration in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 869-70 (1992). There, the Court stated that "[t]he 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." *Casey*, 505 U.S. at 871.

The Supreme Court's decisions rest on the fundamental right of every woman to determine the course of her pregnancy before viability, "because . . . [her] liberty . . . is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear." *Id.* at 852. Recognizing "the urgent claims of the woman to retain the ultimate control over her destiny and her body, claims implicit in the meaning of liberty," the Court "conclude[d] *the line*

should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy." *Id*. at 869-70 (emphasis added).

A ban on abortion at any point prior to viability is therefore *per se* unconstitutional, no matter what exceptions it provides or what interests the State asserts to support it: "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 her pregnancy before viability." *Id.* at 846, 879. *See also Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 921 (9th Cir. 2004) ("Adult women have a Fourteenth Amendment right to terminate a pre-viability pregnancy.").

The law could not be clearer: a ban on abortion at any point before viability cannot stand, even if it allows abortions at some earlier point in pregnancy, and even if it allows for some exceptions. Indeed, since *Roe*, every Circuit court, including this one, to rule on a ban on abortion – at any point prior to viability – has invalidated that ban. *See Jane L. v. Bangerter*, 102 F.3d 1112, 1114-18 & 1114 n.3 (10th Cir. 1996) (striking down a ban on abortions at 22 weeks, with exceptions "to save the pregnant woman's life, to prevent grave damage to the pregnant woman's health, or to prevent the birth of a child with grave defects," as an unconstitutional previability abortion ban) (citations omitted); *Sojourner T. v.*

Edwards, 974 F.2d 27, 29 (5th Cir. 1992) (overturning a ban on abortions except "to save the life of the mother; [or where the] pregnancy is the result of rape [or] incest"); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1368 n.1 & 1372 (9th Cir. 1992) (invalidating a ban on abortions except to treat ectopic pregnancy or where "there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair the health of the mother"). The Act must likewise fall under this straightforward rule of law.

II. THE DISTRICT COURT ERRED IN RELYING ON *GONZALES V. CARHART* TO UPHOLD THE ACT'S BAN ON ABORTIONS PRIOR TO VIABILITY.

The District Court erred by failing to apply the controlling precedent outlined above. Instead, it reasoned that the Act could be upheld because it allows abortions prior to 20 weeks and "does not purport to ban all abortions past 20 weeks" by virtue of its narrow exception for imminent medical emergencies. (ER 010.)[6]

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[6] The District Court's assertion that the exception could be broadly construed is irrelevant. (ER 009.) The Act is unconstitutional regardless of what exceptions it contains, *Casey*, 505 U.S. at 879, and exceptions do not turn a pre-viability ban into a permissible regulation. Moreover, even accepting the District Court's interpretation, which the Physicians do not concede is correct, many serious health conditions would still not come within the exception. (*See* ER 041-046 ¶¶ 16, 17, 20-26; ER 025-026 ¶¶ 4, 5; ER 053 ¶ 20.)

This conclusion is wholly inconsistent with the fundamental principles underlying *Roe* and *Casey*, which afford substantive due process protection to *each* woman deciding whether or not to continue her pregnancy at *each* point up to viability. The demands of the Constitution are not met if, as the District Court suggests, most women are still able to obtain abortions because most do so prior to 20 weeks, or because the ban provides an exception for certain medical emergencies. The court cannot evade the plain meaning of the law by attempting to recharacterize the ban as a "regulation" or "limit," and cannot make valid that which the Constitution plainly prohibits.

A. *Gonzales* Does Not Permit the State to Ban Abortions Prior to Viability.

The crux of the District Court's error was its reading of *Gonzales v. Carhart*, 550 U.S. 124 (2007), as allowing abortion "regulations" that in fact prohibit abortions prior to viability, so long as they are supported by sufficient state interest and — somehow — do not impose an undue burden. (ER 009-010.)

To the contrary, far from allowing the State to prohibit abortions prior to viability, *Gonzales* supports the Physicians' position that the ban is unconstitutional. The *Gonzales* Court "assume[d] the . . . principle [that b]efore viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy.'" 550 U.S. at 146 (quoting *Casey*, 505 U.S. at 879); *see also id.* at 145 (setting forth the essential components of *Roe*, reaffirmed in *Casey*, including "the

right of the woman to choose to have an abortion before viability" (quoting *Casey*, 505 U.S. at 846)). *See also Stenberg v. Carhart*, 530 U.S. 914, 920-21 (2000) (declining to "revisit" the legal principle reaffirmed in *Casey* that "before 'viability . . . the woman has a right to choose to terminate her pregnancy'") (quoting *Casey*, 505 U.S. at 870); (*see also* ER 009-010 (acknowledging previous Supreme Court statements that "'a state may not prohibit any woman from making the ultimate decision to terminate her pregnancy'" before viability) (quoting *Casey*, 505 U.S. at 879)). Thus, this core principle, which determines the outcome of this case, remains entirely undisturbed after *Gonzales*.

The issue before the Court in *Gonzales* was not a ban, but the validity of a federal law prohibiting the use of a single method of abortion – so-called partial-birth abortions. In upholding that law, the *Gonzales* Court noted that the government may "use its voice and its regulatory authority to show its profound respect for the life within the woman" – but if and only if such actions do not "strike at the right itself." 550 U.S. at 157-58. *Gonzales* thus upheld a law that determined *how* an abortion would occur, not *whether* it would occur at all. As such, *Gonzales* underscores that bans such as the Act, which indisputably strike at the right itself, are invalid.

Critical to the *Gonzales* Court's analysis, safe alternative procedures were readily available for women seeking pre-viability, second-trimester abortion care.

Id. at 164-65. Indeed, had that law reached the most common methods of abortion at that stage of pregnancy, it would have been unconstitutional. *Id.* (citing the abortion regulation struck down in *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 77-79 (1976), as an example of a de facto, and therefore unconstitutional, ban on second-trimester abortion care because it reached the "then-dominant second-trimester abortion method"); *Stenberg*, 530 U.S. at 945-46 (striking down a ban on "the most commonly used method for performing pre-viability *second trimester abortions*" as "an undue burden upon a woman's right to make an abortion decision") (emphasis in original). While *Gonzales* held that certain state interests – in "regulating the medical profession in order to promote respect for life," 550 U.S. at 158 – justified a regulation that prohibited a single method but left the most common second-trimester methods readily available, that does not change the result here, where the Act bans not merely the most common methods, but all abortion outright, at and after 20 weeks.

Even under its misreading of *Gonzales* as permitting an outright ban at a point prior to viability, the District Court strained to support its conclusion that the Act is an acceptable regulation. For example, the court asserted that women could still obtain pre-viability abortions before 20 weeks, i.e., before the terms of the Act applied, and suggested that under the Act, women simply need to decide earlier in

pregnancy whether or not to carry to term.[7] (ER 010-012.) Indeed, the District Court depicts the ban as nothing more than a "time limitation" on abortion access. (ER 012 (quoting *Gonzales*, 550 U.S. at 157-58) (citations omitted).) Describing an outright ban at a pre-viability stage of pregnancy as a "time limitation" ignores Supreme Court precedent clearly establishing that viability is the earliest point at which the State may impose a "time limitation." Before that point, it is the woman — not Arizona — who decides whether *and when* she will terminate her pregnancy.

B. The District Court Erred in Applying the Undue Burden Standard to the Act.

The District Court also erroneously interpreted *Gonzales* as allowing a ban on abortion at a pre-viability stage of pregnancy to be reviewed under the undue burden standard. (ER 010.) There is no such holding in *Gonzales*.

Laws banning pre-viability abortions – whether they apply from the beginning of pregnancy, from 12 weeks, or from 20 weeks – are *per se* unconstitutional; they are not reviewed under the "substantial obstacle" standard.

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[7] The District Court likewise relied on Arizona's existing definition of abortion, which excludes procedures used 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 to remove a dead fetus," Ariz. Rev. Stat. § 36-2151(1), as evidence that the Act does not prohibit all abortions and therefore is a mere regulation. (ER 010.) This defies logic. The fact that the Act – an abortion ban – leaves non-abortion conduct untouched does not transform the Act from a ban into a regulation.

Casey makes this explicit by stating that such bans are impermissible, regardless of what exceptions are made or state interests asserted. 505 U.S. at 846, 879. The Supreme Court has already balanced the applicable interests and drawn a bright line, at the point of viability. The District Court's conclusion that the Act should be assessed under the substantial obstacle test as a regulation, rather than a ban, is therefore foreclosed.

But even were that test applicable, which it is not, the Act would (contrary to the District Court's conclusion) clearly fail. The Act places not just a substantial obstacle but an insurmountable obstacle — an outright ban — in the path of a woman seeking abortion care prior to viability. Even a cursory review of the District Court's reasoning demonstrates that it is unsupportable.

First, the District Court erred by considering the impact of the ban on all women seeking abortions, rather than just those seeking pre-viability abortions at or after 20 weeks. (ER 010 (noting that the Act "allows for abortions up to and including 20 weeks gestational age").) This approach is squarely foreclosed by Supreme Court precedent. In *Casey*, the Court rejected the state's argument that a spousal notification requirement, which "affect[ed] fewer than one percent of women seeking abortions," was therefore not a substantial obstacle. 505 U.S. at 894. The Supreme Court explained that "[t]he analysis does not end with the one percent of women upon whom the statute operates; it begins there. . . . The proper

focus . . . is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Id.* The same is true here. The analysis begins with the group of women who are affected by the Act — those seeking pre-viability abortions at or after 20 weeks who do not qualify for the medical emergency exception. For all these women, the Act operates as an absolute, and unconstitutional, ban.

Second, the District Court stated that "while [the Act] may prompt a few women, who are considering abortion as an option, to make the ultimate decision earlier than they might otherwise have made it, [it] is nonetheless constitutional because it does not 'prohibit any woman from making the ultimate decision to terminate her pregnancy.'" (ER 012 (quoting *Gonzales*, 550 U.S. at 146) (citations omitted).) Again, this reasoning misapprehends the right at issue, which is the woman's right to make the ultimate decision — at any point prior to viability — whether or not to continue her pregnancy.

Finally, because the undue burden analysis does not apply, and would not change the result even if it did, the District Court's findings regarding the legitimacy of and evidentiary support for the State's asserted interests are irrelevant. (*See* ER 013-015 (findings that the ban is justified by asserted interests in fetal pain perception and maternal health).)[8] In making those findings, the

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[8] In addition, the District Court's selective quotations from the cases addressing the method ban at issue in *Gonzales*, (ER 013-014), provide no support for its

District Court ignored the controlling and directly applicable Supreme Court holding that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion." *Casey*, 505 U.S. at 879. Had the District Court followed this precedent, it never would have made those findings, which provide no basis on which to sustain its decision, and which should therefore be disregarded.[9]

CONCLUSION

For the foregoing reasons, the Physicians respectfully request that this Court reverse the Order and Judgment of the District Court and order the District Court to enter a judgment declaring Ariz. Rev. Stat. § 36-2159 to be unconstitutional as

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conclusions regarding asserted fetal pain perception. While *Gonzales* provides descriptions of abortion methods, and thoroughly examines the justifications for the method ban under review there, it nowhere refers to asserted fetal pain perception or makes any findings connected to it.

[9] The District Court's assertion "that the facts at issue in this case are not materially in dispute," (ER 015), is correct in the sense that the only fact material to the outcome here — that the ban reaches terminations prior to viability — is undisputed. However, the Physicians noted that they "disagree with the assertions underlying" the State's asserted interests in support of the Act. (ECF No. 3, Plaintiffs' Memorandum in Support of Motion for Preliminary Injunction and Expedited Consideration or in the Alternative for a Temporary Restraining Order at 9, n.6.) As the State's interests are irrelevant, any factual dispute about whether those interests are supported by competent evidence is similarly irrelevant.

applied to abortions prior to viability, and a permanent injunction prohibiting Defendants-Appellees, their employees, agents, and successors from enforcing the Act as applied to such medical care.

DATED: September 4, 2012

Respectfully submitted,

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STATEMENT OF RELATED CASES

Physicians-Appellants are not aware of any related cases in this Court.

CERTIFICATE OF COMPLIANCE PURSUANT TO CIRCUIT RULE 32-1

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,160 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 Times New Roman size 14.

DATED: September 4, 2012

/s/ Janet Crepps
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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have sent the foregoing document by UPS Overnight Delivery to the following non-CM/ECF participants:

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