Appeal No. 12-16670

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL A. ISAACSON, M.D., et al.,

Plaintiffs-Appellants,

v.

TOM HORNE, et al.,

The State-Appellees.

On Appeal from the United States District Court for the District of Arizona
The Honorable James A. Teilborg, Presiding
Civil Action No. 2:12-cv-01501-JAT-PHX

APPELLANTS' REPLY BRIEF

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SUMMARY OF ARGUMENT

The Act bans abortions beginning at 20 weeks of pregnancy and is unconstitutional as applied to abortions prior to viability. Appellees (the "State") attempt to avoid this result by mischaracterizing the Act as a mere regulation, and not a ban. The Act does not "regulate" pre-viability abortions at and after 20 weeks under any legal or common sense understanding of that term. Specifically, that women can still access abortions prior to 20 weeks, and that the Act provides a narrow medical emergency exception, do not change the fundamental operation of the Act, which is to criminalize abortion at 20 weeks. As such, regardless of what interests the State asserts to justify it, the Act cannot stand.

Appellants (the "Physicians") are entitled to relief because they have shown that the Act is unconstitutional as applied to pre-viability abortions. Because the Physicians do not challenge the Act in its entirety, but only as to pre-viability abortions, this is an as-applied and not a facial challenge. Ultimately, however, the characterization of the case as facial or as-applied makes no difference: it relates only to the appropriate remedy, and not the propriety of the case in the first instance. Here, the appropriate remedy is declaratory and injunctive relief against the Act as applied to pre-viability abortion care.

ARGUMENT

I. THE ACT IS A BAN, NOT A REGULATION, AND THE STATE'S ARGUMENTS TO THE CONTRARY ARE NOT CREDIBLE.

Conceding that the Act must fall if it outright bans abortion at a point before viability, the State attempts to transform the Act from the ban that it is into a mere regulation. Indeed, the State's entire argument hinges on this mischaracterization: because it is a regulation, the State argues, the Act is subject to the substantial obstacle test; it passes that test; and it is validated by the State's purported interests. For the reasons demonstrated below, the State's argument, on all counts, is not credible.

A. The Act Is An Unconstitutional Ban.

The State does not — because it cannot — argue that a ban on pre-viability abortions could survive constitutional scrutiny. (*See* Appellants-Physicians' Brief ("Appellants' Br.") at 15-17, ECF No. 12.) Accordingly, the State attempts the impossible: to cast the Act as a mere regulation, rather than as the outright ban at 20 weeks that it plainly is. In making its argument, the State relies on two grounds: that the Act does not apply before 20 weeks, and that it contains a medical emergency exception. (*See*, *e.g.*, Appellee William Montgomery's Answering Brief ("Appellee Montgomery's Br.") at 12, ECF No. 29 ("[T]he statute at issue is a regulation, not a prohibition, since it permits abortion in defined circumstances."); *id.* at 17 (the Act "can only be read as a ban if one ignores the

express medical exception"); *id*. at 22 (The Act is "constitutional because it does not 'prohibit any woman from making the ultimate decision to terminate her pregnancy.' [*Gonzales v. Carhart*, 550 U.S. 124 (2007)] at 146 (2007) (quoting *Casey*, 505 U.S. at 879)");[1] (State Appellees Answering Brief ("Appellee State Br.") at 10, ECF No. 30 ("[A] regulation that specifies when . . . an abortion may be performed (subject to exceptions and to as-applied challenges) does not, by its terms, 'ban' abortion.").)

The State's position is thus that — as a matter of law — a ban is not a ban as long as it does not apply to every woman. Were it not the crux of the State's entire argument, this assertion would barely merit a response, for it necessarily rests on the premise that every Court of Appeals to strike a ban on pre-viability abortions, including this Court, has misread United States Supreme Court precedent. (*See* Appellants' Br. at 16-17 (citing cases striking down bans (with exceptions) on pre-viability abortion care, including at and after 22 weeks).) Indeed, were the State

[1] This quotation from *Gonzales* omits the sentence's first words: "*Before viability*, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy.'" 550 U.S. at 146 (quoting *Planned Parenthood of Se. Pa., Inc. v. Casey*, 505 U.S. 833, 879 (1992) (emphasis added). This telling omission only highlights the weakness of the State's argument. Indeed, the State's briefs often misrepresent the text or significance of several Supreme Court opinions. (*See, e.g.*, Appellee Montgomery's Br. at 10 (altering a quotation from *Gonzales*, 550 U.S. at 167); *id.* at 23 (citing unattributed dissent in *Stenberg v. Carhart*, 530 U.S. 914, 981 (2000) (Thomas, J., dissenting), as what the Court "held"); *id.* at 30 (quoting unattributed plurality opinion in *Webster v. Reproductive Health Services*, 492 U.S. 490, 516 (1989) (plurality opinion) (incorrectly cited to 492 U.S. at 530-31, as part of the Court's holding)).)

correct, then the Texas abortion ban at issue in *Roe v. Wade* would itself have been merely a regulation, as it "permit[ted] abortion in defined circumstances," (Appellee State Br. at 12), such as to "sav[e] the life of the mother," *Roe v. Wade*, 410 U.S. 113 (1973). This argument is obviously wrong.

The Supreme Court has never even suggested that a state may outlaw abortions at a pre-viability point in pregnancy, so long as it does not ban *all* pre-viability abortions. To the contrary, under the bright-line viability rule the Court established in *Roe* and affirmed in *Casey*, the state may not ban abortion at any point prior to viability, but it may regulate abortion as long as it does not impose a substantial obstacle. After viability, the state may ban abortion, as long as it provides an exception to protect the woman's life or health. *Planned Parenthood of Se. Pa., Inc. v. Casey*, 505 U.S. 833, 879 (1992), affirming *Roe*, 410 U.S. at 163.

Because the substantial obstacle test is thus integral to the viability rule, the State is incorrect in arguing that "*Gonzales* signals a shift in emphasis away from the viability rule to the 'substantial obstacle' test." (Appellee Montgomery's Br. at 19.) The State is also wrong in asserting that after "*Gonzales*, no 'bright-line' viability test exists." (*Id.* at 12.)[2] As demonstrated in the Appellants-Physicians'

[2] The State thus cannot say directly that *Gonzales* rejected the viability line. But even its unfounded claim that the case "signal[ed] a shift" would not change the outcome here. (*Id.* at 19.) Even if the constitutional bar to banning abortion before viability "rest[ed] on reasons rejected" in *Stenberg and Gonzales*, this Court would still be bound to apply *Casey*, which is directly applicable, and "leav[e] to th[e

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opening brief, the *Gonzales* decision left this framework undisturbed, and offers no basis whatsoever for upholding the Act. (Appellants' Br. at 18-21.)

Gonzales rejected the claim that a prohibition on one method of abortion imposed an undue burden — but did so because and only because the law did not reach the most common method ("the vast majority") of abortions at the relevant point in pregnancy. 550 U.S. at 150, 156, 164-65 (2007); (*see* Appellants' Br. at 19-20). It was, in other words, a regulation that passed the substantial obstacle test. The State is correct that that regulation — a prohibition on a single method — "affected 'both previability and postviability abortions,'" (Appellee Montgomery's Br. at 18 (quoting *Gonzales*, 550 U.S. at 156)), but that regulation determined only how, not whether, a woman could obtain an abortion. *Gonzales* thus confirms that the Act, which does not regulate but outright bans all methods at and after 20 weeks, cannot stand. (*See* Appellants' Br. at 18-24.)[3]

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Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

[3] The State seeks to bolster its position by arguing that the viability line is simply dicta. (Appellee Montgomery's Br. at 14-15.) This contention should be dismissed out of hand. In *Casey*, the Supreme Court stated that "[t]he woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is *a rule of law* and a component of liberty that we cannot renounce." 505 U.S. at 871 (emphasis added). The Court also noted that it had "twice reaffirmed [the viability line] in the face of great opposition," and was bound by stare decisis to continue to do so. *Id*. at 870. It strains credulity to suggest that this "rule of law" is not binding on this Court. *See supra* at 3, n.1.

B. The Medical Emergency Exception Cannot Save the Act.

The State's attempt to rely on the medical emergency exception to convert the Act's ban into a regulation is equally unavailing. The State argues that the Act is saved by what it styles its "medical exception" or "health exception." (*E.g.*, Appellee Montgomery's Br. at 12, 17, 19, 29.) First, as the Physicians pointed out in their opening brief, neither the presence nor the scope of a health or emergency exception is relevant to the constitutionality of a ban that applies before viability: such a ban is per se unconstitutional, without regard to what if any exceptions it may provide. (Appellants' Br. at 17 n.6.) For forty years, the Supreme Court has made clear that "the State . . . may . . . proscribe[] abortion" only "subsequent to viability," and even then an exception "for the preservation of the life or health of the mother" is required. *Roe*, 410 U.S. at 165-66 (*aff'd*, *Casey*, 505 U.S. at 879). Inclusion of that constitutionally-required "life or health" exception does not transform a ban into a mere regulation; nor, likewise, does the Act's inclusion of a (far narrower) "medical emergency" exception do so.[4]

[4] The State's attempt to paint the Act's "medical emergency" exception as a broader "health exception" has no merit: Under the Act, "Except in a *medical emergency*, a person shall not . . . induce an abortion . . . [after] twenty weeks." (ER at 84 (emphasis added).) The Act defines a "medical emergency" as a "condition that . . . necessitate[s an] . . . *immediate* abortion," or an abortion *without* "*delay*," to "avert her death or . . . serious risk of substantial and irreversible impairment of a major bodily function." Ariz. Rev. Stat. § 36-2151(6) (emphases added). Yet the State makes the implausible claim that the Act "does not require the doctor to wait for the emergency to be imminent." (Appellee

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Second, the State's attempt to support its position by declaring that the Act has a "*Casey* health exception" is sophistry. (*See* Appellee Montgomery's Br. at 12, 29.) There is no such thing as a "*Casey* health exception." The *Casey* Court never considered, let alone approved of, any medical emergency or health language as adequate to save a ban that applied before viability. While the Arizona Act's *medical emergency* exception is indeed identical to that upheld in *Casey*, the language has a vastly different impact in the context of the two very different laws.

Casey, which addressed a 24-hour waiting period, affirmed that this medical emergency language, by design, allows an immediate abortion when delay endangers the woman's health. In all other cases — including health conditions in which a delay would not cause "serious risk" of permanent and substantial harm — a woman is free to obtain an abortion after 24 hours. Under the Act, she remains banned from protecting her health unless and until her condition deteriorates to the point of needing an abortion "immediate[ly]" or without "delay."[5] Again,

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Montgomery's Br. at 18); *see* Merriam-Webster's Collegiate Dictionary 377 (2001 ed.) (defining "emergency" as a "state that calls for immediate action").

[5] As the District Court noted, the phrase "serious risk" can be interpreted in the Arizona law to encompass the same conditions that the medical emergency exception in *Casey* encompassed. (ER at 8.) But that does nothing to eliminate the temporal component of the medical emergency exception: the exception applies only when an abortion *without delay* is necessary to avert a "serious risk." Ariz. Rev. Stat. § 36-2151(6).

however, even were it plausible to excise the "emergency" from the "medical emergency" exception, as the State suggests, it could not save the Act.

C. Asserted State Interests Cannot Save the Act.

Because the Act is thus plainly a ban that applies before viability, it is *per se* unconstitutional; even if it were subject to the undue burden test, it would fail, as it imposes not merely a substantial obstacle, but an absolute obstacle, to pre-viability pregnancy termination starting at 20 weeks. (*See* Appellants' Br. at 16-17, 22-23.) The State therefore also necessarily fails in attempting to justify the Act on the grounds that it serves valid state interests. (*See* Appellee Montgomery's Br. at 18-22 (suggesting Act is valid because it is a regulation that "serves a valid purpose") (internal citations omitted); Appellee State Br. at 9-14 (arguing Act is valid because state may use its "regulatory authority" to further interests in fetal life, maternal health, and medical ethics) (internal citations omitted)).

First, because the Act is not a regulation but a ban that applies before viability, no state interest is strong enough to support it. *See Casey*, 505 U.S. at 846 ("Before viability, the State's interests are not strong enough to support a prohibition of abortion."). *See also supra* at 2-5; (Appellants' Br. at 15-17). Not even the State disputes that no state interest can justify a ban at a pre-viability point in pregnancy. Instead, the State relies again on the implausible claim that the Act is merely a regulation.

Second, however, even if deemed a regulation, the Act imposes a substantial obstacle to pre-viability abortion care, and therefore violates the Constitution without regard to what state interests it may or may not serve. While it is true that pre-viability regulations that do not impose a substantial obstacle must be supported by valid state interests, the presence of valid state interests cannot save a pre-viability regulation that does impose a substantial obstacle. *Casey*, 505 U.S. at 877 ("[A] statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends"); *see also Gonzales*, 550 U.S. at 146 ("Regulations which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn are permitted, *if they are not a substantial obstacle* to the woman's exercise of the right to choose.") (citing *Casey*, 505 U.S. at 877) (emphasis added). Accordingly, even were the State correct that the Act is a regulation, and that it serves valid state interests, it still could not survive constitutional scrutiny.

The State's assertions about its interests are thus irrelevant to the merits of this case, but they are worth noting simply because they illustrate yet again the weakness of its position. The State relies heavily, for example, on the claim that "facts . . . relied on by the Arizona Legislature[] establish that abortion by

20 weeks has higher rates of mortality and health complications for the mother than carrying the unborn child to term." (Appellee Montgomery's Br. at 25.) It is unsurprising that the State provides no record citation to support that claim: the legislature in fact had no evidence before it comparing abortion and childbirth;[6] none of the defense experts made the claim; the Physicians submitted evidence that "abortion is much safer for women than carrying to delivery in terms of both mortality and morbidity," (ER at 22) (citations omitted); and the claim is simply unsupportable (*see* Brief for *Amici Curiae* American College of Obstetricians & Gynecologists, *et al.*, ("*Amici* Br. Am. College of OB-GYNs") at 14-17, ECF No. 18-2).[7]

Even if there were evidence to support the claim, the State's argument fails because it fundamentally misconstrues the right at issue. While the Supreme Court

[6] Appellee County Attorney Montgomery is alone in claiming that the legislature considered such evidence; neither Attorney General Horne nor the legislature's presiding officers join him. (*See* Brief *Amici Curiae* of Andrew M. Tobin, Speaker of the Arizona House of Representatives, and Steve Pierce, President of the Arizona Senate ("*Amici* Br. State Legislators") at 4-7, ECF No. 52.)

[7] The contrary allegations of Amici Association of American Physicians & Surgeons, et al., ("*Amici* Br. Ass'n Am. Phys. & Surgs.") are not supported by their own evidence. For example, the "study out of Chile" which amici say "demonstrate[s] that childbirth is safer than abortion," (*Amici* Br. Ass'n Am. Phys. & Surgs. at 9-11, ECF No. 37), does not compare the relative safety of the two, and indeed states conclusively that Chile's "reduction in the M[aternal] M[ortality] R[atio] is not related to the legal status of abortion." E. Koch *et al.*, Women's Education Level, Maternal Health Facilities, Abortion Legislation and Maternal Deaths: A Natural Experiment in Chile from 1957 to 2007, PLoS ONE 7(5):e36613 (May 4, 2012), *available at* http://ncbi.nlm.gov/PMC/articles/PMC3344918 (last visited Oct. 18, 2012).

has recognized that an interest in maternal health can support regulation of the conditions under which a woman can obtain an abortion, it has never suggested that this interest justifies the imposition of a substantial obstacle to — much less a ban on — pre-viability abortion care. *See Casey*, 505 U.S. at 878 ("Regulations designed to foster the health of a woman seeking an abortion are valid *if they do not constitute an undue burden*.") (emphasis added).

It is for the woman, not a paternalistic state, to weigh medical risks and other factors to determine whether or not to continue her pre-viability pregnancy.[8] The State adds insult to paternalistic injury in pointing to health concerns such as "disturbing dreams," "trouble falling asleep," and risks of pre-term birth in future pregnancies. (Appellee Montgomery's Br. at 27.) As this Court recently noted in *McCormack v. Hiedeman*, Nos. 11-36010, 11-36015, __ F.3d __, 2012 WL 3932735, at *9 n.8 (9th Cir. Sept. 11, 2012): "Numerous medical studies have denounced any link between having an abortion and later mental illnesses." (citations omitted); (*see also* Amici Br. Am. College of OB-GYNs at 17-21

[8] The Legislators' Brief clearly demonstrates this paternalism. It affirms that the "Legislature weighed the risks associated with late-term induced abortion," and reached a decision. (*Amici* Br. State Legislators at 5.) Because it has done all the weighing, no individual woman need consider reasons for, and risks of, choosing abortion for herself at or after 20 weeks. Similarly, because diagnoses of fetal anomalies "should" or "could . . . have" occurred before 20 weeks (except in "rare" circumstances — which nevertheless do not constitute exceptions), their actual timing, and a woman's own process of decision subsequent to them, are irrelevant. (*See id.* at 11.)

("abortion does not increase psychological risks for women")). And to deny a woman a pre-viability abortion based on alleged risks to future pregnancies harkens back to the time when the then-dominant view of women primarily as child bearers impermissibly held legal sway. *See Casey*, 505 U.S. at 852 (the state cannot insist that a woman carry a pregnancy to term based on this view).[9]

In sum, the Supreme Court has squarely rejected the claim that any state interest, including an interest in potential life, can justify a ban on abortion prior to viability. The State's claims as to the number or strength of the interests it asserts do not change this inevitable result.

II. THE PHYSICIANS ARE ENTITLED TO THE RELIEF THEY SEEK BECAUSE THEY HAVE ESTABLISHED THAT THE ACT IS UNCONSTITUTIONAL AS APPLIED TO PRE-VIABILITY ABORTIONS.

As alternative grounds for affirmance, the State argues that the Physicians have brought an improper facial challenge, and that an as-applied challenge on

[9] The State also argues, albeit obliquely, that the ban is justified in order to prevent "accidental live births" or because of an invented "inherent difficulty in ascertaining viability." (Appellee Montgomery's Br. at 18, 28.) This argument does not withstand even superficial scrutiny. These phantom problems were not identified by the Arizona legislature and are reflected nowhere in the record here. Indeed, the undisputed record is that 20 weeks is a pre-viability point in pregnancy. (*See* ER at 9.) In any event, although Arizona is free to ban post-viability abortion, which it does, *see* Ariz. Rev. Stat. § 36-2301.01 (A)(1), binding precedent forecloses it from banning abortion at any specific number of weeks; *Planned Parenthood of Cent. Mo., Inc. v. Danforth*, 428 U.S. 52, 64 (1976) ("it is not the proper function of the legislature to place viability . . . at a specific point in the gestation period"); *see also Colautti v. Franklin*, 439 U.S. 379, 388-89 (1979) (same); *McCormack*, 2012 WL 3932735, at *7 n.5 (same).

behalf of an individual woman is the only means by which a court may review the constitutionality of the Act. (Appellee State Br. at 6-9; Appellee Montgomery's Br. at 9-10.) This argument must also be rejected.[10]

First, the State is incorrect that the label it ascribes to the case—either facial or as-applied—dictates whether the case was properly brought in the first place. (*See* Appellee Montgomery's Br. at 11 ("This facial attack . . . is not ripe for consideration by this or any other court."); *id*. ("Plaintiffs ask the federal courts for nothing more than an advisory opinion"); Appellee State Br. at 9 ("If there is a remedy, it must be sought by way of an as applied challenge.").) As the Supreme Court has explained, "[t]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 130 S. Ct. 876, 893 (2010)

[10] Indeed, the State ignores the numerous cases in which the Supreme Court and this Court have reviewed pre-enforcement challenges to abortion restrictions brought by physicians on behalf of their patients, and not by individual patients. *See*, *e.g.*, *Casey*, 505 U.S. at 845; *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 914 (9th Cir. 2003); *Planned Parenthood of S. Ariz., Inc. v. Lawall*, 180 F.3d 1022, 1024-27 (9th Cir. 1999), *opinion amended on denial of reh'g*, 193 F.3d 1042 (9th Cir. 1999). Moreover, to the extent the State conflates the issue of facial challenges with third-party standing, the Supreme Court has explicitly held that physicians who provide abortion care have standing to raise their patients' claims. *See*, *e.g.*, *Casey*, 505 U.S. at 845; *Singleton v. Wulff*, 428 U.S. 106, 117 (1976) (plurality opinion); *Wasden*, 376 F.3d at 916-17; *Planned Parenthood of S. Ariz., Inc. v. Woods*, 982 F. Supp. 1369, 1376 (D. Ariz. 1997).

(citing *United States v. Treasury Emps.*, 513 U.S. 454, 477-78 (1995)). Rather, "it goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Citizens United*, 130 S. Ct. at 893. Thus, as demonstrated below, regardless of whether the case is deemed facial or as-applied, the Physicians are properly before this Court and are entitled to the relief they seek.

That being said, the Physicians have plainly mounted an as-applied challenge. They challenge the Act as applied only to pre-viability abortions; they do not perform post-viability abortions and do not challenge the Act as applied to those procedures. (ER at 64 ¶ 2.) According to this Court, the Physicians' case is thus the "paradigmatic as-applied" challenge:

> As a general matter, a facial challenge is a challenge to an entire legislative enactment or provision. . . . A paradigmatic as-applied attack, by contrast, challenges only one of the rules in a statute, *a subset of the statute's applications*, or the application of the statute to a specific factual circumstance.

Hoye v. City of Oakland, 653 F.3d 835, 857 (9th Cir. 2011) (quoting Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1334 (2000) (other citations omitted) (emphasis added). The State's attempt to cast this case as a facial challenge lacks merit.

Notwithstanding the above, the State appears determined to characterize this case as a facial challenge because it believes that doing so will subject the Physicians' case to the "large fraction" test. But even were that so, the Physicians

would still prevail. *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, (9th Cir. 2003), sets forth the applicable analysis:

> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 895 (1992), held that a facial challenge to an abortion statute will succeed where, "in a large fraction of the cases in which [the statute] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion" (emphasis added). . . .The relevant "large fraction" is in turn to be computed with reference only to "*the group for whom the law is a restriction, not the group for whom the law is irrelevant*," *i.e.*, those upon whom a challenged law would have some actual effect, rather than all women, or all minors, seeking an abortion. *Id*. at 894.

376 F.3d at 920-21 (footnote and additional citations omitted) (emphasis added).[11]

Here, the relevant group for whom the ban is a restriction is women seeking pre-viability abortions at or after 20 weeks. As already discussed, *supra* at 8-12, for the vast majority of women in this group (and certainly a large fraction), the Act will operate not merely as a substantial but as a total obstacle. Thus, because Plaintiffs can show that the Act would prevent a large fraction of the relevant

[11] Contrary to the State's suggestion, (Appellee State Br. at 9 n.2), *Gonzales* does not support departure from the *Wasden* decision. While the *Gonzales* Court noted that the burden challengers must meet in a facial challenge to abortion statutes "has been a subject of some question," it did "not resolve that debate." 550 U.S. at 167. The Ninth Circuit has adopted the large fraction test, and *Gonzales* does not support departure from that precedent. *See supra* at n.2 (citing *Rodriguez*, 490 U.S. at 484).

group of women from obtaining a pre-viability abortion, they would still prevail — even if this were a facial challenge to which the large fraction test applied.

The State's attempts to avoid this conclusion are unavailing. For example, the State argues that the Physicians have not established "that any woman could not receive an abortion before" 20 weeks and that it is not sufficient to show that a woman "in the exceedingly rare position of desiring an abortion after 20 weeks" may face a restriction. (Appellee State Br. at 8.) This is incorrect. As *Casey* and *Wasden* make clear, women seeking abortions prior to 20 weeks, for whom the law is irrelevant, are not part of the group considered under the large fraction analysis. Similarly, the size of the group does not matter. Under *Casey*, the *only* relevant question for this Court is whether the law acts as a substantial obstacle for a large fraction of the affected group, which it clearly does. Accordingly, while the Physicians have not brought a facial challenge, they satisfy the requirements for success in a facial challenge.

Moreover, to the extent the State argues that *Gonzales* requires this Court to wait until a woman brings an as-applied challenge, its reliance on that case is also misplaced. (Appellee Montgomery's Br. at 10-11; *see also* Appellee State Br. at 9-11.) In the passage of *Gonzales* the State cites, (Appellee Montgomery's Br. at 10), the Supreme Court did *not* address whether the plaintiffs there could seek to invalidate a law on the grounds that it was an outright ban on, or substantial

obstacle to, abortions at a point before viability. *See Gonzales*, 550 U.S. at 167.[12] Indeed, by that point, the Court had already rejected the claim that the federal law prohibiting "partial-birth abortions" was such a ban. *Id.* at 150.

Only after the Court considered the claim that the law was an impermissible ban did it turn to the separate claim that the law was unconstitutional because it did not contain an exception for circumstances in which the prohibited method was necessary to protect a woman's health. It was as to *that* claim that the Court found that the issue of whether such circumstances ever arose was "a contested factual question," *id*. at 161. Thus, the Court held, "the proper means to consider *exceptions* is by as-applied challenge[s] . . . , to protect the health of the woman if it can be shown that in discrete and well-defined instances a particular condition has or is likely to occur in which the procedure prohibited by the Act must be used." *Id*. at 167.

Here, however, the Physicians seek relief based on clear Supreme Court precedent that a ban on pre-viability abortions is unconstitutional regardless of the woman's circumstances or reasons for needing the abortion. *Casey*, 505 U.S. at

[12] The State misquotes this passage from *Gonzales*, substituting without notation the more general word "such" for the actual language used by the Court: "The considerations we have discussed support our further determination that *these* facial attacks should not have been entertained in the first instance." *Gonzales*, 550 U.S. at 167 (emphasis added).

879. In such a case, no evidence — other than the fact, undisputed here, that the Act prohibits pre-viability abortions — is necessary.

Ultimately, the State argues that relief from the Act can only be afforded on a case-by-case basis to a woman who could prove (to the satisfaction of a judge) "that the medical emergency exemptions in the Act are insufficient for her to obtain a necessary abortion." (Appellee Montgomery's Br. at 10.) In making this claim, the State misses the point. The Physicians do not allege that the law should be invalidated only as to some pre-viability abortions in some circumstances, but as applied to *all* pre-viability abortions. Contrary to the State's suggestion, neither *Gonzales* nor any other decision allows the State to require an adult woman to seek judicial permission to obtain pre-viability abortion care. Yet that is exactly the result the State urges upon this Court.[13]

In sum, the Physicians are properly before this Court. Having established that the Act is unconstitutional as applied to pre-viability abortions, they are entitled to the declaratory and injunctive relief they seek.

[13] By insisting that only an as-applied challenge on behalf of an individual patient is proper, the State would require judicial approval for each woman seeking a pre-viability abortion at or after 20 weeks. County Attorney Montgomery explained to the District Court that, in an as-applied challenge, "[a] court could ask a patient . . . to appear in camera, . . . review the specifics of that patient's circumstances in conjunction with her physician's assessment of her condition and the risks being faced," and so "make a determination as to that patient." (July 25, 2012 Reporter's Transcript of Proceedings at 29-31.) Fortunately for Arizona women, the Constitution forecloses such usurpation of a woman's role in determining the course of her medical care.

CONCLUSION

For the foregoing reasons and all the reasons stated in their prior brief, the Physicians respectfully request that the Court reverse the District Court's Order and Judgment, and order the District Court to enter judgment declaring that Arizona Revised Statute section 36-2159 is unconstitutional as applied to pre-viability abortions, and that the State Appellees, their employees, agents, and successors are permanently enjoined from enforcing the Act as applied to abortions prior to viability.

Dated: October 19, 2012

Respectfully submitted,

By: /s/ *Janet Crepps*

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CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 32-1

Pursuant to Ninth Circuit Rule 32-1, counsel for Appellants hereby certifies: The text of the brief is double-spaced, except for quotations and footnotes, in a proportionately spaced font, no less than 14 points, and contains 5,220 words.

Dated: October 19, 2012 By: /s/ *Janet Crepps*

CERTIFICATE OF SERVICE

I hereby certify that, on October 19, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

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

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