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, v. Tom Horne, Attorney General of Arizona, in his official capacity; William (Bill) Montgomery, County Attorney for Maricopa County, in his official capacity; et al. Defendants.	D.C. NO. 2:12-cv-01501-JAT-PHX

APPELLEE WILLIAM MONTGOMERY'S ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellee William G. Montgomery states that he is the Maricopa County Attorney and has no parent corporation and is not a publicly held corporation.

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3). This Court possesses jurisdiction of this appeal pursuant to 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 Tom Horne and William Montgomery in their official capacity ("the State") and against Physician-Plaintiffs on July 30, 2012. The Plaintiffs filed a Notice of Appeal the same day. (ER 017-018.)

ISSUES PRESENTED

1. In the absence of a pregnant woman affected by Arizona's Chapter 250, Laws of 2012, is a facial challenge to the statute ripe for adjudication?

2. Is Arizona's Chapter 250, Laws of 2012, constitutionally valid because it does not impose, as articulated in *Gonzales*, "a substantial obstacle to late-term, but previability, abortions,"?

STATEMENT OF THE CASE

This case involves a challenge to Chapter 250, Arizona Laws of 2012 (House Bill 2036), which became effective on August 2, 2012. The Plaintiffs, three physicians who perform abortions, filed a one-count complaint against the Arizona Attorney General, the County Attorneys of Maricopa and Pima Counties, the Arizona Medical Board and the Board's Executive Director, alleging a violation of "the substantive due process rights of Plaintiffs' patients." Excerpt of Record ("ER") 063 ¶ 40.

The Complaint sought declaratory and injunctive relief and was accompanied by a motion for a preliminary injunction against enforcement of Chapter 250. ECF 2 and 3. In particular, the Complaint challenged Ariz. Rev. Stat. § 36-2159(A) and (B), created by Section 7 of Chapter 250:

> 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.

"Medical emergency" is defined by Ariz. Rev. Stat. § 36-2151(4):

> [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.

Defendant William Montgomery, the Maricopa County Attorney, filed a Motion to Dismiss (ECF 25), which was argued along with the Motion for Preliminary Injunction. County Attorney Montgomery (ECF 27), Pima County Attorney Barbara LaWall (ECF 23) and the State Defendants (ECF 26) each filed Responses to the Motion for Preliminary Injunction. The Plaintiffs filed a Reply in Support of their Motion for Preliminary Injunction (ECF 34) and a Response to the Motion to Dismiss (ECF 36).

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, the District Court entered final judgment in favor of the State and County Defendants and dismissed the action. (ER 001.) The Physician-Plaintiffs filed a Notice of Appeal the same day. (ER 017-018.)

STATEMENT OF FACTS

The Arizona Legislature, in Chapter 250 § 9, listed a number of findings and purposes. Findings in support of section 7 include that:

(1) Abortion can cause serious both short-term and long-term physical and psychological complications for women, including but not limited to uterine perforation, uterine scarring, cervical perforation or other injury, infection, bleeding, hemorrhage, blood clots, failure to actually terminate the pregnancy, incomplete abortion (retained tissue), pelvic inflammatory disease, endometritis, missed ectopic pregnancy, cardiac arrest, respiratory arrest, renal failure, metabolic disorder, shock, embolism, coma, placenta previa in subsequent pregnancies, preterm delivery in subsequent pregnancies, free fluid in the abdomen, organ damage, adverse reactions to anesthesia and other drugs, psychological or emotional complications such as depression, anxiety or sleeping disorders and death;

(2) Abortion has a higher medical risk when the procedure is performed later in pregnancy. Compared to an abortion at eight weeks of gestation or earlier, the relative risk increases exponentially at higher gestations;

(3) The incidence of major complications is highest after twenty weeks of gestation;

(4) The risk of death associated with abortion increases with the length of pregnancy, from one death for every one million abortions at or before eight weeks gestation to one per 29,000 abortions at sixteen to twenty weeks and one per 11,000 abortions at twenty-one or more weeks . . . After the first trimester, the risk of hemorrhage from an abortion, in particular, is greater, and the resultant complications may require a hysterectomy, other reparative surgery or a blood transfusion;

(5) The State of Arizona has a legitimate concern in protecting the public's health and safety;

(6) The State of Arizona 'has legitimate interests from the outset of pregnancy in protecting the health of women'. . . . More specifically, Arizona 'has a legitimate concern with the health of women who undergo abortions;' and

(7) There is substantial and well-documented medical evidence that an unborn

> child by at least twenty weeks of gestation has the capacity to feel pain during an abortion.

Chapter 250, Laws of 2012 § 9(A)(1-7)(citations omitted). Each of the medical findings was supported by citations to peer-reviewed medical studies. Supplemental Excerpt of Record ("SER") Tab 6 at 0094-96.

As a result of these findings, the Arizona Legislature stated that it promulgated H.B. 2036 "based on the documented risks to women's health and the strong medical evidence that unborn children feel pain during an abortion at [20 weeks] gestational age." Chapter 250, Laws of 2012 § 9(B)(1) Supplemental Excerpt of Record ("SER") Tab 6 at 0097.

The Legislature's findings are consistent with medical evidence presented to the trial court that scientific knowledge in the fields of neurobiology, perinatology, neonatology, pediatric anesthesia and pediatric surgery have increased greatly in the past 30 years. Declaration of Jean A. Wright, M.D., ER 031 ¶ 15. Authoritative studies have shown that "neonates" have the physiological and chemical brain processes required for mediating pain and noxious stimuli. Declaration of Jean A. Wright, M.D., ER 031 ¶ 19.

There is substantial evidence that an unborn child is even more sensitive to pain than a newborn. It takes fewer stimuli to create pain in an unborn child. Declaration of Jean A. Wright, M.D., ER 032 ¶ 24. Studies have provided evidence for a therapeutic response in pain receptors for unborn children at 16-21

weeks of gestation for the administration of anesthesia. Declaration of Jean A. Wright, M.D., ER 033 § 27.

An unborn child begins to develop pain sensors on its face in the 7th week of life, and sensory receptors all over the body by the 20th week. Affidavit of Paul H. Liu, M.D., SER Tab 1 at 0001 ¶ 4. The 20th week sensory receptors are fully functional, and when provoked by a painful stimulus, react by increasing stress hormones and with cardiovascular changes. Affidavit of Paul H. Liu, M.D., SER Tab 1 at 0001 ¶ 5. These changes, which are similar to those of a newborn infant, decrease when the unborn child is given anesthesia. *Id*.

As to the Arizona Legislature's interest in protecting women from unsafe abortion, the medical literature supports the conclusion that the risk of complications of abortion increase significantly every week the abortion is delayed beyond the 8th week of gestation, with an alarming 38% increase in risk of abortion related maternal death for each additional week of gestation. Affidavit of Allan T. Sawyer, M.D., SER ¶ Tab 3 at 0030 ¶ 4, 5. Fewer than 1% of abortions are performed after 20 weeks gestation. Affidavit of Allan T. Sawyer, M.D. SER ¶ Tab 3 at 0030 ¶ 6.

Dr. Allan T. Sawyer declared, "the definition of 'medical emergency' affords me as a physician considerable latitude in determining whether my patient's life or health may be endangered without an abortion" because "the same

definition that is in the statute was upheld by the United States Supreme Court twenty years ago." *Id.* at ¶ 16. Further, current scientific knowledge and medical practice result in the probable diagnosis of fetal anomalies before 20 weeks of gestation. Affidavit of Allan T. Sawyer, M.D., SER Tab 3 at 0032 ¶ 12. It is "rare" that an abortion minded patient whose baby is diagnosed with a fetal anomaly would lose the opportunity to abort because she is past 20 weeks of gestation. *Id.*

SUMMARY OF ARGUMENT

The Arizona Legislature, citing numerous peer-reviewed medical studies, adopted a regulatory statute that restricts abortions at or after 20 weeks to instances of medical emergency based on its dual interest in addressing (1) the relative hazard to the mother of abortion at least by 20 weeks, and (2) the pain experienced by the unborn child in late-term abortion. Chapter 250, Arizona Laws of 2012.

The Plaintiffs in this case seek to bring a facial challenge to this legislation without joining as a plaintiff any pregnant woman that might be affected by the law in a discrete and well-defined instance. Such a facial challenge, without a pregnant woman that might be affected by the statute, should be dismissed because it is improperly speculative and thus not ripe for adjudication.

Further, the Arizona regulation is constitutionally valid as determined by the

District Court because, as articulated in *Gonzales*, it does not impose "a substantial obstacle to late-term, but previability, abortions." Lastly, the Arizona regulation withstands constitutional scrutiny because the Constitution does not grant a woman the right to an unsafe abortion.

In accord with the Supreme Court's decisions in *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Gonzales v. Carhart*, 550 U.S. 124 (2007), Arizona's regulation is based on important state interests about the consequences of late-term abortion for both the pregnant woman and the unborn child.

LEGAL ARGUMENT

I. Standards of Review.

A district court's ruling on the constitutionality of a state statute is reviewed de novo. *See American Academy of Pain Mgmt. v. Joseph*, 353 F.3d 1099, 1103 (9th Cir. 2004). Whether a state law is subject to a facial constitutional challenge is also an issue of law reviewed de novo. *Southern Oregon Barter Fair v. Jackson County, Oregon*, 372 F.3d 1128, 1134 (9th Cir. 2004).

II. Plaintiffs' Facial Challenge to the Arizona Statute Is Improperly Speculative and Therefore Not Ripe For Adjudication.

The Plaintiffs in this case are physicians whose interest is, at best, wholly derivative of patients whose existence is entirely speculative. In short, this is a facial challenge masquerading as an "as-applied" challenge.

The Supreme Court has held that facial challenges to statutes are not favored. Such challenges "impose a 'heavy burden' upon the parties maintaining the suit." *Gonzales v. Carhart*, 550 U.S. 124, 167 (2007) (citing *Rust v. Sullivan*, 500 U.S. 173, 183 (1991)). Addressing the validity of a pre-enforcement facial challenge in *Gonzales*, Justice Kennedy in writing for the majority noted:

> Such facial attacks should not be entertained in the first instance. In these circumstances the proper means to consider exceptions is by as-applied challenge. This is the proper manner to protect the health of a woman if it can be shown that in *discrete and well-defined instances* a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used. In an as-applied challenge the nature of the medical risk can be better quantified and balanced than in a facial attack.

Gonzales, 550 U.S. at 167 (Emphasis added).

Because these Plaintiffs have failed to demonstrate the actual existence of even one woman in Arizona who could establish that the medical emergency exemptions in the Act are insufficient for her to obtain a necessary abortion, they have failed to demonstrate a "strong likelihood of success" on the merits. Moreover, because of Plaintiffs' failure to bring into court such an actual pregnant

woman who alleges that the Act harms her in a "discrete, well-defined" manner that creates a substantial obstacle to preclude her from having an abortion, neither declaratory nor injunctive relief can be granted. Conjecture, speculation or creative hypotheticals about some woman, somewhere, in some place, at some time, who "might" or "may" be harmed is woefully inadequate to support the extraordinary relief Plaintiffs seek.

As the *Gonzales* Court stated: "It is neither our obligation nor within our traditional institutional role to resolve questions of constitutionality with respect to each potential situation that might develop. '[It] would indeed be undesirable for this Court to consider every conceivable situation which might possibly arise in the application of complex and comprehensive legislation.'" *Id.* at 168 (quoting *United States v. Raines*, 362 U.S. 17, 21 (1960)).

This facial attack on Chapter 250 is not ripe for consideration by this or any other court because its speculation is based upon an inadequate factual record. In effect Plaintiffs ask the federal courts for nothing more than an advisory opinion. Accordingly, this Court should conclude that the Plaintiffs lack standing by failing to bring into court any plaintiff who is a pregnant woman with a claim related to "discrete and well-defined" circumstances. *Gonzales*, 550 U.S. at 167.

III. The District Court Properly Determined that the Arizona Regulation of Abortions After 20 Weeks Is Constitutional Under *Casey* and *Gonzales*.

Plaintiffs' Opening Brief disregards the well-reasoned lower court decision,

asserts the radical proposition that a woman has an absolute right to an unsafe previability abortion, and ignores the State's interest in protecting fetal life from brutal and inhumane pain. Because Plaintiffs' brief raises several fundamentally flawed arguments, each will be addressed separately below.

A. The District Court Properly Concluded that the Arizona Regulation to Protect Maternal Health and Fetal Life Does Not Constitute a Substantial Obstacle.

In light of the Supreme Court's decision in *Gonzales*, no "bright-line" viability test exists. Moreover, as the District Court recognized, the statute at issue is a regulation, not a prohibition, since it permits abortion in defined circumstances. Consequently, the District Court correctly applied Supreme Court case law to conclude that the statute is not a substantial obstacle to a woman seeking a previability late-term abortion. Furthermore, even under the traditional analysis of States' interests under *Roe* and *Casey*, Arizona's strong interests in maternal health and fetal life defeat any claim of unconstitutionality.

State laws such as Arizona's, regulating abortion at or after 20 weeks gestation (with a *Casey* health exception), are permitted by the Supreme Court's decisions in *Roe v. Wade*, 410 U.S. 113 (1973), *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Gonzales v. Carhart*, 550 U.S. 124 (2007). As the District Court, at page 8, correctly noted, the Supreme Court in *Gonzales* set forth the standards and policy considerations that

must be taken into account in determining whether a statute regulating previability late-term abortions is constitutional. *Gonzales*, 550 U.S. at 146 (quoting *Casey*, 505 U.S. at 879).

1. *There is no bright-line viability test after* Gonzales.

Plaintiffs' Opening Brief makes a series of rhetorical leaps that is not supported by the Supreme Court's case law. The Opening Brief, at 15, urges that Chapter 250 breaches a bright-line defined prohibition against regulations addressed to abortions before "viability" of the unborn child.

Plaintiffs' argument is decisively defeated in *Gonzales*. In *Gonzales*, the Supreme Court upheld the previable application of an abortion prohibition. Specifically, the Court held that Congress can protect a *previable* unborn child from the brutality of abortion.[1] 550 U.S. at 160-161. As the dissenting opinion in *Gonzales* recognized, the Supreme Court had upheld a ban on an abortion procedure that applied throughout pregnancy, and, in the view of that dissent, "blur[red] the line" between "previability and postviability abortions." 550 U.S. at 171, 186 (Ginsburg, J., dissenting).

[1] The *Gonazales* Court focused on the "brutal" nature of partial birth abortion that seemingly ignored other brutal abortion methods, and upheld it partly on the Congress' rational interest in preventing infanticide. Likewise, the Arizona Legislature was proper in relying on medical evidence establishing that abortion is brutal to unborn children at least by 20 weeks based on the intense pain that they are capable of experiencing.

While the Court's decisions before *Gonzales* have identified fetal viability as the point in pregnancy at which the state's interest in fetal life becomes "compelling," *Gonzales* emphasizes that the Court allows greater deference to the states to regulate "late-term abortions," a term which the *Gonzales* majority used several times (550 U.S. at 156, 160), as the dissent noted. 550 U.S. at 187 (Ginsburg, J., dissenting). In fact, the *Gonzales* majority posed the essential question as "whether the Act, measured by its text in this facial attack, imposes a substantial obstacle to late-term, but *previability*, abortions." *Id.* at 156 (emphasis added).

Gonzales explicitly held that the *Casey* decision had rejected both *Roe*'s rigid trimester framework and the interpretation of *Roe* that considered all previability regulations of abortion unwarranted. 550 U.S. at 146. *Gonzales* noted that *Casey* had overruled the holdings in two cases because they undervalued the State's interest in potential life. *Id*.

In his dissent in the first partial-birth abortion decision, *Stenberg v. Carhart*, 530 U.S. 914 (2000), Justice Kennedy emphasized that "when the fetus is close to viable," "the State is regulating the process at the point where its interest in life is nearing its peak." 530 U.S. at 968 (Kennedy, J., dissenting).

As scholars have pointed out, the viability rule was *dictum* in *Roe*, and in *Casey* as well. *See, e.g.*, John Hart Ely, *The Wages of Crying Wolf: A Comment on*

Roe v. Wade, 82 Yale L.J. 920, 922 (1973); Mark Tushnet, *Two Notes on the Jurisprudence of Privacy*, 8 Const. Comment. 75, 83 (1991). The issue of the duration of abortion rights was not truly before the Court in *Roe*. That case involved a challenge to a Texas statute that prohibited all abortions except those necessary to save the mother's life. *See Roe v. Wade*, 314 F. Supp. 1217, 1219 n.2 (N.D. Tex. 1970), *aff'd in part and rev'd in part*, 410 U.S. 113 (1973). Once the Court concluded that a woman has a fundamental right to terminate an unwanted pregnancy and that the states lack a compelling interest in protecting fetal life at the outset of pregnancy, the invalidity of the statute was established regardless of how far into pregnancy the right to an abortion extends. 410 U.S. at 163-64. The validity of the Texas statute did not turn on the question of when in pregnancy a state may regulate to protect fetal life. The Court's articulation of the viability rule was thus unnecessary to resolve the case before the Court.

Even those commentators who favor abortion rights nevertheless recognize that *Gonzales* allows States to enact much broader abortion regulations. For example, in her 2010 law review article, Khiara M. Bridges, an associate professor of law at Boston University, wrote with respect to *Gonzales v. Carhart* (which she refers to as *Carhart*):

> With these simple pronouncements [including Justice Kennedy's assertion in *Gonzales* that the "fetus is a living organism while within the womb, whether or not it is viable outside the womb,"], the majority asserts the insignificance of viability as a site distinguishing

> potential life from unqualified life. With this pronouncement, *Carhart makes the "bright line" of viability no more than an arbitrary moment, a moment among moments*, within the continuous, always already "life" of the fetus. As such, *Carhart* can be read to eliminate the significance of viability as a marker, and therefore eliminate the significance of the distinction between the pre-viable and post-viable stages of pregnancy.

Khiara M. Bridges, *Capturing the Judiciary: Carhart and the Undue Burden Standard*, 67 Wash. & Lee L. Rev. 915, 941 (2010) (emphasis added).

Randy Beck, an associate professor of law at the University of Georgia Law School and a former clerk to Justice Anthony Kennedy, in his essay *Gonzales, Casey, and the Viability Rule*, 103 Nw. U. L. Rev. 249, 278 (2009), notes that in the 2007 *Gonzales* ruling, Justice Kennedy and the other four justices in the majority merely "assumed" the continued application of the viability doctrine but did not actually reaffirm it. Beck asserts that even in the *Casey* ruling, which reaffirmed the "core holdings" of *Roe v. Wade*, "the plurality's retention of the viability rule can be viewed as dicta," – meaning, of course, that the language was not essential to the issues in the case and therefore has no precedential force. *Id*. at 250, n.9; *see also* Beck, *Transtemporal Separation of Powers in the Law of Precedent*, 87 Notre Dame L. Rev. 1405, 1459 (2012) (noting that Supreme Court decisions since 1989 show a gradual diminution of the significance attributed to fetal viability).

Thus, notwithstanding the statements in the Court's opinion in *Planned*

Parenthood v. Casey about viability (i.e. "before viability, the State's interests are not strong enough to support a prohibition of abortion," 505 U.S. at 846, and "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," 505 U.S. at 879,) these must be considered in their limited context for at least two reasons: they continued to assume the comparative safety of abortion over childbirth, and they were not informed of current medical knowledge that the unborn child feels pain.

In affirming the District Court, this Court is not being asked to ignore Supreme Court holdings. Rather, this Court should apply the Supreme Court jurisprudence on state regulation of abortion in light of all applicable decisions – especially the Court's most recent pronouncement in *Gonzales*.

2. *The District Court properly recognized Chapter 250 as a regulation and not a prohibition.*

The Plaintiffs' argument that the Arizona Regulation is an unconstitutional ban is factually and legally flawed because Chapter 250 can only be read as a ban if one ignores the express medical exception set forth in the law.

The District Court correctly read the medical emergency exception in Chapter 250 the same as the *Casey* Court did: reading "serious risk" to mean the same as "medical emergency," i.e., "conditions [which] could lead to an illness with substantial and irreversible consequences." *Casey* continued "'[W]e read the

medical emergency exception as intended by the Pennsylvania legislature to assure that compliance with its abortion regulations would not in any way pose a significant threat to life or health of a woman.'" *Casey*, at 880, quoting the Court of Appeals at 947 F.2d, at 701. Similarly, under the Arizona law, a fair interpretation of the Act is to allow a 20-week or later abortion when the anomaly of the child or the condition of the pregnancy is such that there is now or will likely be a significant threat to the mother in the future. The statute does not require the doctor to wait for the emergency to be imminent. In short, the Act is a regulation on abortion; not a prohibition. The Act does not prevent abortions; instead, it is a reasonable regulation given the balance of interests that the Arizona Legislature has considered in light of controlling Supreme Court precedent as to women's health and fetal life.

3. *The District Court properly determined Chapter 250 poses no substantial obstacle.*

The District Court, at pages 8-11, correctly found that Chapter 250 does not impose a substantial obstacle to previability abortions, notwithstanding the inherent difficulty in ascertaining viability in an individual case. In section IV of its opinion in *Gonzales*, the Supreme Court emphasized the "substantial obstacle" test, and, in observing that the Partial-Birth Abortion Ban Act affected "both previability and postviability" abortions, the Court explained that "the question is whether the Act, measured by its text in this facial attack, imposes a substantial obstacle to late-term

but previablity, abortions." 550 U.S. at 156. Justice Kennedy, in his *Stenberg* dissent, had twice emphasized that the Nebraska law "deprived no woman of a '*safe* abortion' and therefore did not impose a 'substantial obstacle' on the rights of any woman." *Id.* at 965, 967 (emphasis added). Similarly, a woman in Arizona under Chapter 250 can obtain an abortion without restriction before the 20-week gestation date, and an abortion after 20 weeks if her abortion falls within the medical exception.

The Court's decision in *Gonzales* signals a shift in emphasis away from the viability rule to the "substantial obstacle" test. Viability and "substantial obstacle" are not welded to each other. The *Gonzales* Court concluded that the federal Partial-Birth Abortion Ban Act did not create a substantial obstacle even though it (1) applied to pre-viability abortions and (2) did not include a "maternal health" exception. The most important question, under *Gonzales*, is not whether the unborn child is strictly viable but whether a state regulation restricting abortion creates a "substantial obstacle."

Justice Kennedy, author of the Court's opinion in *Gonzales*, emphasized in *Stenberg* that *Casey* "held it was inappropriate for the Judicial Branch to provide an exhaustive list of state interests implicated by abortion." *Stenberg v. Carhart*, 530 U.S. 914, 961 (2000) (Kennedy, J., dissenting) (citing *Casey*, 505 U.S. at 877). He also observed, "*Casey* is premised on the States having an important constitutional role in defining their interests in the abortion debate." 530 U.S. at 961. Contrary to a

strict view of viability, Justice Kennedy also emphasized that "there is a substantial state interest in potential life throughout pregnancy." *Stenberg*, 530 U.S. at 960-61 (Kennedy, J., dissenting) (citing *Casey*, 505 U.S. at 876). He twice characterized *Casey* as standing for the proposition that the "abortion right" is the right "to elect abortion in defined circumstances." *Id.* at 956, 965.

In *Stenberg*, Justice Kennedy criticized the majority view that the only interests that the states had were two: "health of the woman…and…the life of the fetus she carries." 530 U.S. at 960. He considered this to be a "misunderstanding" of *Casey*. *Id.* Instead, he affirmed Nebraska's interests in "concern for the life of the unborn and 'for the partially-born,'" in "preserving the integrity of the medical profession," and in "'erecting a barrier to infanticide.'" *Id.* at 961.

Another state interest recognized in *Gonzales* is also served by a state regulation on abortions at or after 20 weeks. That is the interest in "express[ing] respect for the dignity of human life," 550 U.S. at 156-58, and that is served even more directly by eliminating the possibility of "born alive abortions" at or after 20 weeks of gestation than by the law upheld in *Gonzales*.

A fourth state interest recognized in *Gonzales* is also served. That is the interest in "protecting the integrity and ethics of the medical profession" and its "reputation." 550 U.S. at 157. A 20-week restriction would reinforce the "bright line that clearly distinguishes abortion and infanticide," *Gonzales*, 550 U.S. at 158. The 20-week

restriction thus protects physicians from being accused of participating in infanticide. These broad interests affirmed by the *Gonzales* majority indicate a concern with late-term abortions generally, without any particular emphasis on viability.

The District Court here cited the testimony of both the Plaintiffs' and Defendants' experts in support of its findings. It noted (at 10) that Plaintiff Dr. Clewell avowed that 90% of abortions take place during the first trimester of pregnancy, through approximately the thirteenth week. (ER 039 at ¶ 9). The District Court also noted that although Dr. Clewell urged that, in some patients, it is not possible to diagnose an anomaly until close to 20 weeks of gestation, he stopped short of claiming that there are any conditions that could only be diagnosed after 20 weeks that could not have been found before that time.

And indeed, Dr. Sawyer (whose affidavit was presented by the Defendants) avowed "[w]ith antenatal screening being done with nuchal fold translucency testing and early genetic marker testing, the diagnosis of fetal anomalies should occur prior to 20 weeks gestation. It is truly rare [that a woman could not choose] to abort because she is past 20 weeks gestation." Affidavit of Allan T. Sawyer, M.D., SER Tab 3 at 0032 ¶ 12. Thus, the District Court, at 11, found that it would be extremely rare to find a condition that could be diagnosed after 20 weeks that could not have been diagnosed earlier.

The District Court correctly rejected Plaintiffs' argument that a "substantial

obstacle" was created by the fact that a pregnant woman needs time to make the extremely difficult decision as to whether to continue the pregnancy and, in such a situation, it could take longer than twenty weeks to make such a decision. Accepting that statement as true, the District Court found that the time limitations imposed by Chapter 250 cannot be construed to be a substantial obstacle to the right to make the abortion decision itself, *citing Gonzales*, 550 U.S. at 157-58 ("The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.") and *Roe v. Wade*, 505 U.S. at 874.

As the District Court noted, the Supreme Court in *Gonzales* observed that, despite the fact that the "necessary effect of the regulation" would "be to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions," the regulation was constitutional. *See* 550 U.S. at 160. Likewise, a corollary proposition is that, while Chapter 250 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, the Arizona statute is nonetheless constitutional because it does not "prohibit any woman from making the ultimate decision to terminate her pregnancy." *Id*. at 146 (quoting *Casey*, 505 US. at 879). The Arizona statute would also have the effect of the woman having an abortion at a point in her pregnancy where the risk of mortality is less.

B. Supreme Court Precedent Does Not Establish a Right to Abortion on Demand, Generally, or to an Unsafe Abortion, Specifically.

Plaintiffs' Opening Brief speaks about abortion in absolutist terms. Plaintiffs would have this Court hold that the Constitution provides a woman the unconditional right to have an abortion at any time up to viability, regardless of the dangers. However, this rule cannot be found in any of the Supreme Court's abortion jurisprudence.

1. *There is no constitutional right to abortion on demand.*

The Supreme Court has made clear that *Roe v. Wade* and subsequent jurisprudence does not create a constitutional right to abortion on demand. *Roe*, 410 U.S. at 154 ("The privacy right involved, therefore, cannot be said to be absolute.") The Supreme Court in *Stenberg v. Carhart*, 530 U.S. 914, 981 (2000) held that any suggestion of Court-mandated abortion on demand "had come to an end" as a result of *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) and *Casey*.

The Court in *Casey* had concluded that "[e]ven the broadest reading of *Roe* … has not suggested that there is a constitutional right to abortion on demand." 505 U.S. at 887 (citing *Doe v. Bolton*, 410 U.S. 179, 189 (1973)). Rather, the *Casey* opinion articulated the right protected by *Roe* as a right "to decide to terminate a pregnancy free of undue interference by the State." *Id*. Arizona's Regulation does not contravene this right.

2. *There is no right to an unsafe abortion.*

As the detailed findings in Chapter 250 document, Arizona has a compelling interest in protecting maternal health. SER Tab 6 at 0094-096. Indeed, the Supreme Court has never held that there is a right to an unsafe abortion.

In fact, citing *Roe*, this Court recently recognized that "[h]istorically, laws regulating abortion have sought to further the state's interest in protecting the health and welfare of pregnant women," and that "abortion statutes were first enacted to protect pregnant females from third parties providing dangerous abortions." *McCormack v. Heideman*, ___ F.3d ___, 2012 WL 3932735 (No. 11-36010, 9th Cir., September 11, 2011).[2]

The unchallenged assumption running through 40 years of abortion jurisprudence has been that abortion is safer than childbirth throughout all nine months of pregnancy. However, in light of the modern medical evidence presented to the Arizona Legislature, this assumption is shown to be false at or after 20

[2] In concluding that the plaintiff met the preliminary injunction standard of showing a likelihood of success on the merits, the *McCormack* opinion identified the issue as whether the state can impose criminal liability on pregnant women for failing to abide by the state's abortion statutes. Slip Op. at 10929. That is not the issue in this case. The plaintiffs here are not patients threatened with any criminal prosecution, but rather physicians who seek to assert their patients' substantive due process rights. And *McCormack*, like other cases, recognized "[a]ll abortion regulations interfere to some degree with a woman's ability to decide whether to terminate her pregnancy," thus the constitutionally critical concern is whether the regulations "in [a] real sense deprive[ ] women of the ultimate decision." Slip Op. at 10928 (quoting *Casey*, 505 U.S. at 856).

weeks. Thus, the State is justified in acting to limit the harm of unsafe elective abortion.

The Opening Brief at 10 urges that abortion, even after 20 weeks, is safer than carrying to term and giving birth. However, it is legally irrelevant whether Plaintiffs' experts disagree with the evidence and fact-findings of the Arizona Legislature. "The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales*, 550 U.S. at 163; *see also, Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 686 F.3d 889, 899-900 (8th Cir. 2012).

Further, the facts of more recent medical knowledge, as relied on by the Arizona Legislature, establish that abortion by 20 weeks has higher rates of mortality and health complications for the mother than carrying the unborn child to term. Accordingly, Arizona's interest in regulating post 20-week abortion, except under medical emergency, already strong, becomes compelling. *Roe v. Wade*, 410 U.S. 113 (1973). The *Roe* decision relied on the key medical assumption that abortion was generally safer than childbirth. *Id*. at 149, 162-63. That medical assumption was central to the relative weight of the state interests in the first, second, and third trimesters. *Id*.

The state of present medical knowledge, including that relied upon by the Legislature and the District Court in this case, replaces those assumptions with

medical facts. SER Tab at 0094-96 (Findings #1, 2, 3 and 4). *See also* American Medical Association Council on Scientific Affairs, Council Report, *Induced Termination of Pregnancy Before and After Roe v. Wade*, 268 JAMA 3231 (1992). Moreover, studies that employ record linkage have found that mortality rates associated with childbirth are significantly lower than those associated with abortion. *See, e.g.*, Reardon, et al., *Deaths Associated with Pregnancy Outcome: a Record Linkage Study of Low Income Women*, Southern Medical Journal, 834-841 (August 2002); Coleman, et al., *Reproductive History Patterns and Long-term Mortality Rates: a Danish, Population-based Record Linkage Study*, European Journal of Public Health, (Sept. 5, 2012) http://eurpub.oxfordjournals.org/content/early/2012/09/05/eurpub.cks107.abstract.

The Supreme Court has said in *Roe* that the states "have an important and legitimate interest in preserving and protecting the health of the pregnant woman." 410 U.S. at 162. This interest "grows in substantiality as the woman approaches term, and, at a point during pregnancy . . . becomes compelling." 410 U.S. at 162-63. Then the Court said:

> With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, *in the light of present medical knowledge*, is at approximately the end of the first trimester. This is so because of the now-established medical fact, referred to above at 149, that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion

> procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health.

410 U.S. at 162-62, (emphasis added). The Court's uncertainty and tentativeness about its medical assumption is clear. Here, Arizona has asserted its interest in maternal health after 20 weeks based on widely accepted medical findings. SER Tab 6 at 0094-096.

At the time that *Roe* was decided, the Supreme Court did not consider long-term risks from abortion, and assumed that abortion is safer than childbirth. Antique mechanical comparisons of mortality rates look only at immediate complications and short-term risks (those appearing by 6 weeks after termination).

But recent medical knowledge enlightens this issue. A 2010 study compared the mental health of women undergoing early versus late-term abortions, and the researchers found that women who underwent later abortions (13 weeks or beyond) reported "more disturbing dreams, more frequent reliving of the abortion, and more trouble falling asleep." Coleman, et al., *Late-Term Elective Abortion and Susceptibility to Posttraumatic Stress Symptoms*, 2010 Journal of Pregnancy 1, 7. *See also* L. A. Bartless et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 Obst & Gyn 729 (2004).

Since the Supreme Court's *Casey* decision, many studies have been published in European and American medical journals that note the existence of several long-term risks to the mother after abortion, especially the increased risk of

pre-term birth (PTB) in pregnancies that occur after an abortion.[3] Pre-term birth is a significant risk for the mother and a significant risk for cerebral palsy in the child. The national health care costs attributable to caring for mother and child after a pre-term birth subsequent to an earlier, aborted pregnancy have been calculated at $1.2 billion annually. Thorp, Hartmann & Shadigian, *Long-Term Physical and Psychological Health Consequences of Induced Abortion: Review of the Evidence*, 58 Obst. & Gyn. Survey 67 (2003), SER Tab 9 at 0125-155.

C. Arizona's Interest in Protecting Maternal Health Combined with Its Interest in Protecting Fetal Life Defeats Any Claims of Unconstitutionality.

Contrary to the arguments advanced by the Opening Brief, advances in medical science have highlighted the dangers of late-term abortions and accidental live births. In 2007, the Supreme Court in *Gonzales* acknowledged the problem: "[O]ne doctor would not allow delivery of a live fetus younger than 24 weeks because 'the objective of (his) procedure is to perform an abortion,' not a birth." 550 U.S. at 139. The Court thus recognized that abortions are not a benign

[3] *E.g.*, Swingle, et al., *Abortion and the Risk of Subsequent Preterm Birth: A Systematic Review with Meta-analyses*, 54 J. Repro Med. 95 (Feb. 2009) (SER Tab 9 at 0173-0181, cited by the Arizona Legislature, SER 0094-95); Shah & Zao, *Induced Termination of pregnancy and Low Birthweight and Preterm Birth: A Systematic Review and Meta-analyses*, 116 Brit. J. of Ob. Gyn. 1425 (October 2009); Freak-Poli et al., *Previous Abortion and Risk of Preterm Birth: A Population Study*, 22 J Maternal-Fetal Med. 1 (Jan. 2009).

procedure: in addition to endangering the mother, the abortion attempt may result in complications such as a live birth or infanticide.

Though state regulation of abortion at 20 weeks and after, with a *Casey* health exception, might be constitutional based solely on the state's compelling interest in maternal health, regulation at 20 weeks is further supported by a second important state interest: "the legitimate interest of the Government in protecting the life of the fetus that may become a child," *Gonzales*, 550 U.S. at 146. State regulation at 20 weeks and after recognizes that there is uncontroverted medical evidence that the unborn child feels pain and may in fact be viable, when the likelihood of error in estimating gestational age is considered. Anand & Hickey, *Pain and its effects in the Human Neonate and Fetus*, 317 New Eng. J. Med. 1321 (1987), SER Tab 10 at 0156-172; Antony Kolenc, *Easing Abortion's Pain: Can Fetal Pain Legislation Survive the New Judicial Scrutiny of Legislative Fact-Finding?*, 10 Texas Review of Law & Politics 171 (2005); Teresa Collett, *Fetal Pain Legislation: Is it Viable?*, 30 Pepperdine L. Rev. 161 (2003).

Late-term abortions account for approximately 51,000 nationwide abortions annually ("36,000 taking place at 16-20 weeks and 1.3% or 15,600 occurring beyond the 20th week of pregnancy"). Coleman, et al., *Late-Term Elective Abortion and Susceptibility to Posttraumatic Stress Symptoms*, 2010 Journal of Pregnancy 1, 1. Live-birth abortions are the direct and persistent result of this

national policy. In light of the Court's recognition in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), and as noted above, "there may be a 4-week error in estimating gestational age" (*Id.* at 530-31), live-birth abortions in the second trimester are bound to occur.

Arizona's regulation directly serves the states' interest in preventing the tragedy of "born alive abortions." Moreover, it protects an unborn child that—given the uncertainty in gestational dating—may, in fact, be already viable, or will likely be viable within a week or two. Thus, the State's interest in maternal health and the life of the unborn child (including the pain that abortion inflicts on him or her) is sufficient to sustain the law from Plaintiffs' challenge.

CONCLUSION

Chapter 250, Arizona Laws of 2012, complies fully with the Supreme Court's holdings regarding permissible regulation of abortions. This Court should affirm the District Court's judgment.

RESPECTFULLY SUBMITTED this 3rd day of October, 2012.

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STATEMENT OF RELATED CASES

There are no cases deemed to be related to this matter in this Court.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), and Ninth Circuit Rule 32-1, I certify that the Answering Brief of Appellee is proportionately spaced in 14-point, double-spaced, Times New Roman font, and contains 6,970 words (according to the word count feature of Microsoft Word, excluding the tables, the statement of related cases, this certificate, and the certificate of service).

/s/ William G. Montgomery
WILLIAM G. MONTGOMERY

CERTIFICATE OF SERVICE

I certify that on October 3, 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.

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

/s/ William G. Montgomery
WILLIAM G. MONTGOMERY