NO. 12-16670

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

TOM HORNE, Attorney General of Arizona, in his official capacity; et al.,
Defendants - Appellees.

MOTION OF AMICUS CURIAE LIBERTY COUNSEL FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS-APPELLEES URGING AFFIRMANCE

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Pursuant to Fed. R. App. P. 29(b) and Ninth Circuit Rule 29-3, amicus curiae Liberty Counsel moves for leave to file the attached brief amicus curiae in support of Defendants' support of the constitutionality of Arizona's House Bill 2036 ("HB 2036").

INTEREST OF AMICUS

Liberty Counsel is an international nonprofit litigation, education and policy organization dedicated to advancing religious freedom, the sanctity of human life and the family. Founded in 1989 by Anita and Mathew Staver, who also serves as the Dean of Liberty University School of Law, Liberty Counsel has offices in Florida, Virginia, Washington, D.C., and Jerusalem, Israel and has hundreds of affiliate attorneys in all fifty states. A critical aspect of Liberty Counsel's mission is to preserve and protect the inalienable right to life guaranteed to all, including unborn children.

This case cuts to the core of the issue of the right to life for unborn children. The District Court's affirmance of Arizona's statute is a significant step toward restoring the right to life to unborn children. Liberty Counsel has amassed substantial materials on the history of protection of the right to life for unborn children and believes the information will be critical to this Court's determination.

REASON FOR GRANTING LEAVE TO FILE AMICUS BRIEF

This case represents a critical turning point in American jurisprudence. Do states have the ability to respond to advances in science and public policy by acting to protect unborn children, as stated in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 877 (1992) and *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007), or are the interests established in those cases merely illusory? Arizona has taken the Supreme Court's statements in *Casey* and *Gonzales* seriously and has adopted legislation that establishes a bright line rule for when the interests of the unborn child can outweigh a pregnant woman's desire to terminate her pregnancy.

The confluence of the various interests—medical, legal, social, economic and political— involved in this case make it particularly important for this Court to obtain detailed information on the ramifications of the Arizona legislation so that it can make a reasoned decision. Liberty Counsel has developed a body of information on the history and science behind protection of unborn children that will be of great assistance to this Court in its deliberations.

For these reasons, Liberty Counsel respectfully requests that this Court grant leave to file the attached amicus curiae brief.

CONSENT OF THE PARTIES

In accordance with Ninth Circuit Rule 29-3, Liberty Counsel has sought the consent of the parties to file an amicus curiae brief. Attorneys for Defendants-

Appellees and Plaintiffs-Appellants have consented to the filing of the amicus brief.

CONCLUSION

For the foregoing reasons, with the consent of the parties, Amicus Curiae Liberty Counsel requests that this Court grant leave to file the attached amicus curiae brief.

Dated: October 10, 2012.

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CERTIFICATE OF SERVICE

I certify that on October 10, 2012, I electronically filed the foregoing Motion for Leave to File Amicus Curiae Brief with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users (either as entities or through individual attorneys representing those offices) will be served by the appellate CM/ECF system.

Dated: October 10, 2012.

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CORPORATE DISCLOSURE STATEMENT

Proposed Amicus Curiae is not a nongovernmental entity with a parent corporation or a publicly held corporation that owns 10% or more of its stock.

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INTEREST OF AMICUS[1]

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This case cuts to the core of the issue of the right to life for unborn children. The District Court's affirmance of Arizona's statute is a significant step toward restoring the right to life to unborn children. Liberty Counsel has amassed substantial materials on the history of protection of the right to life for unborn children and believes the information will be critical to this Court's determination. Accordingly, in accordance with F. R. App. P 29(b), upon leave of this Court, Liberty Counsel respectfully submits this Amicus Brief for the Court's consideration.

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[1] Pursuant to Fed. R. App. P. 29(c)(5), amicus states that no party's counsel authored this brief in whole or in part, and that no party or person other than amicus, its members, and its counsel contributed money towards the preparation or filing of this brief.

INTRODUCTION

At stake in this case is whether Arizona's "legitimate and substantial interest in preserving and promoting fetal life" is anything more than a meaningless hollow shell. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 877 (1992); *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007). Arizona has enacted legislation in furtherance of its interests as defined in *Casey* and *Gonzales* by restricting abortions at and after 20 weeks gestation. In keeping with medical advances, history and common sense, the Arizona Legislature has said that a 20-week-old unborn child, pictured at right,[2] is a human being, not merely a "potential human being," whose rights must be balanced with the mother's rights when deciding whether an abortion can be performed.

Arizona's statute builds a bridge from the historical recognition of the humanity of the unborn child to modern medical science which continues to demonstrate the human attributes of the unborn child in increasing detail (as seen above). English legal scholar, William Blackstone, summarized the prevailing law at the time of the founding of the United States: "Life is the immediate gift of God,

[2] http://www.doctorsonfetalpain.com/ (last visited September 10, 2012).

a right inherent in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb."[3] Similarly, the prevailing principle in the medical community at that time was that: **"**To extinguish the first spark of life is a crime of the same nature, both against our Maker and society, as to destroy an infant, a child, or a man…."[4] That remained the prevailing view in law and medicine in the United States through the middle of the 20th Century, when a societal shift prompted a "liberalization" of criminal laws involving sexual activity, which, in turn, led to a "liberalization" of restrictions against abortion.

Citing that trend, the United States Supreme Court concluded that unborn children were not persons under the 14th Amendment, but were merely "potential" persons until after an undefined period of "viability." *Roe v. Wade*, 410 U.S. 113, 158 (1973). Consequently, according to the Court, unborn children could be "terminated" without interference from the state until "viability," and after "viability," could be "terminated" if a health care provider believes that it is in the best interest of the mother's physical, psychological or emotional health. *Id.*, *see also, Doe v. Bolton*, 410 U.S. 179, 192 (1973).

Since *Roe* and *Doe*, advances in medical science have established the truth of the pre-20th Century view of the unborn child as fully, not merely "potentially"

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[3] 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 129-130 (Philadelphia, George T. Bisel Co. 1922).

[4] 2 Thomas Percival, THE WORKS, LITERARY, MORAL, AND MEDICAL OF THOMAS PERCIVAL, M.D., 430-431(London: Crutwell, 1807).

human and of the dangers of abortion to women. Arizona's H.B. 2036 responds to these advances, as evident in the legislature's inclusion, amid findings regarding health risks to pregnant women, a 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." H.B. 2036, 50th Leg., 2d Reg. Sess. § 9(A)(5) (Ariz. 2012).

Arizona appropriately exercised its rights, under *Casey* and *Gonzales* to preserve and protect fetal life when it enacted HB 2036. The District Court properly upheld the legislature's actions and this Court should affirm the District Court's decision.

ARGUMENT

I. PROTECTION OF UNBORN CHILDREN DATES BACK TO ANCIENT GREECE.

Long before modern medicine gave physicians a window into the womb and even before the process of conception, gestation and birth were fully understood, society recognized that unborn children were not merely lumps of tissue that could be discarded with impunity. The Hippocratic Oath, credited to Greek physician Hippocrates, specifically prohibited physicians from inducing abortion. One translation reads: "I will not give to a woman a pessary to produce abortion."[5]

[5] Frederick N. Dyer, THE PHYSICIANS' CRUSADE AGAINST ABORTION 10 (Science History Publications, USA 2005).

Another translation reads: "I will not give a woman an abortive remedy."[6] Thus, the medical profession was founded upon the foundation of recognition of and respect for the humanity of unborn children.

Building upon that foundation, Anglo-Saxon law before the Norman Conquest penalized abortion both civilly and ecclesiastically.[7] The common law disapproved of abortion as *malum in se* and sought to protect unborn children from the moment that their living biological existence could be proven.[8] By the 13th Century, scientists were teaching that a separate life existed once the unborn child's form became recognizable, at approximately 40 days gestation.[9] Law followed science as legal scholars condemned abortion of a fetus "formed [or] animated, and particularly if it be animated," as homicide.[10]

The Supreme Court majority in *Roe v. Wade*[11] characterized early reported cases in the 14th Century, which did not classify abortion as "murder," as somehow reflecting a medieval common law "freedom" for pregnant women to

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6 *Id.*

7 Robert M. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORDHAM L. REV. 807, 816 (1973) (citing G. Grisez, ABORTION: THE MYTHS, THE REALITIES, AND THE ARGUMENTS 186-87 (1970) and Quay, *Justifiable Abortion-Medical and Legal Foundations*, 49 GEO. L.J. 395, 431 (1961)).

8 *Id.*

9 *Id.*

10 *Id.*

11 410 U.S. 113 (1973).

procure abortions without threat of criminal sanction.[12] In fact, however, the early cases merely reflected the state of scientific knowledge at that time in the context of the stringent proof requirements for a murder conviction.[13] Legal and medical experts did not have the scientific tools available to determine whether a child who was stillborn following an injury or the ingestion of toxic substances was alive at the time of the injury or ingestion, and therefore could not make the "beyond a reasonable doubt" determination that the defendant had acted in a way that killed a child who was alive at the time of the incident.[14] Reviewing the early cases in context shows that the failure to indict was not due to a lack of recognition of the humanity of unborn children, but to problems of proof, *i.e.*, had the abortionist's act really been the cause of a stillbirth or the death of a child shortly after an unsuccessful abortion?[15] The cases recognized that killing an unborn child was a crime, but proof problems made prosecution and conviction for homicide difficult.[16]

Nevertheless, some 16th Century legal scholars used the early cases to inaccurately claim that, as a practical matter, abortion was not a crime−an assertion

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12 Byrn at 816-817.

13 *Id.* at 818.

14 *Id.* at 817.

15 *Id.* , citing Cyril C. Means Jr., *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335 (1971),translating Y. B. 1 Edw. 3, fol. 23, Mich. pl. 18 (1327).

16 *Id.* at 819.

that the *Roe* majority adopted, in part, as justification for the conclusion that the unborn child was not protected by the Fourteenth Amendment.[17]

In the 17th Century, English commentators developed definitions to assist with the problems of proof that plagued early cases. English legal scholar Sir Edward Coke drafted a definition of abortion that became a fixture in English law:

> If a woman be quick with childe, and by a Potion or otherwise killeth it in her wombe; or if a man beat her, whereby the childe dieth in her body, and she is delivered of a dead childe, this is a great misprison [misdemeanor], and no murder: but if the childe be born alive, and dieth of the Potion, battery, or other cause, this is murder: for in the law it is accounted a reasonable creature, *in rerum natura*, when it is born alive.[18]

Coke recognized that, in the context of 17th Century medical knowledge, the difficulty of proving that a child was alive in utero at the time of injury or ingestion of toxins meant that the birth of a stillborn child could not be proven to be murder.

As the 17th Century came to a close, "the law of abortion appears to have been as follows:"[19]

> First, an abortion of a woman "quick with child" resulting in the live birth and subsequent death of the child was either murder or "a great crime." Second, an abortion of a pregnant woman "quick with child" resulting in a stillbirth was a "great misprision." Third, an abortion of a pregnant woman, at any stage of pregnancy, which resulted in her death, was felony murder. Fourth, every unborn child was "a person *in rerun natura*" at common law except that problems of proof precluded such a designation in criminal abortion situations. Fifth, at the very

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17 *Id.*

18 *Id.* at 819-820, citing E. Coke, INSTITUTES OF ENGLISH LAW III 50 (1644).

19 *Id.* at 822-823.

> least, abortion was regarded as *malum in se*, a secular wrong to the unborn child, and can hardly be said to have been considered a "freedom" of the pregnant woman. Sixth, the 1327 and 1348 cases are not contrary to any of these rules.[20]

Legal commentator Sir Matthew Hale, like Coke, characterized abortion as a great crime, but did not include it as murder or homicide because of proof problems inherent in obtaining a murder conviction.[21] As was true with Coke, Hale recognized that the unborn child is a living human being.

> But if a woman be with child, and any gives her a potion to destroy the child within her, and she takes it, and it works so strongly, that it kills her, this is murder, for it was not given to cure her of a disease, but unlawfully to destroy her child within her, and therefore he that gives a potion to this end, must take the hazard, and if it kill the mother, it is murder, and so ruled before me at the assizes at Bury in the year 1670.[22]

Blackstone echoed Coke's and Hale's statements regarding the humanity of the unborn child, and added detailed discussion of various legal scenarios to help clarify the definitional problems that had plagued courts that sought to punish abortionists but were unable to establish evidence of a living being at the time of injury:

> Life is the immediate gift of God, a right inherent in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a women is quick with child, and by a potion, or otherwise, killeth it in her womb; or if

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20 *Id.*

21 *Id.* at 821-822, citing 1 M. Hale, HISTORY OF THE PLEAS OF THE CROWN 433(1736).

22 *Id.*, citing M. Hale at 429-430.

> anyone beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or manslaughter, But the modern law doth not look upon this offence in quite so atrocious a light, (but if the child be born alive, and afterwards die in consequence of the potion or beating, it will be murder and of course those who, with a wicked intent, administered the potion, or advised the woman to take it, will be accessories before the fact, and subject to the same punishment as the principal), but merely as a heinous misdemeanor. An infant *in ventre sa mere* or in the mother's womb, is supposed in law to be born for many purposes. It is a capable of having a legacy, or a surrender of a copyhold estate, made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation as if it were then actually born. And in this point the civil law agrees with ours.[23]

Thus, Blackstone introduced the concept of "quickening," when the mother feels the baby's movements, as a starting point for legal recognition of a right to life for unborn children.

Building upon that foundation, legislators, courts and medical professionals in the 19th Century erected a number of milestones in legal protection for the unborn in England. In 1803, England adopted the first statute to provide abortion protection for the preformed child.[24] It imposed greater penalties for an abortion of a woman "quick with child" than one performed on a woman "not being, or not being proved to be, quick with child."[25] It is noteworthy that the statute punished

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[23] 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 129-130 (Philadelphia, George T. Bisel Co. 1922).

[24] Byrn at 824 (citing 43 Geo. 3 ch. 58, § 2 (1803)).

[25] *Id.*

abortion on a woman before quickening, which illustrated an increased sensitivity to the unborn child's right to life at all stages of gestation.[26]

In the same vein, in the same year physician Thomas Percival published his widely quoted treatise, *Medical Ethics*, which included blistering attacks on physicians who performed abortions. Dr. Percival wrote:

> To extinguish the first spark of life is a crime of the same nature, both against our Maker and society, as to destroy an infant, a child, or a man; these regular and successive stages of existence being the ordinances of God, subject alone to His divine will, and appointed by sovereign wisdom and goodness as the exclusive means of preserving the race, and multiplying the enjoyments of mankind.[27]

Anonymous[28] was the first case decided under the English statute and first to articulate the "quickening" rule for delineating when the right to life attaches to an unborn child. In *R. v. Wycherley*, the court reinterpreted an ancient common law rule which forbade the execution of a death sentence upon a woman "quick with child" when it instructed the jury that '"Quick with child' is having conceived. 'With quick child' is when the child has quickened."[29]

The change in the common law reflected in *Wycherley* was one result of advancements in medical science in the 19th Century. Prior to 1827, scientists believed that the male inseminated the female by implanting a seed which grew

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26 *Id.*

27 Dyer at 10 (citing 2 Thomas Percival, THE WORKS, LITERARY, MORAL, AND MEDICAL OF THOMAS PERCIVAL, M.D., 430-431(London: Crutwell, 1807).

28 170 Eng. Rep. 1310 (N.P. 1811)

29 173 Eng. Rep. 486 (N.P. 1838).

within the woman in distinct stages.[30] It was not until "formation" that a new, distinct, separate life could be said to exist, which is why "formation and animation" were the defining characteristics in Blackstone, Coke, Hale and other commentaries.[31] The ovum was discovered in 1827 and scientists understood the true nature of conception as co-semination instantly producing a new life.[32]

As a result, Parliament enacted a new anti-abortion statute that imposed a common penalty for all abortive acts. The unborn child was effectively protected from the moment of conception.[33]

II. PRE-TWENTIETH CENTURY AMERICAN COMMON LAW AND MEDICAL TREATISES PROTECTED UNBORN CHILDREN AS LIVE HUMAN BEINGS.

At the time that the 14th Amendment, upon which the *Roe* court relied for its finding of a constitutional right to abortion, was ratified in 1868, 28 of the 37 states prohibited abortion prior to quickening.[34] By 1883 Colorado had entered the union and seven additional states criminalized pre-quickening abortion.[35]

> Whatever may be said of the common law and the early nineteenth century, it is evident that in the period from 1859 to 1871, spanning a war fought to vindicate the essential dignity of every human being and the subsequent ratification of the fourteenth amendment in 1868, the

30 Byrn at 825.
31 *Id.*
32 *Id.*
33 *Id.*
34 Byrn at 836.
35 *Id.*

> anti-abortion mood prevalent in the United States can be explained only by a desire to protect live human beings in the womb from the beginning of their existence.[36]

American courts in the 19th Century consistently recognized the inherent humanity of unborn children from the time of conception, not merely from the time of "quickening." Some courts went a step further to affirm the sanctity of human life as a gift from God. The Supreme Judicial Court of Maine said that the legislature had changed the prior common law rule that an act causing an abortion prior to quickening was not a criminal offense. *Smith v. State*, 33 Me. 48, 57 (1851). The Vermont Supreme Court clarified that the unborn child was protected from the time of conception when it refused to construe a statute defining abortion as an act to procure a miscarriage of a woman "pregnant with child" to require proof that the child was alive in utero prior to the criminal act. *State v. Howard*, 32 Vt. 380, 399-400 (1859) (overruled on other grounds, *State v. Briggs*, 152 Vt. 531, 543 n.3 (1989)). Similarly, the North Carolina Supreme Court refused to confine the crime of abortion to after a woman is "quick with child" and held that "it may be committed at any stage of pregnancy." *State v. Slagle*, 83 N.C. 630, 632 (1880). *Accord, State v. Gedicke*, 43 N.J.L. 86, 90 (Sup. Ct. 1881)) (statute was designed to protect the life of the unborn child as well as the life and health of the mother); *People v. Sessions*, 58 Mich. 594, 596 (1886) ("To attempt to produce an abortion

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[36] *Id.*

or miscarriage, except when necessary to save the life of the mother, under advice of medical men, is an unlawful act, and has always been regarded as fatal to the child and dangerous to the mother."); *Lamb v. State*, 67 Md. 524 (1887)(abortion is a crime at common law without regard to the stage of gestation); *State v. Crook*, 16 Utah 212 (1898)(upholding law criminalizing acts intended to procure miscarriage without differentiating between stages of gestation).

At the same time, American physicians, following in the footsteps of their British colleague Dr. Percival, engaged in a zealous campaign to protect unborn children and halt illegal abortion. In his 1860 book, *On Criminal Abortion in America*, Dr. Horatio Storer made the case for protection of fetal life from the moment of conception, rejecting any arbitrary determination that life begins at some later stage.[37] Based upon that, he concluded that abortion was always a crime.[38] Other physician advocates campaigning against illegal abortion in the late 19th Century used similar language and made statements prescient of today's world of legal abortion. In 1885, Dr. John Floyd Banton wrote, "America stands today without a parallel among the nations of the world for the wholesale murder of human souls."[39] Dr. Edmund J. Doering bluntly wrote in an 1888 newspaper series: "The most infamous, the foulest of all crimes, is the murder of the unborn,

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37 Horatio M. Storer, M.D., ON CRIMINAL ABORTION IN AMERICA (1860)

38 *Id.* at 13.

39 Dyer, p. 213, citing John Floyd Banton, *Infanticide*, CHICAGO TIMES, December 16, 1888, at p. 1, col. 1.

and its punishment should be *death*, nothing less, as it *is* murder in the first degree."[40] He referred to physicians who performed abortions as "human monsters whose very existence is a plague and a public calamity."[41] In 1894, Dr. Mary Amanda Dixon Jones wrote: "Abortion, induced at any time, or for any purpose except for the mother's welfare, or for the preservation of the life of the fœtus, is a crime and a murder."[42] In language that is even more apropos today, Dr. Dixon Jones called abortion the "holocaust—a great army of little children" destroyed as a result of criminal abortion.[43] "A physician has no more right to destroy a human fœtus, because he imagines it, in future years, may be sickly, than he has a right to destroy the delicate baby, because it possibly may have before it years of invalidism."[44]

Consequently, at the dawn of the 20th Century, both common law and public sentiment solidly supported the concept that an unborn child was a human life from the time of conception. Notably, this was before the advent of today's medical technology that permits physicians and patients to actually view the developing child in utero.

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40 *Id.* at 214, citing, Edmund J. Doering, President of the Chicago Medico-Legal Society, *Infanticide*, CHICAGO TIMES, December 17, 1888, at p. 1, col. 1.

41 *Id.*

42 *Id.* at 228, citing Mary Amanda Dixon Jones, *Criminal Abortion, Its Evils and Its Sad Consequences*, 46 MEDICAL RECORD 9-16 (1894).

43 *Id.* at 229.

44 *Id.* at 231.

III. EARLY TWENTIETH CENTURY AMERICAN COURTS CONTINUED TO UPHOLD ABORTION LAWS AND OTHER ENACTMENTS THAT RESPECTED AND PROTECTED UNBORN CHILDREN.

American courts in the early 20th Century reinforced respect for and the inherent humanity of unborn children. Courts rejected defendants' attempts to interpret anti-abortion statutes to delay recognition of the humanity of unborn children and thereby escape conviction.

As the Nebraska Supreme Court said, "at common law it was thought that a person could not be guilty of abortion unless the pregnant woman was quick with child," but due to the confusion caused by its misinterpretation, the legislature made it clear that abortion was punishable at every stage of pregnancy. *Edwards v. State*, 112 N.W. 611, 612 (Neb. 1907). Under the Nebraska statute, the crime occurred when a physician or other person administered or advised that another administer any substance "to any pregnant woman with a vitalized embryo, or fœtus, at any stage of utero-gestation" with the intent to procure an abortion. *Id.* The court found that the use of the words "at any stage of utero-gestation," in the statute meant at any stage of pregnancy. *Id.*

The Alabama Court of Appeals explicitly stated that the unborn child acquires legal protection at the moment of conception, using language reminiscent of the criticism leveled against physicians by their 19th Century peers. *Trent v. State*, 15 Ala. App. 485, 488 (1916), *cert. denied*, 198 Ala. 695 (1917).

Accord, Bowlan v. Lunsford, 54 P.2d 666, 668 (Okla. 1936) ("anti-abortion statutes in Oklahoma were enacted and designed for the protection of the unborn child and through it society."); *State v. Cox*, 197 Wash. 67, 77 (1938) (Washington anti-abortion statute was "designed to protect the life of the mother as well as that of her child."); *Anderson v. Commonwealth*, 190 Va. 665, 673 (1950) (the abortion statute was aimed at protecting unborn children as well as pregnant women.); *Joy v. Brown*, 173 Kan. 833, 839 (1953)(statute is designed to protect the life of the unborn child and the mother); *State v. Siciliano*, 21 N.J. 249, 257-258 (1956)(abortion statute's object was protection of the unborn child and life and health of the mother).

These cases reflect the underlying child-protective worldview in society in pre- and immediately post-World War II America.[45] This worldview was exemplified by the "baby boom" which began with the end of the war in 1945 and saw births leap to 3.4 million in 1946 and 3.9 million in 1947 and by the public disapproval of "illegitimacy."[46] Less than a quarter century later the United States moved from that family and child-protective worldview to one under which "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Roe v. Wade*, 410 U.S. 113, 158 (1973). When viewed in the context of history, it is apparent that "*Roe v. Wade* is in the worst tradition of a tragic judicial

45 Judith A. Reisman, Ph.D., SEXUAL SABOTAGE, 88-89 (2011).

46 *Id.*

aberration that periodically wounds American jurisprudence and, in the process, irreparably harms untold numbers of human beings."[47] "Three generations of Americans have witnessed decisions by the United States Supreme Court which explicitly degrade fellow human beings to something less in law than 'persons in the whole sense.'"[48] One generation was present at *[Dred}Scott v. Sandford*, [60 U.S. 393 (1856)]another at *Buck v. Bell* [274 U.S. 200 (1927)[affirming state sterilization of mentally challenged adults] and now a third at *Roe v. Wade*."[49]

A review of the sociological history of the United States reveals that *Roe* was not a sudden seismic cultural shift, but the result of a gradual, decades-long social decline.

IV. TWENTIETH CENTURY AMERICAN JURISPRUDENCE REFLECTS A CULTURAL TRANSFORMATION THAT DIMINISHED THE HUMANITY OF THE UNBORN.

Even up to a year before the decision in *Roe,* the United States Supreme Court exhibited a respect for the sanctity of life that was mirrored in state court decisions that upheld prohibitions on abortions as protective of unborn children. Justice Brennan expressed the underlying sentiment behind the Court's invalidation of a death penalty statute: "[I]f the deliberate extinguishment of human life has any effect at all, it more likely tends to lower our respect for life

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47 Byrn at 809

48 *Id.*, citing *Roe v. Wade,* 410 U.S. at 162, "the unborn have never been recognized in the law as persons in the whole sense."

49 *Id.*

and brutalize our values." *Furman v. Georgia*, 408 U.S. 238, 303 (1972) (Brennan, J. concurring). That observation summarized the prevailing theme of the 20th Century up to that time, *i.e.*¸ respect for human life, including unborn children, as basic to civilization.

Only one year later, the *Roe* court concluded that an unborn child was not a "person" guaranteed the right to life under the 14th Amendment. *Roe v. Wade*, 410 U.S. 113, 158 (1973). At most, the unborn child becomes "potential life" subject to protection by the state at "viability." *Id.* at 163. Consequently, women can "terminate" their pregnancy, *i.e.*, kill their unborn "non-viable" child, without interference from the state. *Id.* at 163. As Professor Byrn observed, as a result of *Roe* and the companion decision in *Doe v. Bolton*, 410 U.S. 179 (1973), unborn children can legally be denied the right to life until birth.[50] The *Roe* Court based its sweeping reversal of centuries of legal and social protection of unborn children by focusing upon what it perceived as a lessening of recognition of the humanity of the preborn child.[51] That perception was, in turn, based upon societal changes that undermined the child-protective worldview prevalent immediately before and after World War II.[52]

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50 Byrn at 812-813.

51 *Id*. at 814.

52 *See*, Reisman, SEXUAL SABOTAGE, at 88-89.

Among those changes was the adoption of the American Law Institute's Model Penal Code ("MPC") in 1955. *Roe,* 410 U.S. at 140. According to the *Roe* Court, "a trend toward liberalization of abortion statutes has resulted in adoption, by about one-third of the States, of less stringent laws, most of them patterned after the ALI Model Penal Code." *Id.* The *Roe* court also relied upon changing opinions by the American Medical Association (AMA), American Public Health Association (APHA) and American Bar Association (ABA) which reflected a societal sea change affected by publication of two "values-free scientific stud(ies) of human sexuality," *Sexual Behavior in the Human Male*[53] and *Sexual Behavior in the Human Female,* by Alfred Kinsey.[54,55] That societal change included a shift of focus from protection of the unborn child to protection of the mother as the only "patient." *Id.* at 143-147.

The shift of focus was exemplified by the AMA, whose members championed the rights of the unborn in the physicians' crusade against abortion in the 19th Century, but then became supporters of abortion by focusing solely on the physical and mental health of the mother. *Id.* at 143. Citing "rapid changes in state laws and … judicial decisions which tend to make abortion more freely available" the association adopted resolutions which permitted abortions if they were not

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53 Alfred C. Kinsey, et. al., SEXUAL BEHAVIOR IN THE HUMAN MALE (1948).

54 Alfred C. Kinsey, et. al., SEXUAL BEHAVIOR IN THE HUMAN FEMALE (1953).

55 Judith A. Reisman, Ph.D., KINSEY: CRIMES & CONSEQUENCES 187-188 (Institute for Media Education, 4th ed. 2011).

contrary to "the best interests of the patient since good medical practice requires due consideration for the patient's welfare." *Id.* at 143. Only the mother was recognized as the patient, and the unborn child became merely "*pars viscerum matris"* [part of the mother's body], whose removal would "be like that of a limb or of any other portion of the body, whose loss is not absolutely attended with that of life."[56] Similarly, the standards adopted by the APHA in 1970 addressed only the mother seeking an abortion, which should "be readily available through state and local public health departments, medical societies, or other non-profit organizations." *Id.* at 144-145 (citing *Recommended Standards for Abortion Services*, 61 AM. J. PUB. HEALTH 396 (1971)).

Conspicuously absent from these resolutions by health care professionals was any consideration for unborn children, whose rights the members of these organizations were championing only a generation earlier. Tragically, the abandonment of protection of unborn children by these organizations coincided with scientific advances that provided indisputable evidence of the humanity of the unborn child through all stages of prenatal development.

[56] Storer, ON CRIMINAL ABORTION IN AMERICA, at 9.

V. ARIZONA'S STATUTE COMPORTS WITH MEDICAL SCIENCE, LEGISLATIVE PROTECTION OF THE UNBORN AND RECENT SUPREME COURT PRECEDENT CONFIRMING THE STATES' COMPELLING INTEREST IN PROTECTING FETAL LIFE.

Arizona's action to protect unborn children at and after 20 weeks gestation is in keeping with those scientific advances and with increasing legal protection provided to unborn children in non-abortion contexts. As the district court correctly concluded, it is also consistent with the Supreme Court's most recent abortion jurisprudence, which affirms the states' right to enact legislation to protect unborn children. *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 877 (1992); *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007).

A. Scientific Advances Regarding Pregnancy And Birth Bolster Recent Precedent And Justify The Arizona Legislature's Action To Protect Unborn Children.

Scientific advances have bolstered what physicians such as Dr. Doering and Dr. Percival said in the 19th Century, *i.e.*, the killing of an unborn child "*is* murder in the first degree,"[57] and "to extinguish the first spark of life is a crime of the same nature, both against our Maker and society, as to destroy an infant, a child, or a man…."[58] Science has established that the unborn child "is not an inert being," akin to the larval stage of insects, but "an active and dynamic creature, responding and even adapting to conditions inside and outside the mother's body as its readies

[57] Edmund J. Doering, President of the Chicago Medico-Legal Society, *Infanticide*, CHICAGO TIMES, December 17, 1888, at p. 1, col. 1.

[58] Thomas Percival, THE WORKS, LITERARY, MORAL, AND MEDICAL OF THOMAS PERCIVAL, M.D., 430-431.

itself for life in the particular world it will soon enter."[59] The unborn child not only absorbs the food, drink, and other substances ingested by his mother, but also her other sensory inputs.[60] Scientists have found that the unborn child does more than merely absorb these inputs.[61] Instead, the developing child actually uses these inputs as information, "biological postcards from the world outside."[62] The unborn child's brain and other organs are "tweaked" and "tuned" to provide the flexibility necessary to survive in the child's particular environment.[63] Scientific research regarding fetal development has revealed that, like all human beings, unborn children are profoundly affected by their environment from the outset, and their later years are very much a by-product of what occurs during their nine months in the womb.[64]

Such discoveries should have moved the medical community to advocate for greater regulation and restriction of abortion, and consequently, protection of the unborn child, particularly as pregnancy progresses. Instead, the medical

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59 Annie Murphy Paul, ORIGINS: HOW THE NINE MONTHS BEFORE BIRTH SHAPE THE REST OF OUR LIVES 5 (2010).

60 *Id.*

61 *Id.* at 6.

62 *Id.*

63 *Id.*

64 See, generally, *id.* at 3-6.

establishment has opposed restrictions on abortion, and, as exhibited in this case, opposed efforts to humanize and protect the unborn child.[65]

Notably, many of the same scientists who oppose efforts to protect unborn children as human instead of potentially human have rushed to conclude that "[a]ll individuals are sexual beings from "womb to tomb."[66] Paul Gebhard, a co-author of the Kinsey books, stated: "Children are sexual beings...[L]ittle males get erections even in the uterus. They are sexual from the word go…."[67] Dr. Mary Calderone, a medical director of Planned Parenthood who authored comments to the Model Penal Code relied upon by the *Roe* court, is a proponent of the idea that children are sexual even in utero, even as she touts abortion as an acceptable medical procedure.[68] Both propositions cannot be true. If an unborn child is merely a "potential" human as abortion proponents claim, then he cannot be a sexual being in the womb as many also claim. Conversely, if an individual is sexual in the womb, then he is fully, not merely potentially human, and the premise upon which *Roe*'s right to abortion is founded disappears.

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65 *See e.g*, Brief For Amici Curiae American College Of Obstetricians And Gynecologists And American Congress Of Obstetricians And Gynecologists In Support of Plaintiffs-Appellants And Reversal, Dkt. No. 18-2, Case No. 12-16670 (arguing that abortion is an "essential health-care service" with no mention of the unborn child).

66 Clint E. Bruess, et. al., SEXUALITY EDUCATION: THEORY AND PRACTICE 18 (2008).

67 Reisman, KINSEY: CRIMES & CONSEQUENCES, at 148.

68 *Id*. at 149.

Arizona's law complements advances in medicine and sides with the fully humanity of the unborn child by setting a bright line standard for when the balance of rights must weigh in favor of the child's right to life. It also complements the protection accorded to unborn children in other areas of the law in all 50 states.

B. States Have Extended Legal Protection To Unborn Children In All Areas of the Law.

Legislators have embraced the life-protective perspective of their 19th Century colleagues, as described by Blackstone,[69] by enacting laws that extend legal protection to unborn children. All of the states have extended legal protection to unborn children in one or more areas of the law–criminal, tort, health care, property and guardianship–and these protections have withstood repeated constitutional challenges.[70] "It is surely an anomaly that, in every area of law but one–abortion–the States may define the legal status of the unborn child and confer legal rights upon the unborn child."[71]

That anomaly flies in the face of both medical science and recent Supreme Court jurisprudence clarifying states' continuing interest in protecting unborn life.

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69 *See* footnote 22 and accompanying text.

70 Paul Benjamin Linton, *The Legal Status of the Unborn Child under State Law* (forthcoming article to be published in Vol. 6, No. 1, of the UNIVERSITY OF ST. THOMAS JOURNAL OF LAW & PUBLIC POLICY), at 20. Available at http://ssrn.com/abstract=2121574 (last visited September 18, 2012).

71 *Id.*

Arizona's law is one step toward resolving the anomaly and bringing all aspects of law in sync with science.

C. Arizona Acted Consistently With Precedent To Protect Fetal Life.

Arizona balanced the rights of the unborn child with the rights of the pregnant woman in a manner consistent with *Casey* and *Gonzales* when it established an objective standard for when the child's right to life takes precedence over the mother's interest in terminating her pregnancy. Abortion proponents, including Appellants, continue to rely upon the vague "viability" standard, first articulated in *Roe*, to strike down state attempts to protect fetal life. *See Roe v. Wade*, 410 U.S. 113, 163 (1973). While the *Roe* majority stated that the "compelling" point for the state's interest was at "viability," it did not provide an objective definition of the term. *Id.* In fact, the *Roe* court "failed to offer any constitutional principle connecting state regulatory power and the value of developing fetal life that—when combined with the Court's definition of viability—would entail the conclusion that the state can only prohibit abortion of a viable fetus."[72] The *Casey* court abandoned *Roe*'s trimester framework, but said it was maintaining the viability concept which lay at the heart of the trimester framework. *Casey*, 505 U.S. at 870. However, the Court still did not provide

[72] Randy Beck, *Gonzales, Casey, and The Viability Rule*, 103 NW. U. L. REV. 249, 270 (2009).

constitutional justification or objective guidelines for "viability."[73] Furthermore, the viability discussion was not relevant to the constitutionality of the challenged regulations, and potential justifications for the viability rule played no more than a de minimis role in the parties' briefs, so the Court's discussion of viability was arguably *dicta* that cannot be used to support striking down of Arizona's law.[74]

This is particularly true in light of the *Casey* court's emphasis on the states' "legitimate and substantial interest in preserving and promoting fetal life," which cannot be dependent upon an arbitrary, fungible standard such as "viability."[75] As Justice White explained:

> The governmental interest at issue is in protecting those who will be citizens if their lives are not ended in the womb. The substantiality of this interest is in no way dependent on the probability that the fetus may be capable of surviving outside the womb at any given point in its development, as the possibility of fetal survival is contingent on the state of medical practice and technology, factors that are in essence morally and constitutionally irrelevant. The State's interest is in the fetus as an entity in itself, and the character of this entity does not change at the point of viability under conventional medical wisdom. Accordingly, the State's interest, if compelling after viability, is equally compelling before viability.

Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 795 (1986) (White, J., dissenting). The difference between a "pre-viable" and "post-viable" fetus is not a difference in kind, but merely a difference in degree of

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73 *Id.* at 271.

74 Randy Beck, *The Essential Holding of Casey: Rethinking Viability*, 75 UMKC L. REV. 713, 718-719 (2007).

75 *Id.* at 726.

development, which is not a constitutionally relevant distinction for purposes of restricting state regulation of abortion.[76]

Gonzales further diminished the "viability" standard while emphasizing the state's right to "express profound respect for the life of the unborn" when it upheld a law prohibiting a particular abortion procedure without regard to whether the unborn child was "viable." *Gonzales*, 550 U.S. at 146. The court found that the "Act does apply both previability and postviability because, 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." *Id.* at 147. In keeping with that sentiment, Arizona has acted to protect that living organism at a stage when evidence shows that the balance between the child's interests and the mother's interests weighs in favor of protecting the unborn child. As the district court properly held, that act does not violate the Constitution.

CONCLUSION

Arizona's Legislature acted in conformance with science, history and the Supreme Court's most recent precedents when it enacted HB 2036 and created a bright-line rule for the protection of unborn life.

[76] *Id.* at 728.

This Court should affirm the decision of the district court in upholding the law.

Dated: October 10, 2012

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached Brief for Amici Curiae, has a typeface of 14 points and contains 6,676 words, exclusive of exempted portions.

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CERTIFICATE OF SERVICE

I certify that on October 10, 2012, I electronically filed the foregoing Brief for *Amicus Curiae* with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

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