Appeal 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

STATE APPELLEES'ANSWERING BRIEF

Thomas C. Horne
Attorney General

David R. Cole
Solicitor General
Thomas M. Collins

Assistant Attorney General
1275 West Washington
Phoenix, Arizona 85007-1296
(602) 542-3333 (Phone)
(602) 542-8308 (Fax)
Attorneys for Defendants-Appellees Arizona Attorney General Tom Horne, Arizona Medical Board, and its Executive Director, Lisa Wynn

Table of Contents

Table of Authorities

Cases

Statutes

Issue Presented for Review

Does the United States Constitution, as construed by the Supreme Court, create a per se rule providing that a regulation of abortion after 20 weeks of gestation is facially unconstitutional and subject to permanent injunction where women remain free to seek abortion services prior to 20 weeks, the scientific evidence establishes the basis for the regulation, and the State has an unquestioned interest in the life of the unborn child, the health of the mother, and the regulation of the medical profession?

Jurisdictional Statement

The District Court exercised jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3) and entered judgment on July 30, 2012. (Appellant's Excerpts of Record ["E.R."] 001, 002.) A timely notice of appeal followed on July 30. (E.R. 017.) This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

Statement of the Case

This case concerns the scope of a federal court's authority to enter an injunction against a duly enacted law of the State of Arizona regulating the abortion of unborn children after 20 weeks of gestation. On April 12, 2012, Arizona Governor Jan Brewer signed House Bill (H.B.) 2036 into law. The

measure, which passed both houses of the Legislature with the votes of 57 of Arizona's 90 legislators (including two-thirds of the State Senate), provides for the regulation of abortions after the unborn child reaches 20 weeks of gestational age. The Act was to become effective on August 2, 2012, the general effective date of legislation for the 2012 Regular Session.

Prior to the Act's effective date, Plaintiffs Isaacson, Clewell, and Miller, ("Plaintiffs"), who are doctors who perform abortions, filed a Complaint and a Motion for Preliminary Injunction or Temporary Restraining Order seeking declaratory and injunctive relief on behalf of themselves and their patients. This claim for relief was based on their patients' alleged rights to substantive due process under the 14th Amendment to the United States Constitution. Plaintiffs named as defendants Attorney General Tom Horne, the Arizona Medical Board, and its executive director, Lisa Wynn, in their official capacities, along with the Maricopa County Attorney, Bill Montgomery, and the Pima County Attorney, Barbara Lawall.

The District Court scheduled a hearing on preliminary injunction for July 25, 2012. Defendant Montgomery filed a Motion to Dismiss on July 19, 2012, which was consolidated for hearing with the preliminary injunction. On July 30, 2012, the District Court issued an order denying Defendant

Montgomery's Motion to Dismiss, denying the relief sought by Plaintiffs, and, having determined that no factual issue remained, granting judgment in favor of all Defendants. Plaintiffs filed their notice of appeal, and on August 1, 2012, this Court granted Plaintiffs an emergency stay of the District Court's order pending this expedited appeal.

Statement of Facts

The facts relevant to this case are straightforward. In enacting H.B. 2036, the Arizona Legislature assessed the regulation of abortions and made specific determinations respecting the need for this new law. Specifically, based on its review of the relevant medical research, the Legislature determined that that "[a]bortion can cause serious both short-term and long-term physical and psychological complications for women." H.B. 2036, § 9, ¶ 1. Among the consequences are physical harms (including the perforation and scarring of internal organs, hemorrhaging, cardiac arrest, coma, and subsequent difficulties in bearing children) as well as psychological and emotional complications including "depression, anxiety or sleeping disorders" and ultimately death. *Id.* Furthermore, the Legislature concluded that "[a]bortion has a higher medical risk when the procedure is performed later in pregnancy." *Id.* at ¶ 2. Indeed, "the relative risk increases exponentially at higher gestations," culminating in the

"highest" "incidence of major complications . . . after twenty weeks of gestation." *Id.* at ¶¶ 2-3. Most gravely, the Legislature found that:

> 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.

Id. at ¶ 4 (internal citation omitted).

In addition to recognizing the State's interest in the life and health of pregnant women, *id.* at ¶¶ 5-6, the Legislature also found that abortion inflicts pain upon unborn children. *Id.* at ¶ 7 (finding that "[t]here 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."). In reliance on these findings, each of which is supported by the medical literature, the Legislature determined that certain regulations of abortions after 20 weeks of gestation were necessary to address the problems endemic in administering abortions. Specifically, the Legislature adopted Arizona Revised Statutes ("A.R.S.") Section 36-2159, which provides, among other things, that "except in a medical emergency," a physician or referring physician must determine the gestational age of an unborn child before "perform[ing], induc[ing] or attempt[ing] to perform or induce an

abortion" A.R.S. § 36-2159(A). Additionally, the legislation provides that "[e]xcept 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." A.R.S. § 36-2159(B).

The evidence before the District Court confirmed the legislature's findings, and established that, by 20 weeks of gestation, unborn children can suffer pain, that complications from abortion increase if the procedure does not occur by the eighth week of pregnancy, that abortions after 20 weeks are exceedingly rare, and that the vast majority of anomalies that might trigger a desire for abortion are identified by 20 weeks. (Appellee Montgomery's Supplemental Excerpts of Record ["S.E.R." 001, 002, 030, 032, 033.)

Standard of Review

This Court reviews the constitutionality of state statutes de novo. *Delano Farms Co. v. Cal. Table Grape Comm'n*, 318 F.3d 895, 897 (9th Cir. 2003).

Summary of Argument

Although Plaintiffs couch their argument in terms of an "as applied" challenge, it is, in reality, a facial challenge. It does not purport to be a challenge based on some discrete set of circumstances in which a particular

individual sustains injury as a result of the operation of the statute. Rather, Plaintiffs flatly assert that no regulation of abortion like that contained in A.R.S. § 36-2159(B) can ever be constitutional. This is the essence of a facial challenge. Because Plaintiffs have not made a sufficient showing to sustain a facial challenge, the District Court's judgment should be affirmed.

Furthermore, Plaintiffs fundamentally misunderstand the Supreme Court's decision in *Gonzales v. Carhart*, 550 U.S. 124 (2007), which fully supports the District Court's judgment in this case and gives dispositive weight to the interests asserted by the State in the context of a facial challenge. No one can question the State's interest in the life of the unborn child and the health of pregnant women from the "outset" of pregnancy, *see Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (opinion of the court), yet Plaintiffs, in direct contravention of controlling precedent, would deny that interest any weight.

Argument

I. Plaintiffs have raised a facial, rather than, an as applied, challenge.

Plaintiffs assert that their claim is an "as applied" challenge to H.B. 2036. *See, e.g.*, Op. Br. at 14 (requesting an order "direct[ing] [the District Court] to enter a judgment declaring the Act to be unconstitutional as applied to pre-viability abortions, and a permanent injunction prohibiting

Defendants-Appellees. . . from enforcing the Act as applied to such medical care.") But Plaintiffs' artful attempt to avoid the fact that this is a facial challenge itself supports defendants' contention that the Court should uphold the law subject to a true as applied challenge. *Gonzales*, 550 U.S. at 168. ("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."). Furthermore, in couching this challenge as they do, Plaintiffs effectively concede that they cannot show "that the Act would be unconstitutional in a large fraction of relevant cases." *Id*. at 167-68.

Plaintiffs' assertion that the challenge is "as applied" is belied by their claim that "[t]he 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." Op. Br. at 16. Accordingly, this is a facial challenge and, as such, it fails on its own terms. The Opening Brief contains no citation to the record indicating how many women receive abortions after 20 weeks of pregnancy; instead, Plaintiffs assert that such evidence is irrelevant under *Casey*. Op. Br. at 20-21.[1]

---

[1] Plaintiffs attempt to rectify their apparent concession by noting (Op. Br. at 24 n .9) that in their filings below they "disagree[d] with the assertions underlying the State's interests in support of the Act. (internal quotation omitted). Nevertheless, Plaintiffs have not contested any of the factual findings on appeal and again reiterate that "any factual dispute about

Plaintiffs may have succeeded in correctly quoting *Casey*, but not without mischaracterizing the Court's holding. Although the Court concluded that a spousal notification requirement that applied to less than 1 percent of women was unconstitutional in that case, it did so based on the conclusion, supported by the record, that as to the category of women there was a particularized burden. 505 U.S. at 893-94. Here, in contrast, Plaintiffs make no such showing, and, in any event, as applied relief remains available. Although the record supports the conclusion that some doctors have performed abortions on patients after 20 weeks (E.R. at 040), such circumstances are exceedingly rare (*see* S.E.R. at 030). Plaintiffs do not argue that any woman could not receive an abortion before that time, but rather that a woman who finds herself in the exceedingly rare position of desiring an abortion after 20 weeks, and who is not otherwise exempted from the regulation, may face a restriction. That is not the *Casey* analysis. Furthermore, even if the reasoning of *Casey* suggests a facial challenge could succeed here, the Supreme Court itself has signaled its discomfort with this anomalous standard, that appears to treat abortion differently from other cases. *Gonzales*, 550 U.S. at 167 (noting potential conflict between *Casey* and other as applied cases). This discomfort is well-placed because

---

whether [the State's] interests are supported by competent evidence is similarly irrelevant." *Id.*

an expansive reading of *Casey*, such as that Plaintiffs propose, amounts to an effective displacement of the role of legislatures in the area of abortion, a position that is anathema to the proper role of the judiciary. *See Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 329-330 (explaining that broad injunctions substitute the Court's judgment for the legislature.). If there is a remedy, it must be sought by way of an as applied challenge.[2]

II. Regardless of the label placed on the challenge, the District Court correctly applied controlling case law.

Plaintiffs' principal claim in this respect is that the District Court erred in relying on *Gonzales*. But their efforts to distinguish *Gonzales* are unavailing and demonstrate the essential hollowness of their argument. For example, Plaintiffs assert that the issue in *Gonzales* "was not a ban, but the validity of a federal law *prohibiting* the use of a single method of abortion."

---

[2] In the event this Court concludes it has held otherwise, *see Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 920-21 (9th Cir. 2004), it should recognize that *Gonzales*, while not resolving the circuit split on the issue of facial challenges to abortion regulations, found that the challenge in that case failed under either test. Accordingly, this Court's rule must be considered in light of the Supreme Court's holding. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc) (holding that where "the relevant court of last resort" has "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable," then "a three-judge panel of this court and district courts should consider themselves bound by the intervening higher authority and reject the prior opinion of this court as having been effectively overruled").

Op. Br. at 19 (emphasis added). Plaintiffs attempt to evade this conceptual problem—that the Supreme Court has rejected a facial challenge to a "prohibition" that applies previability—by asserting that the difference is between how and when an abortion is performed. *Id.* But a regulation that specifies when, based on legislative findings and scientific evidence, an abortion may be performed (subject to exceptions and to as-applied challenges) does not, by its terms, "ban" abortion. In other words, Plaintiffs' argument turns on the notion that the statute prohibits abortions. *See* Op. Br. at 16. But nowhere does the statute suggest that is the case. The District Court correctly found that the statute permits abortions and that there is no substantial obstacle sufficient to support a facial challenge.

Plaintiffs' claim that certain regulations are per se unconstitutional is also belied by the Supreme Court's treatment of the health exception in *Gonzales*. There, the Court recognized that under its precedents, the lack of a health exception could create a facial constitutional problem, but observed that "there is documented medical disagreement whether the [prohibition of partial birth abortion] would ever impose significant health risks on women." *Id.* at 161-62. Thus, Plaintiffs' assertion that H.B. 2036 is per se unconstitutional cannot be squared with *Gonzales*, where, as here, the District Court found that the State has a valid interest in ensuring maternal

health and the Legislature found that medical complications are at their highest when abortions are performed after twenty weeks. H.B. 2036, § 9, ¶ 3. Even if there were medical uncertainty respecting whether abortion services outside of the regulations in H.B. 2036 "necessary to preserve a woman's health" the availability of services that are considered safe (which the District Court concluded are available) means the regulation is not "invalid on its face." *Gonzales*, 550 U.S. at 166.

III. H.B. 2036 advances the State's interests in the life of unborn children, maternal health, and the ethics of the medical profession.

Plaintiffs discount the State's interest in preventing pain to unborn children. But their cramped reading of the State's interest in life, presumably driven by their effort to render the District Court's findings "irrelevant," is profoundly mistaken. Op. Br. at 23-24. There can be no dispute that the "the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child." *Casey*, 505 U.S. at 846. Thus, the State may "use its voice and its regulatory authority to show its profound respect for the life within the woman." *Gonzales*, 550 U.S. at 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.

The *Gonzales* Court recognized that the State's interest encompassed concerns that a certain procedure itself compromised that interest where it blurred the line between infanticide and abortion. *Gonzales*, 550 U.S. at 159 ("It was reasonable for Congress to think that partial-birth abortion, more than standard D & E, 'undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world.'") (quoting congressional findings). This important interest, which recognizes the State's interest in life is not limited to merely preserving life, but to respecting it, demonstrates that the pain inflicted by abortion on unborn children is hardly irrelevant. Further, "[t]he State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion." *Id*. at 160. In short, states are not precluded from recognizing the essential humanity of unborn children and from enacting regulations that advance society's interest in protecting them.

Likewise, Plaintiffs suggest that the District Court incorrectly concluded that the State has an interest in preserving the health of mothers of unborn children. Op. Br. at 23-24 & n.24. But again, there can be no

dispute that the State has an interest in maternal health from the outset of pregnancy. *Casey*, 505 U.S. at 346. Plaintiffs suggest that, whatever interest the State has in maternal health, it cannot impose a regulation that potentially interferes with any mother receiving an abortion after 20 weeks of pregnancy. Op. Br. at 24. This reasoning turns *Gonzales* and *Casey* on their heads. Plaintiffs concede that any issue that concerns maternal health is irrelevant to their argument, *see* Op. Br. at 8 (disclaiming any fact as relevant other than their legal assertion that H.B. 2036 "prohibits . . . abortions in instances in which the fetus is not viable"), and assert that the facts contained in their brief "merely illustrate the ban's impact." *Id.* Thus, they do not dispute the facts that the District Court found, but assert that those facts are irrelevant. Op. Br. at 24 & n. 9. But these facts are palpably relevant because the State has an unquestioned interest in both maternal health and regulation of the medical profession. *See Gonzales*, 550 U.S. at 157 ("There can be no doubt the government 'has an interest in protecting the integrity and ethics of the medical profession.'" (quoting *Washington v. Glucksberg*, 521 U.S. 702, 731, (1997)); *Casey*, 505 U.S. at 846 (State's interest in maternal health arises at the inception of pregnancy). And, even if Plaintiffs challenged these findings as a factual matter, "[m]edical uncertainty does not foreclose the exercise of legislative power in the

abortion context any more than it does in other contexts." *Gonzales*, 550 U.S. at 165. "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." *Stenberg v. Carhart*, 530 U.S. 914, 968 (2000) (Kennedy, J., dissenting) (internal quotation marks and citation omitted).

IV. Plaintiffs' broad assertions concerning the right to abortion are not supported by the U.S. Supreme Court's holdings.

At its core, Plaintiffs' argument is that doctors are entitled to administer abortions at any time prior to viability. *See, e.g.*, Op. Br. at 21. But "[t]he law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community." *Gonzales*, 550 U.S. at 163. Indeed, even in *Roe v. Wade*, the Court acknowledged that the State has an "important and legitimate interest in protecting the potentiality of human life." 410 U.S. 113, 162 (1972). And, to the extent that *Roe* suggested that "[f]or the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician," 410 U.S. at 164, the Court later jettisoned Roe's trimester framework, *Casey*, 505 U.S. at 871-73, clarified

that the State's interest permits regulation pre-viability, *id.* at 869, recognized the State's strong interest in regulating the medical profession, *Gonzales*, 550 U.S. at 157, and ultimately concluded that a regulation that prohibits certain previability abortions survives a facial challenge, *id.* at 156. In light of these developments, Plaintiffs' assertions to the contrary cannot be correct. Plaintiffs' argument returns to the *Roe*-era contention, long-since abandoned, that doctors have special, constitutionally divined rights to administer certain procedures to their patients free from any State interest. That is not the law and has not been for at least two decades.

Conclusion

For the foregoing reasons, the District Court's judgment should be affirmed.

Respectfully submitted this 3rd day of October, 2012.

Thomas C. Horne
Attorney General

s/ David R. Cole
David R. Cole
Solicitor General

Thomas M. Collins
Assistant Attorney General

Attorneys for Defendants-Appellees Arizona Attorney General Tom Horne, Arizona

Medical Board, and its
Executive Director, Lisa Wynn

Statement of Related Cases

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

Certificate of Compliance with Rule 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,579 words, excluding the parts of the brief that Fed. R. App. P. 32(a)(7)(B)(iii) exempts.

2. 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 in fourteen-point Times New Roman type style.

Dated this 3rd day of October, 2012.

s/ Thomas M. Collins
Thomas M. Collins
Assistant Attorney General

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:

United States Court of Appeals
Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

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

By: s/ Maureen Riordan

#2886744