No. 12-16670

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL A. ISSACSON, M.D., *et al.*,

Plaintiffs-Appellants,

v.

TOM HORNE, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
District of Arizona
Case No. 2:12-cv-01501-JAT-PHX (Hon. James A. Teilborg)

BRIEF OF AMICUS CURIAE CENTER FOR ARIZONA POLICY, INC., IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Center for Arizona Policy, Inc. ("CAP") is an Arizona non-profit corporation. It has no parent corporation, and no publicly held corporation owns ten percent or more of its stock.

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INTEREST OF AMICUS CURIAE

Pursuant to Rule 29(a), F.R.Civ.P., all parties have consented to the filing of this amicus brief.

According to its mission statement (found at http://www.azpolicy.org/about-us), CAP "is a nonprofit research and education organization committed to promoting and defending the foundational values of life, marriage and family, and religious liberty." It was "established in 1995 as a nonprofit organization dedicated to strengthening Arizona families through policy and education." *Id.* Its interest in this case is one of public policy. In 2012, CAP advocated for the passage of House Bill 2036 ("Act") before the Arizona Legislature, and it seeks to defend the Act before this Court. It is "dedicated to the protection of human life from the time of conception to the end of natural life. [It] promote[s] public policy to protect the unborn child and their mothers. In further support of life, [it] oppose[s] euthanasia, physician-assisted suicide, human cloning, and embryonic stem cell research." *Id.*

RULE 29(c)(5) STATEMENT

No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

There can be no reasonable doubt but that, as a matter of fact, human life begins at conception. Thus, the question presented in this case is when Arizona can extend the protection of its laws to human life. When it adopted the Act in 2012 by overwhelming majorities, the Arizona Legislature extended such protection to the unborn child at 20 weeks of gestation in some but not all cases. The Act made life and health exceptions. In contrast, Plaintiffs claim Arizona can never extend the protection of its laws to the unborn child before viability, Op. Br. at 15, which usually is attained at 23 to 24 weeks of gestation. That argument cannot stand before the Supreme Court's analysis in *Gonzalez v. Carhart*, 550 U.S. 124 (2007), and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). The test of constitutionality in both cases is whether a law imposes "a substantial obstacle to the woman's effective right to elect the procedure."

Gonzalez, 550 U.S. at 145 (quoting *Casey*, 505 U.S. at 846). The Arizona Act does not do so.

STANDARD OF REVIEW

Under Rule 52(a)(6), F.R.Civ.P., the District Court's findings of fact are reviewed "for clear error." *Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049, 1054 (2000). "This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 574 (1985). "Questions of law or mixed questions of law and fact implicating constitutional rights are reviewed de novo." *American-Arab Anti-Discrimination Comm'n v. Reno*, 70 F.3d 1045, 1066 (9th Cir. 1995).

ARGUMENT

I. LIFE WITHIN THE WOMB.

Courts have spoken to the question of life within the womb. Their factual findings or observations are that human life begins at conception. Experience would add that, unless interrupted prematurely, life then passes through multiple stages of development, from birth to infancy, childhood, adolescence, youth, middle age, the golden years, the dwindling years, and death.

The Supreme Court itself has acknowledged that "by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb." *Gonzalez*, 550 U.S. at 147. Yet the Supreme Court has been reticent to express any opinion on when, as a matter of fact and science, human life begins — at conception, at viability, or at some other point:

> The Supreme Court has been loath to address issues relating to the genesis of life. In *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), the Supreme Court expressed the belief that the question of when human life begins is moral, philosophical, and theological in origin. In its ruling, the Supreme Court stated, "When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." *Id.* at 159, 93 S.Ct. 705. "We need not resolve the difficult question of when life begins." *Id.* On several occasions post-*Roe*, the Supreme Court has reaffirmed its reticence to define when human life begins. *City of Akron v. Akron Center of Reproductive Health, Inc.*, 462 U.S. 416, 444, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983) (overruled on other grounds).

Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dep't of Health, 794 F.Supp.2d 892, 916 (S.D.Ind. 2011).

Other courts have dealt with the question of fetal development as a matter of fact. For instance, in a health insurance coverage case, the District Court made a detailed description of fetal development:

> In discussing fetal development, the Merck Manual acknowledges that from the date of conception "[t]he heart begins to pump plasma through the vessels on day 20." The Merck Manual, 1709 (Robert Berkow, M.D., et al. eds., 14th ed. 1982). At eight weeks of gestation, brain activity has been observed. Flower, M.J., Neuromaturation of the Human Fetus, 10 J.Med.Philos. 237–351 (1988), and Goldenring, J.M., Development of the Fetal Brain, 307 N.Eng.J.Med. 564 (1982). Anesthesia is used during fetal surgery as early as 18 weeks because the fetus feels pain. Levine, A.H., Fetal Surgery 54 Aorn 17–19, 22–27, 27–30, 30–32 (1991); Strickland, R.A. *et als.*, Anesthesia, Cardiopulmonary Bypass and the Pregnant Patient, 66 Mayo Clin.Proc. 411–429 (1991); Rosen, M., Anesthesia and Monitoring for Fetal Intervention, *in* The Unborn Patient, 2nd. edited by, M.R. Harrison, 172–181. Spontaneous movement of the unborn child begins between six and seven and one-half weeks gestation. de Vries, J.I.P., Visser, G.H.A., and Prechtl, H.F.R., The Emergence of Fetal Behavior, 7 Early Hum.Dev. 301–322 (1982). Obviously, at all times during gestation, the fetus ingests food and metabolizes oxygen.

Foster v. State Farm Mut. Auto. Ins. Co., 43 F.Supp. 89, 98 (W.D.N.C. 1994).

Turning to the abortion related cases, based on an affidavit given by bioethicist Paul Root Wolpe, Ph.D., an expert offered by Planned Parenthood of Minnesota, North Dakota, and South Dakota, the Eighth Circuit noted:

> Indeed, Dr. Wolpe's affidavit, submitted by Planned Parenthood, states that 'to describe an embryo or fetus scientifically and factually, one would say that a living embryo or fetus in utero is a developing organism of the species Homo Sapiens which may become a self-sustaining member of the

> species if no organic or environmental incident interrupts its gestation.' Wolpe Aff. ¶ 6. This statement appears to support the State's evidence on the biological underpinnings of § 7(1)(b) and the associated statutory definition.

Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 736 (8th Cir. 2008).[1] Similarly, the District Court had to weigh competing fact assertions regarding whether the fertilized egg constituted a human life in *Planned Parenthood of Indiana*, 794 F.Supp.2d at 916. Indiana offered evidence in support of its position in the form of an expert affidavit:

> Maureen L. Condic, Ph.D., a Professor of Neurobiology and Anatomy at the University Of Utah School Of Medicine whose primary research focuses have been the development and regeneration of the nervous system, testified as follows:
>
> > The unique behavior and molecular composition of embryos, from their initiation at sperm-egg fusion onward, can be readily observed and manipulated in the laboratory using the scientific method. Thus, the conclusion that a human zygote is a human being (i.e. a human organism) is not a matter of religious belief, societal convention or emotional reaction. It is a matter of observable, objective, scientific fact.

Id. at 916-17. Planned Parenthood offered a competing declaration contesting Dr. Condic's affidavit. *Id.* The District Court concluded,

[1] *Rounds* involved a law "amending the requirements for obtaining informed consent to an abortion as codified in S.D.C.L. § 34-23A-10.1." 530 F.3d at 726. Part of the information that the law required an abortion doctor to provide to a patient involved South Dakota's determination that an abortion would "terminate the life of a whole, separate, unique, living human being." *Id.*

"Having weighed the testimony of all declarants, the [District] Court resolves this conflict in Defendants (sic) favor." *Id.* at 917, n. 9.

In a pre-*Gonzalez* partial-birth abortion case, the Second Circuit made the following observation:

> Abortion is the killing of a fetus prior to birth. For centuries abortion has been a matter of intense controversy. Some consider abortion the illegitimate killing of a person. Others consider abortion a legitimate medical procedure used by a pregnant woman, in consultation with her doctor, to terminate a pregnancy prior to birth. Those on both sides of the controversy acknowledge that the fetus is a living organism, starting as a collection of cells just after conception and developing into a recognizable human form as the time for birth approaches.

Nat'l Abortion Fed'n v. Gonzalez, 437 F.3d 278, 281 (2nd Cir. 2006).[2]

Thus, the genuine question for the courts in this case is whether Arizona can extend the protection of its laws in specified instances to the 20-week unborn child under the Fourteenth Amendment. The District Court concluded that Arizona could do so, because the limitations imposed on abortion by Arizona between 20 weeks of gestation and viability created no significant obstacle to a woman's right to elect an abortion pre-viability. On

[2] The Second Circuit struck down the partial-birth abortion law then before it. 437 F.3d at 290. After the Supreme Court made its decision in *Gonzalez*, 550 U.S. at 168, "upholding the Partial-Birth Abortion Ban Act of 2003 against a facial attack identical to the one in this case," the Second Circuit vacated this opinion. 224 Fed. Appx. 88 (2nd Cir. 2007).

a facial challenge, the District Court's judgment was proper on the law and the facts, and should be affirmed.

II. VIABILITY IS NOT A BARRIER TO PREVENTING ABORTIONS AFTER 20 WEEKS WITH EXCEPTIONS FOR LIFE AND HEALTH.

A. Viability Is Not Rooted in the Fourteenth Amendment.

In *Roe*, the Supreme Court found that the word "person" as used in the Fourteenth Amendment did "not include the unborn." 410 U.S. at 158. Yet, as noted above, the Court shied away from answering the question of whether human life began at conception, noting differing religious and philosophical views of the matter. *Id.* at 160-62. Nonetheless, the Supreme Court found that a "pregnant woman cannot be isolated in her privacy." *Id.* at 159.

> She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. *See* Dorland's Illustrated Medical Dictionary 478-479, 547 (24th ed. 1965). The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold*, *Stanley*, *Loving*, *Skinner* and *Pierce* and *Meyer* were respectively concerned. As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

Id. The Court found that a State did have interests to protect in an unborn child:

> We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a non-resident who seeks medical consultation and treatment there, and that it has still another important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.'

Id. at 162-63.

The Court found the State's interests to be sufficient to override a woman's privacy right at viability:

> This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.

Id. at 163-64. But the Court's reasoning has been criticized as circular: "But no, it is viability that is constitutionally critical: the Court's defense seems to mistake a definition for a syllogism." John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 924 (1972).

In candor, the Court conceded that the right to privacy on which the right to an abortion was founded was not specified in the Constitution: "The

Constitution does not explicitly mention any right of privacy." *Id.* at 152. Yet the Court found the right of privacy to be "founded in the Fourteenth Amendment's concept of personal liberty . . . ." *Id.*

We appreciate the difficulties inherent in substantive due process analysis, which the Supreme Court elaborated on at length in *Casey*, 505 U.S. at 846-50, and capsulized in a quote from Justice Harlan:

> Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. *See* U.S. Const., Amdt. 9. As the second Justice Harlan recognized:
>
> > [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.

Casey, 505 U.S. at 849-50. The Court nonetheless derived a woman's liberty interest and privacy right from this analysis.

While this analysis may serve as the foundation of a woman's rights, *Roe*, 410 U.S. at 153, and *Casey*, 505 U.S. at 868-69, it provides no clear

guideposts for determining when a State's interest in a pregnancy becomes so compelling as to override a woman's privacy rights. Inevitably the recognition of the competing interests of a woman's right of privacy and of a State's interest in protecting an unborn child compels some line drawing at which one right trumps the other. *Id.* at 869-70. Yet it is in this quarter that, with respect and deference, one in fairness can conclude the Court's decision was arbitrary. *See Casey*, 505 U.S. at 870 ("Any judicial act of line-drawing may seem somewhat arbitrary . . . .")

Though the Court later described *Roe*'s viability rule as "a reasoned statement, elaborated with great care," *Casey*, 505 U.S. at 870, it remains true that the Court just as easily could have drawn the line at quickening, which it described as "the first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy." *Roe*, 410 U.S at 132. As Professor Ely observed, quickening "is the point that historically [has] been deemed crucial — to the extent that any point between conception and birth has been focused on." Ely, *supra*, 82 Yale L.J. at 924. One can see why the common law focused on quickening as the dividing line, because that is the point at which the body of an unborn child becomes animate, a milestone on the path an unborn child takes to personhood. For its part, the Court itself acknowledged quickening was the

position at which many, though not all, common law courts and commentators found a State could criminalize abortion. *Id.* at 133-36.

The Court could have chosen the position of the Conference of Commissioners on Uniform State Laws and of the American Bar Association, which in 1972 was 20 weeks. *Id.*, at 146. Ironically, the 1972 position of the ABA and of the Uniform Law Commissioners on the dividing line is the same as the 2012 position of the Arizona Legislature as expressed in the Act.

It could have selected the position of the American Law Institute, which was to allow abortion up to the 26th week. *Doe v. Bolton*, 410 U.S. 179, 206-07 (1973).

Yet the Court chose viability, which in 1973 was at 28 weeks. *Roe*, 410 U.S. at 160. This is a full efflorescence of Justice Jackson's dictum, "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Justice Jackson concurring in the result). Indeed, if "there were a super-Supreme Court," as Justice Jackson adverted to in *Brown*, 344 U.S. 540, it could have chosen a point earlier than viability and been consistent with the very

respectable authorities the Supreme Court itself noted in *Roe*, 410 U.S. at 162-64.[3]

B. Viability Is a Moving Target.

A bedrock notion of the rule of law is that we all stand with equal rights before the law. *See, e.g.*, Sec. I of the Virginia Declaration of Rights (June 12, 1776) ("That all men are by nature equally free and independent . . . ."); Sec. I of the Declaration of the Rights of the Inhabitants of the Commonwealth or State of Pennsylvania ("That all men are born equally free and independent . . . .").

Thus, it is disconcerting to see constitutional analysis linked to a variable concept.[4] Yet the Supreme Court has tied viability to the judgment of the abortion doctor, and frankly has acknowledged that viability will vary from unborn child to unborn child:

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[3] The apparent arbitrariness of the decision to make viability the dividing line has brought intense criticism on *Roe*. *See*, *e.g.*, Ely, *supra*, 82 Yale L.J. at 938 ("We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.") It also has led to the contention and controversy that have dogged nominations to the Supreme Court in recent times. *See also* Benjamin Wittes, *Letting Go of Roe*, THE ATLANTIC MAGAZINE (January/February 2005), *available at* http://www.theatlantic.com/magazine/archive/2005/01/letting-go-of-roe/303695/ ("Legislative compromises tend to be durable, since they bring a sense of resolution to divisive issues by balancing competing interests ...")

[4] In *Casey*, the Supreme Court dismissed such concerns. 505 U.S. at 860.

> The determination of when the fetus is viable rests, as it should, with the physician, in the exercise of his medical judgment, on a case-by-case basis." Brief for Appellee Danforth 26. "Because viability may vary from patient to patient and with advancements in medical technology, it is essential that physicians make the determination in the exercise of their medical judgment." *Id.*, at 28. "Defendant agrees that 'viability' will vary, that it is a difficult state to assess . . . and that it must be left to the physician's judgment." *Id.*, at 29.

Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 65 n.4 (1976).

With the advance of medicine since *Roe* was decided in 1973, viability has shrunk from 28 weeks to 24 or 23 weeks. Thus, with viability as the rule, the rights of women have receded and the interests of the States have proceeded over the last 39 years as medicine has marched forward. What's more, the key factor in determining viability appears to be the lung capacity of the unborn child. But there is nothing intrinsic in lung capacity for it to be the determinant of whether the unborn child can be aborted. Indeed, it is not fantastic to predict that medicine in the future, and perhaps not distant future, will invent devices to assist the lungs of the unborn child to absorb the necessary quantity of oxygen for the unborn child to survive outside the womb at far earlier than 23 weeks.

Viability suffers from a further defect in that it must vary depending on the skill of the attending physicians and the capability of the treating hospital. An unborn child stands a higher chance of survival outside the

womb when the physician treating the child is among the most skilled and the treating natal intensive care unit has the latest and most advanced equipment.

Viability suffers from yet an even further defect in that it is to be judged by the abortion doctor whose own financial interests may be served by providing abortion services. *See, e.g.*, Maryclaire Dale and Patrick Walters, *Pa. Abortion Doctor Charged with Eight Counts of Murder*, WASHINGTON TIMES (Jan. 19, 2011), *available at* http://www.washingtontimes.com/news/2011/jan/19/pa-abortion-doctor-charged-8-counts-murder/ ("Dr. Kermit Gosnell, 69, made millions of dollars over 30 years, performing as many illegal, late-term abortions as he could, prosecutors said . . . Dr. Gosnell 'induced labor, forced the live birth of viable babies in the sixth, seventh, eighth month of pregnancy and then killed those babies by cutting into the back of the neck with scissors and severing their spinal cord,' [District Attorney] Williams said.")

Finally, today's high resolution ultrasound has struck a blow at the legitimacy of viability as the dividing line from which it may never recover. It is difficult to view the unborn child living and moving within the womb with the intensity a modern sonogram now affords and not be deeply

impressed with the vitality and humanity of the being dwelling within the womb.

C. *Casey* and Undue Burden.

Given the shaky constitutional foundations of viability, it is hardly surprising that in *Casey* the Supreme Court abandoned *Roe*'s "trimester framework." 505 U.S. at 873. While the Court in *Casey* was at pains to emphasize it was not abandoning viability as the dividing line when a State's interests overtake a woman's liberty interest, *id.* at 871, logically viability coexists uneasily with undue burden, if at all. The undue burden test inevitably weakens viability as a bright line, because its whole point is to admit exceptions to the bright line. The Court in *Casey* minimized the logical tension between viability and undue burden:

> 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. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.

Id. at 874. But any burdening of the right to an abortion is going to prevent the exercise of the right in some instances, which the Court in *Gonzalez* candidly acknowledged: "It is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some

women to carry the infant to full term, thus reducing the absolute number of late-term abortions." 550 U.S. at 160.

Casey's "undue burden" rule struck a balance that *Roe*'s rigid trimester analysis did not permit. *See Gonzalez*, 550 U.S. at 146 ("*Casey* in short, struck a balance. The balance was central to its holding.") An undue burden "exists if a regulation's 'purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'" *Gonzalez*, 550 U.S. at 146 (quoting *Casey*, 505 U.S. at 848). In much more practical terms than *Roe* would have allowed, a burden will be upheld against a facial challenge if it does not limit the abortion right in too many cases. *Casey*, 505 U.S. at 895. *See also Gonzalez*, 550 U.S. at 167-68 (Respondents "have not demonstrated that the Act would be unconstitutional in a large fraction of relevant cases.") As shown below, the Act meets this standard.

D. A Sounder Balance.

The last 39 years of constitutional analysis have used a balancing test to weigh a woman's liberty interest against a State's interests in protecting life within the womb, but the Constitution does not mandate a specific result of the balancing. Where the balance tips depends on the facts and evidence placed in the pans, viewed in the light of today's knowledge of medicine and

science. But tomorrow's light may be different, as often has happened in the past. Science throws off the shackles of dogma. Newton once stood astride the world, yet Einstein replaced him at the pinnacle. Heisenberg, with his quantum analysis, now shares the pinnacle with Einstein.[5]

In 1973, the balance pointed to viability as the dividing line under the Supreme Court's analysis in *Roe*. Later, the balance shifted *sotto voce* to undue burden. The more practical analysis would be to eschew any rigid result, and leave the dividing line mutable to be fixed by balancing evolving legislative determinations against a woman's established liberty interest. The dividing line thus can move slowly as necessary to remain within society's currents and medicine's ever astounding developments.

III. THE ACT DOES NOT IMPOSE AN UNDUE BURDEN.

Though Plaintiffs had the burden in a facial challenge of proving the fact of a substantial obstacle, they wholly failed to carry that burden. Instead, they essentially stood on legal arguments and tried to resuscitate

[5] *See* Brian Vastag, *Second Experiment Indicates Faster-Than-Light Particles*, WASHINGTON POST (Nov. 17, 2011), *available at* http://www.washingtonpost.com/national/health-science/second-experiment-confirms-faster-than-light-particles/2011/11/17/gIQAlRlTWN_story.html.

Roe's rigid trimester analysis to form a bright line at viability. Undue burden eliminated a bright line rule in favor of a balancing rule.[6]

In the case below, the District Court found as a fact that Plaintiffs could not meet the required showing in a large fraction of the cases: "Accordingly the Court finds that it would be extremely rare to find a condition that could be diagnosed after 20 weeks that could not have been diagnosed earlier." Plaintiffs have made no effort to set these findings aside as clearly erroneous. Founded on the affidavit of Dr. Sawyer, a medical expert whose opinion the District Court had the discretion to accept, the District Court's finding must be sustained. *Anderson*, 470 U.S. at 574. The District Court's finding does not foreclose an as-applied challenge depending on the particular facts of a particular case. It does foreclose a facial challenge under the substantial obstacle/undue burden test. *Gonzalez*, 550 U.S. at 167-68.

CONCLUSION

Plaintiffs cannot unwind the clock. The Supreme Court has moved forward from *Roe* to *Casey* and *Gonzalez*. The test is now undue burden,

[6] Defendants-Appellees have developed the facts supporting the District Court's conclusions in detail, and we accordingly limit this section of this brief to avoid repetition.

defined as a substantial obstacle to the exercise of a woman's liberty interest. The District Court found the facts not to support the allegation of substantial obstacle. Such findings are entitled to deference on appeal. Plaintiffs' facial challenge should be rejected, and opponents of the Act should be left to an as-applied approach.

DATED on October 10, 2012.

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CERTIFICATE OF COMPLIANCE

I, David J. Cantelme, certify the following:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(d) because this brief contains 4,906 words, based on the word count of the word-processing system used to prepare the brief, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. The 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 2007 in 14 point Times New Roman Font.

DATED on October 10, 2012.

s/ David J. Cantelme
David J. Cantelme
Attorney for Amicus Curiae
Center for Arizona Policy, Inc.

CERTIFICATE OF SERVICE

I, David J. Cantelme, hereby certify that I caused to be 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 on October 10, 2012.

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

I further certify that one of the participants in this case is not a registered CM/ECF user. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participant:

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DATED on October 10, 2012.

s/ David J. Cantelme
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