No. _____

IN THE

Supreme Court of the United States

TOM HORNE, ATTORNEY GENERAL OF ARIZONA;
WILLIAM GERARD MONTGOMERY,
COUNTY ATTORNEY FOR MARICOPA COUNTY,

Petitioners,

v.

PAUL A. ISAACSON, M.D.; WILLIAM CLEWELL, M.D.;
HUGH MILLER, M.D., *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Gonzales v. Carhart*, this Court upheld a prohibition on partial-birth abortion that operated throughout pregnancy, pre- as well as post-viability, in deference to Congress's legislative findings that the prohibition protected against fetal pain and upheld the integrity of the medical profession by drawing a bright line between abortion and infanticide.

Relying on similar advances in medical knowledge, Arizona made legislative findings that documented evidence of fetal pain and dramatically increased maternal health risks warranted limitations on abortion after twenty weeks gestational age (a few weeks short of viability based on currently available medicine) except when necessary to avoid death or serious health risk to the mother.

The Ninth Circuit held that Arizona's statute was "*per se* unconstitutional" because it applied to previability abortions. Three issues are presented:

1. Did the Ninth Circuit correctly hold that the "viability" line from *Roe v. Wade* and *Planned Parenthood v. Casey* remains the only critical factor in determining constitutionality, to the exclusion of other significant governmental interests, or is Arizona's post-twenty-week limitation facially valid because it does not pose a substantial obstacle to a safe abortion?

2. Did the Ninth Circuit err in declining to recognize that the State's interests in preventing documented fetal pain, protecting against a significantly increased health risk to the mother, and

upholding the integrity of the medical profession are sufficient to support limitations on abortion after twenty weeks gestational age when terminating the pregnancy is not necessary to avert death or serious health risk to the mother?

3. If the Ninth Circuit correctly held that its decision is compelled by this Court's precedent in *Roe v. Wade* and its progeny, should those precedents be revisited in light of the recent, compelling evidence of fetal pain and significantly increased health risk to the mother for abortions performed after twenty weeks gestational age?

PARTIES TO THE PROCEEDING

Petitioners: William Gerard Montgomery is the County Attorney for Maricopa County, Arizona. Tom Horne is the Attorney General of Arizona. They were named in their official capacities as defendants in the District Court, and were appellees in the Court of Appeals.

Respondents: Paul A. Isaacson, M.D.; William Clewell, M.D.; and Hugh Miller, M.D. were plaintiffs in the District Court and appellants in the Court of Appeals.

Barbara Lawall, County Attorney for Pima County; Lisa Wynn, Executive Director of the Arizona Medical Board (both in their official capacities); and the Arizona Medical Board were defendants in the District Court and appellees in the Court of Appeals.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDING iii
TABLE OF AUTHORITIES vii
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
STATEMENT OF JURISDICTION 1
PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS 2
STATEMENT OF THE CASE 2
REASONS FOR GRANTING THE WRIT 6
I. Certiorari Is Warranted to Clarify Whether, Post-*Gonzales*, Abortion Limitations Prior to Viability Are "Per Se Unconstitutional." 8
A. The Ninth Circuit Erroneously Viewed "Viability" as the Exclusive and Critical Point for Assessing the Constitutionality of Abortion Regulations 8
B. The Gruesome Facts of Partial-Birth Abortion Led This Court in *Gonzales* to Uphold an Abortion Ban that Covered Previability Abortions. 10
C. Evidence of Fetal Pain and Significant Increase in Risk to Maternal Health After Twenty Weeks Gestation Similarly Supports Arizona's Post-Twenty-Week Limitations. 11

II. Certiorari Is Also Warranted to Address Whether Arizona's Unrebutted Legislative Findings of Fetal Pain and Increased Maternal Health Risks Are Entitled to the Same Deference This Court Afforded in *Gonzales* to Congress's Findings on Partial-Birth Abortion. 14

A. This Court Applied Deferential Rational Basis Review in *Gonzales* to the Legislative Findings Congress Made in Support of Its Partial-Birth Abortion Ban. .. 14

III. If the Ninth Circuit Correctly Determined that This Court's Existing Precedent Requires that Arizona's Statute Be Deemed Unconstitutional, Certiorari Is Warranted to Revisit That Precedent. 19

A. Recent Scientific Evidence Indicates that the Risk to Maternal Health Increases Significantly, Even Exponentially, Later in Pregnancy, Such that by Twenty Weeks, Abortion Is Far Riskier than Childbirth. 21

B. The Recent Evidence on Fetal Pain Highlights How The Dignity of The Unborn Child Is Particularly Undermined By Late-Term Abortion. 29

CONCLUSION 31

APPENDICES

A. Opinion of the U.S. Court of Appeals for the Ninth Circuit (May 21, 2013) 1a

B. Opinion of the U.S. District Court, District of Arizona (July 30, 2012) 43a

C. Pertinent Constitutional and Statutory Provisions 66a

TABLE OF AUTHORITIES

Cases

Akron v. Akron Ctr. for Reprod. Health,
462 U.S. 416 (1983) .....passim
Carhart v. Ashcroft,
331 F.Supp.2d 805 (D. Neb. 2004) 11
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550 U.S. 124 (2007) .....passim
Holden v. Hardy,
169 U.S. 366 (1898) 21
Jane L. v. Bangerter,
809 F.Supp. 865 (D. Utah 1992) 28
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518 U.S. 137 (1996) 28
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385 F.3d 846 (5th Cir. 2004) 17
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133 S.Ct. 2612 (2013) 20
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462 U.S. 506 (1983) 23
Stenberg v. Carhart,
530 U.S. 914 (2000) 10
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521 U.S. 702 (1997) 15
Women's Medical Prof. Corp. v. Voinovich,
130 F.3d 187 (6th Cir.) 28

Statutes

18 U.S.C. § 116 21
28 U.S.C. § 1254(1) 1
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28 U.S.C. § 1292(a)(1) 1
28 U.S.C. § 1331 1
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ARIZ. H.B. 2036 ..... passim
ARIZ. REV. STAT. § 36-2151(4) 2
ARIZ. REV. STAT. § 36-2159 2
ARIZ. REV. STAT. § 36-2301.01 2
Ariz.Rev.Stat. § 36-2151(6) (2012) 14
ARK. CODE ANN. §§ 20-16-1301 to 20-16-1310 (2013) 7
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GA. CODE ANN. §§ 16-12-140 to 16-12-141(2013) 7
GA. CODE ANN. tit. 31 Ch. 9B; 31-9B-1 to 31-9B-3 (2012) 7
IDAHO CODE ANN. §§18-501 to 18-510 (2011) 7
IND. CODE § 16-34-2-1 (2013) 7
KAN. STAT. ANN. §§ 65-6722 to 65-6725 (2012) 7
LA. REV. STAT. ANN. 40:1299.30.1 (2013) 7
N.C. GEN. STAT. § 14-45.1 (2013) 7
N.D. CENT. CODE, § 14-02.1-11 (2013) 8
Neb. Rev. Stat. §§ 28-3,102 to 28-3,111 (2011) 7
OKLA. STAT. tit. 63 § 1-745.1 to 1-745.11 (2013) 7

Pain-Capable Unborn Child Protection Act, H.R. 1797, 113th Cong. (2013) 8
TEX. HEALTH & SAFETY CODE §§ 171.041 to 171.048 (2013)..... 8
U.S. CONST. Amend. XIV 2

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the decision of United States Court of Appeals for the Ninth Circuit holding unconstitutional Arizona's effort to restrict non-emergency abortions after twenty weeks gestational age because of well-documented concerns about fetal pain and exponentially increased risks to maternal health.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 716 F.3d 1213. Pet.App.1a-42a. The district court's opinion granting summary judgment to the Arizona governmental defendants and denying plaintiffs' requested declaratory and injunctive relief is reported at 884 F.Supp.2d 961. Pet.App.43a-65a.

STATEMENT OF JURISDICTION

The judgment below was entered on May 21, 2013. Pet.App.1a. Timely requests for extension were granted by Justice Kennedy, extending the time in which to file this petition until September 28, 2013. *Horne, et al. v. Isaacson, et al.*, No. 13A177 (Aug. 19, 2013); *Montgomery v. Isaacson, et al.*, No. 13A62 (July 29, 2013). This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeals had jurisdiction under 28 U.S.C. § 1292(a)(1), and jurisdiction in the District Court was invoked under 28 U.S.C. §§ 1331 and 1343(a)(3).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant constitutional and statutory provisions are set forth in Appendix C. They are U.S. CONST. Amend. XIV and portions of Arizona House Bill 2036, as codified at ARIZ. REV. STAT. § 36-2151(4); ARIZ. REV. STAT. § 36-2159; and ARIZ. REV. STAT. § 36-2301.01.

STATEMENT OF THE CASE

The current state of scientific knowledge demonstrates that a fetus feels pain beginning as early as sixteen (and quite likely by twenty) weeks gestation and that late-term abortion poses an exponential increase in risk to maternal health. Confronted with this documented evidence, the utter gruesomeness of late-term abortion (however performed), and the threats it posed to the integrity of the medical profession, the State of Arizona determined, through its duly constituted legislative authority, to protect the health of the mother and the dignity of the unborn child to be free from excruciating pain by allowing abortions after twenty weeks only when necessary to avert death or serious health risks to the mother. Pet.App.47a (citing H.B.2036, 50th Leg., 2d Reg. Sess. §§ 9(A)(1-7), (B)(1) (Ariz. 2012)); *see also* Testimony, D.Ct. Dkt. No. 25-6, Ex. 4-C-1,[1] at 5-7, Sup-

[1] The documents and testimony that form the legislative record were introduced into evidence at the District Court as Exhibit C, attached to the Declaration of Cheryl Laube, Chief Clerk of the Arizona House of Representatives for the Fiftieth Legislature, which was in turn Exhibit 4 to the Motion to Dismiss submitted by Petitioner Montgomery. Decl. of Cheryl Laube, D.Ct. Dkt. No. 25-6, ¶¶2, 7; Montgomery Mot. to Dismiss, D.Ct.

plemental Excerpt of Record ("SER") at 0054-0056 (referencing the "lurid stories" of late-term abortions, "preserving the integrity of the medical profession," and "erecting a barrier to infanticide").

That legislative judgment was challenged in federal court by abortion advocacy groups a few weeks before it was set to take effect on August 2, 2012. These groups contended that this Court's abortion decisions, from *Roe v. Wade*, 410 U.S. 113 (1973), to *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and even *Gonzales v. Carhart*, 550 U.S. 124 (2007), prohibit the State of Arizona from safeguarding maternal health, protecting against fetal pain, and upholding the integrity of the medical profession through such legislation. Representing three Arizona doctors who perform late-term abortions,[2] they sought a declaratory judgment that Section 7 of Arizona H.B. 2036 ("H.B.2036") violated the substantive due process rights of women who might seek abortions, and preliminary and permanent injunctive relief prohibiting enforcement of H.B.2036 with respect to previability abortions. Complaint ¶¶ 1-3.

Imposing the "heavy burden" on parties bringing a broad facial challenge to an abortion restriction, as required by this Court's decision in *Gonzales*, 550 U.S., at 167, the District Court for the District of Ar-

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Dkt. No. 25, Ex. 4. The evidence was also before the Court of Appeals. *See* Montgomery Resp. to Emergency Mot. for Prelim. Inj. Pending Appeal, Notice of Exhibits, Ct.App. Dkt. No. 7-2, Ex. B; Ct.App. Dkt. No. 7-4 (Exhibits); SER .

[2] The suit was brought both on the doctors' own behalf and on behalf of their unidentified patients assertedly "seeking previability abortions at and after 20 weeks." Complaint, ¶¶ 7-9.

izona rejected Plaintiffs' constitutional challenges. Reviewing an unchallenged factual record, it held that H.B.2036 regulates rather than prohibits "abortions that take place after 20 weeks gestational age" and that H.B.2036 did not impose a substantial obstacle to a woman who wishes to obtain a previability abortion because some post-twenty-week and all pre-twenty-week abortions are still allowed. Pet.App.55a-56a. It also held that the State of Arizona had a legitimate interest in regulating post-twenty-week abortions because of the "substantial and well-documented evidence"—evidence that was both "uncontradicted and credible"—"that an unborn child has the capacity to feel pain during an abortion by at least twenty weeks gestational age" and because of Arizona's well-supported legislative "finding that the instance of complications [to the health of the pregnant woman] is highest after twenty weeks of gestation." Pet.App.63a-64a. Furthermore, the Court held that in the rare event a serious fetal anomaly was diagnosed after the twenty-week mark that might lead a woman to re-open consideration of an abortion, an as-applied challenge to H.B.2036 could be entertained at that time. Pet.App.59a.

After granting an emergency injunction the day before the statute was to take effect, a panel of the Court of Appeals for the Ninth Circuit reversed, holding in an opinion by Circuit Judge Berzon that a "prohibition on the exercise of [a woman's constitutional right to choose to terminate her pregnancy before the fetus is viable] is *per se* unconstitutional." Pet.App.5a. In the Ninth Circuit panel's view, "whether the District Court's 'findings' [with respect to fetal pain and significantly increased maternal

health risks] are supported by the record" was completely irrelevant to its decision. Pet.App.11a-12a. Because "Arizona's ban on abortion from twenty weeks necessarily prohibits pre-viability abortions," the Ninth Circuit held, "Section 7 is . . . , without more, invalid." Pet.App.22a. The Court enjoined the Section 7 "in its entirety." Pet.App.34a.

Judge Kleinfeld wrote separately to note that the "current state of the law compel[led him] to concur." Pet.App.35a. Although Arizona had "presented substantial evidence to support its legislative findings" of both fetal pain and "considerably greater" maternal risk after the twenty-week gestational age point, these findings did not, in his view, "suffice to justify the statute in the current state of constitutional law." *Id.* The Court was "bound . . . by the absence of any factual dispute as to whether the fetuses to be killed between gestational ages 20 and 23 or 24 weeks are viable," because "viability is the 'critical fact' that controls constitutionality," he claimed. Pet.App.38a. Judge Kleinfeld conceded that this was an "odd rule, because viability changes as medicine changes," and he thought the briefs filed by defendants made "good arguments for why viability should not have the constitutional significance it does," but he concluded that under controlling decisions of this Court, viability does indeed have that significance. Pet.App.38a-39a.

As for the conflict between the State's contention that post-twenty-week fetuses feel pain and Plaintiffs' contention that they do not, Judge Kleinfeld acknowledged that "legislatures have 'wide discretion to pass legislation in areas where there is medical and scientific uncertainty.'" Pet.App.41a-42a (cit-

ing *Gonzales*, 550 U.S., at 163). But he erroneously concluded that "protection of the fetus from pain, even the pain of having a doctor stick scissors in the back of its head and then having the doctor 'open[ ] up the scissors [and stick in] a high-powered suction tube into the opening, and suck[ ] the baby's brains out' was not enough in *Gonzales* to justify a complete prohibition," Pet.App.42a (citing *Gonzales*, 550 U.S., at 139), and he felt "bound" by that precedent to hold that the Arizona statute was unconstitutional, *id*.

REASONS FOR GRANTING THE WRIT

When this Court decided *Roe v. Wade* in 1973, it announced that "the judiciary, at [that] point in the development of man's knowledge, [was] not in a position to speculate as to the answer" to "the difficult question of when life begins." *Roe v. Wade*, 410 U.S. 113, 159 (1973). Whether or not the Court's ambivalence was warranted at the time, more recent scientific advances in the fields of fetal development, neurobiology, perinatology, and human genetics have demonstrated beyond peradventure that the fetus—the "unborn child," to use this Court's language in *Gonzales*, 550 U.S., at 134, 160—is a unique human being from the moment of his or her conception, not merely from the moment of "viability" outside the womb. It is a human person, and as this Court recognized in *Gonzales*, it is now "uncontested" that "a fetus is a living organism while within the womb, whether or not it is viable outside the womb." 550 U.S., at 147. It is entitled to "respect for the dignity of [its] human life." *Id.*, at 157.

The viability line that developed out of *Roe* and its progeny was always, as Justice O'Connor recog-

nized, on a collision course with itself, for it failed to give full credence to the fact "that the State's interest in protecting potential human life exists throughout the pregnancy." *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 458, 461 (1983) (O'Connor, J., dissenting). Indeed, by twenty weeks, the likelihood of eventual live birth is so overwhelming and the baby's development so advanced that the word "potential" cannot properly be used to describe the actual human life at issue. Moreover, scientific knowledge now understands, and the unrebutted record in this case documents, that an infant *in utero* begins to feel pain as early as sixteen weeks gestational development, and quite probably by the twenty-week gestational age point utilized by H.B.2036. Section III.B., *infra.* The risk to maternal health also increases exponentially as one moves beyond the first trimester of pregnancy to the latter part of the second. Section III.A, *infra.*

On the basis of these scientific developments, the legislatures of thirteen States,[3] including Arizona, as

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[3] Nebraska adopted the first twenty-week limitation in 2010. NEB. REV. STAT. §§ 28-3,102 to 28-3,111 (2011). Alabama, Idaho, Kansas and Oklahoma followed suit in 2011. CODE OF ALA. §§ 26-23B-1 to 26-23B-9 (2013); IDAHO CODE ANN. §§18-501 to 18-510 (2011); KAN. STAT. ANN. §§ 65-6722 to 65-6725 (2012); OKLA. STAT. tit. 63 § 1-745.1 to 1-745.11 (2013). Arizona, Georgia, and Louisiana adopted their twenty-week statutes in 2012. Az. Rev. Stat. § 36–2159; GA. CODE ANN. §§ 16-12-140 to 16-12-141(2013) and GA. CODE ANN. tit. 31 Ch. 9B; 31-9B-1 to 31-9B-3 (2012); LA. REV. STAT. ANN. 40:1299.30.1 (2013). Already this year, Arkansas, Indiana, North Carolina, North Dakota, and Texas have added twenty-week regulations to their statute books. ARK. CODE ANN. §§ 20-16-1301 to 20-16-1310 (2013); IND. CODE § 16-34-2-1 (2013); N.C. GEN. STAT. § 14-45.1 (2013);

well as one house of the U.S. Congress,[4] have now adopted legislation limiting access to abortion beyond twenty weeks except when necessary to avert death or serious health risks to the mother. These scientific developments provide ample predicate for distinguishing this Court's prior abortion precedents. Certiorari should be granted to reverse the Ninth Circuit's decision to the contrary, so as to give due deference to the important legislative judgments of the States in this sensitive and scientifically developing policy area.

But if the scientific evidence of fetal pain offered by Arizona and relied upon by a dozen other States and Congress itself is truly irrelevant under this Court's existing precedent, as the Ninth Circuit claimed, then certiorari is warranted to reconsider a body of precedent that would prevent States from responding to the developing medical evidence that late-term abortion inflicts severe pain on the unborn child and an exponentially increased health risk to the mother.

I. Certiorari Is Warranted to Clarify Whether, Post-*Gonzales*, Abortion Limitations Prior to Viability Are "Per Se Unconstitutional."

A. The Ninth Circuit Erroneously Viewed "Viability" as the Exclusive and Critical

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N.D. CENT. CODE, § 14-02.1-11 (2013); TEX. HEALTH & SAFETY CODE §§ 171.041 to 171.048 (2013).

[4] Pain-Capable Unborn Child Protection Act, H.R. 1797, 113th Cong. (2013).

Point for Assessing the Constitutionality of Abortion Regulations.

The Arizona statute at issue here restricts some—but not all—abortions after twenty weeks gestational age and therefore includes abortions before the current medical viability line of about twenty-four weeks. That rendered the statute, "without more, invalid," the Ninth Circuit held, because in its view viability is the "critical point"—that is, the exclusive point—for determining the constitutionality of an abortion restriction under this Court's decision in *Casey*. This was, according to the Ninth Circuit, the "central holding" of *Roe*, which "*Casey* reaffirmed" and which *Gonzales* "has since reiterated." Pet.App.16a.

This Court's abortion jurisprudence is more nuanced than that. To begin with, *Casey* "jettisoned" the *Roe* trimester framework, which had attempted unsuccessfully to reconcile the irreconcilable conflict between the State's interest in the life of the unborn child and the *Roe*-recognized right of a woman to choose to terminate her pregnancy. Pet.App.16a (citing *Casey*, 505 U.S., at 871-73 (plurality opinion)). As Justice O'Connor, one of the members of the *Casey* plurality, had previously recognized, "the *Roe* framework [was] on a collision course with itself." *Akron*, 462 U.S., at 458 (O'Connor, J., dissenting).

The "viability" line drawn in *Casey* is no less on a collision course with itself, as the *Casey* plurality seemed to recognize. "No changes of fact have rendered viability more or less appropriate as the point at which the balance of interests tips," noted the *Casey* plurality, implying that there may well be "changes of fact" that would render the viability line

inappropriate. 505 U.S., at 860-61. In other words, some of the substantial State interests that must be taken into account once warranted by changes of our factual understanding of abortion are simply not covered by an exclusive focus on viability, and as Justice Kennedy has noted, *Casey* held that it is "inappropriate for the Judicial Branch to provide an exhaustive list of state interests implicated by abortion." *Stenberg v. Carhart*, 530 U.S. 914, 961 (2000) (Kennedy, J., dissenting) (citing *Casey*, 505 U.S., at 877).

B. The Gruesome Facts of Partial-Birth Abortion Led This Court in *Gonzales* to Uphold an Abortion Ban that Covered Previability Abortions.

One such change of fact was the gruesomeness of partial-birth abortion with which this Court was confronted in *Gonzales*. Crediting Congress's policy judgment that "the practice of performing a partial-birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary and should be prohibited," this Court *upheld* a complete ban on partial-birth abortions, except where "necessary to save the life of the mother." 550 U.S., at 141, 142, 158. The ban applied "both previability and postviability because, by common understanding and scientific terminology," the Court noted, "a fetus is a living organism while within the womb, whether or not it is viable outside the womb." *Id.*, at 147; *see also id.*, at 156 (posing the central question as "whether the Act . . . imposes a substantial obstacle to late-term, *but previability*, abortions," and concluding that it does not) (emphasis added).

Significantly, the District Court decision that *Gonzales* reversed was based on the same viability line treated as dispositive by the Ninth Circuit in this case. *See id.*, at 125 (noting that "the District Court granted a permanent injunction that prohibited the Attorney General from enforcing the Act in all cases but those in which there was no dispute the fetus was viable" (citing *Carhart v. Ashcroft*, 331 F.Supp.2d 805, 1048 (D. Neb. 2004)). As Justice Ginsburg expressly acknowledged in her dissent, *Gonzales* "blur[red] the line" between "previability and postviability abortions." *Gonzales*, 550 U.S., at 171, 186 (Ginsburg, J., dissenting).[5]

C. Evidence of Fetal Pain and Significant Increase in Risk to Maternal Health After

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[5] Legal scholars have agreed with that assessment. *See, e.g.*, Khiara M. Bridges, *Capturing the Judiciary:* Carhart *and the Undue Burden Standard*, 67 Wash. & Lee L. Rev. 915, 941 (2010) ("the majority [in *Gonzales*] asserts the insignificance of viability. . . . As such, *Carhart* can be read to eliminate the significance of viability as a marker, and therefore eliminate the significance of the distinction between the pre-viable and post-viable stages of pregnancy"); Randy Beck, Gonzales*,* Casey*, and the Viability Rule*, 103 Nw. U. L. Rev. 249, 253, 276 n.152 (2009) (noting that the *Gonzales* decision, which merely "assumed" the continued application of the viability rule, "undermines *Casey*'s attempted defense of the viability rule"); *cf.*, *e.g.*, John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920, 924 (1973) (describing *Roe*'s defense of the viability line as "simply not adequate;" "mistak[ing] a definition for a syllogism"); Mark Tushnet, *Two Notes on the Jurisprudence of Privacy*, 8 Const. Comment. 75, 83 (1991) (describing *Roe*'s viability line as "entirely perverse").

Twenty Weeks Gestation Similarly Supports Arizona's Post-Twenty-Week Limitations.

Other changes of fact that put the *Roe*/*Casey* viability line on a collision course with itself include the growing body of evidence, described more fully in Part II below and relied upon by the Arizona legislature, that a baby *in utero* feels pain long before it is viable outside the womb, and that the risk of abortion to a woman's health increases significantly, even exponentially, well before the point of viability.

As *Gonzales* makes clear, the viability line is not on a collision course with itself simply because medical advances make viability a moving target. It is on a collision course with itself because the viability matrix does not give full recognition to "the principle that the State has legitimate interests *from the outset of the pregnancy* in protecting the health of the mother and the life of the fetus that may become a child." *Gonzales*, 550 U.S., at 145 (citing *Casey*, 505 U.S., at 846, (emphasis added)); *see also Akron*, 462 U.S., at 459 (O'Connor, J., dissenting) ("the point at which these interests become compelling does not depend on the trimester of pregnancy. Rather, these interests are present throughout pregnancy"). As Justice O'Connor explained in *Akron*:

> The difficulty with the viability analysis is clear: *potential* life is no less potential in the first weeks of pregnancy than it is at viability or afterward. . . . The choice of viability as the point at which the state interest in *potential* life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward. Accordingly, I believe that

> the State's interest in protecting potential human life exists throughout the pregnancy.

Id., at 461.

Casey asserted that this principle "do[es] not contradict" the principle that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion," but as the *Gonzales* Court recognized, *Casey* nevertheless "rejected *Roe*'s rigid trimester framework and the interpretation of *Roe* that considered all previability regulations of abortion unwarranted." *Gonzales*, 550 U.S., at 146 (citing *Casey*, 505 U.S., at 875-876, 878 (plurality opinion)).

In other words, the significance of *Gonzales* is that factors other than viability matter to this Court's abortion jurisprudence. As with the congressional statute upheld in *Gonzales*, Arizona has not banned all previability abortions. It continues to allow them prior to twenty weeks gestational age when, as even abortion proponents acknowledge, the overwhelmingly large majority of second trimester abortions are performed. *See, e.g.*, Guttmacher Institute, "Facts on Induced Abortion in the United States" (July 2013) (available at http://www.guttmacher.org/pubs/fb_induced_abortion.html) (noting that 88% of abortions are performed in the first twelve weeks and 98.5% are performed by the twentieth week); *see also* Aff. of Allan T. Sawyer, M.D., SER at 0030 ¶ 6. Arizona also continues to allow abortions even after twenty weeks when terminating the pregnancy is necessary to avert death or serious

health risk to the mother.[6] But responding to current medical understanding, Arizona has imposed limitations on abortions after the twenty-week mark in order to protect against fetal pain and a significant increased risk to maternal health. This is the very kind of important legislative judgment based on evolving medical evidence that is not captured by the viability line, but that this Court credited in *Gonzales*.

Treating viability as the *sine qua non* of this Court's abortion jurisprudence, therefore, as the Ninth Circuit did below, cannot be squared with the full import of the holding in *Gonzales*. Certiorari is warranted to clarify whether, post-*Gonzales*, viability remains the only critical factor in determining constitutionality, to the exclusion of these other significant governmental interests.

II. Certiorari Is Also Warranted to Address Whether Arizona's Unrebutted Legislative Findings of Fetal Pain and Increased Maternal Health Risks Are Entitled to the Same Deference This Court Afforded in *Gonzales* to Congress's Findings on Partial-Birth Abortion.

A. This Court Applied Deferential Rational Basis Review in *Gonzales* to the Legislative Findings Congress Made in Support of Its Partial-Birth Abortion Ban.

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[6] The "health exception" utilized by Arizona is identical to the health exception approved by this Court in *Casey*. *Compare Casey,* 505 U.S., at 879-80 (quoting and upholding 18 Pa.C.S.A. § 3202 (1990)), *with* Ariz.Rev.Stat. § 36-2151(6) (2012).

In *Gonzales*, this Court relied in part on Congress's determination that "[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary and should be prohibited." *Gonzales*, 550 U.S., at 141 (citing 117 Stat. 1202, notes following 18 U.S.C. § 1531 (2000 ed., Supp. IV), p. 768, ¶ (1) ("Congressional Findings")). It accepted Congress's concern, rooted in "respect for the dignity of human life," that "[i]mplicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent life." *Id.*, at 157 (citing Congressional Findings ¶ (14)(N)). And it accepted Congress's additional concern that the practice of partial-birth abortion would have a negative impact on the medical community and on its reputation, noting that there "can be no doubt the government 'has an interest in protecting the integrity and ethics of the medical profession.'" *Id.* (quoting *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997)).

The *Gonzales* Court then upheld the Partial-Birth Abortion Ban Act using the language of this Court's highly deferential "rational basis" standard of review. *Id.*, at 158 (holding that where "it has a *rational basis* to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of *legitimate interests* in regulating the medical profession in order to promote respect for life, including life of the unborn" (emphases added)). Justice Ginsburg in dissent agreed that the

majority had applied rational basis review. *Id*., at 187 (Ginsburg, J., dissenting) ("Instead of the heightened scrutiny we have previously applied, the Court determines that a 'rational' ground is enough to uphold the Act").

The Ninth Circuit viewed the deference this Court gave to the legislative judgment upheld in *Gonzales* as applicable only to restrictions on "a particular *method* of terminating" a pregnancy, not on other restrictions of the sort at issue here. Pet.App.23a. But *Gonzales*'s deference is not so limited, and the policy judgment made by the Arizona legislature, well-grounded in evidence and uncontradicted at the District Court, is likewise entitled to judicial deference, as least where, as here, access to all abortions prior to twenty weeks gestational age, and to medically necessary abortions thereafter, remains available.

Indeed, the legislative findings made by the Arizona legislature in support of H.B.2036 are quite similar to those made by Congress in support of the Partial-Birth Abortion Ban Act of 2003, upheld by this Court in *Gonzales*. "Abortion can cause serious both short-term and long-term physical and psychological complications for women," the Arizona legislature found, "including . . . uterine perforation, . . . cervical perforation or other injury, infection, bleeding, hemorrhage, . . . placenta previa in subsequent pregnancies, . . . [and] psychological or emotional complications such as depression, anxiety or sleeping disorders and death." Chapter 250, Laws of 2012 §

9(A)(1) (citations omitted).[7] Similarly, Congress found that:

> Partial-birth abortion poses serious risks to the health of a woman undergoing the procedure[, including], among other things: an increase in a woman's risk of suffering from cervical incompetence, a result of cervical dilation making it difficult or impossible for a woman to successfully carry a subsequent pregnancy to term; an increased risk of uterine rupture, . . . and a risk of lacerations and secondary hemorrhaging due to the doctor blindly forcing a sharp instrument into the base of the unborn child's skull while he or she is lodged in the birth canal, an act which could result in severe bleeding, brings with it the threat of shock, and could ultimately result in maternal death.

H.R. Conf. Rep. 108-288, p. 4, para. 14(A), 2003 U.S.C.C.A.N. 1273; *see also McCorvey v. Hill,* 385 F.3d 846, 850-51 (5th Cir. 2004) (Jones, J., concurring) ("Studies by scientists . . . suggest that women may be affected emotionally and physically for years afterward and may be more prone to engage in high-risk, self-destructive conduct as a result of having had abortions").

Arizona found that "Abortion has a higher medical risk when the procedure is performed later in pregnancy." Chapter 250, Laws of 2012 § 9(A)(2).

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[7] Each of the findings made by the Arizona legislature was supported by citations to peer-reviewed medical studies and were unchallenged by Plaintiffs. Chapter 250, Laws of 2012 § 9(A)(1-7) (citing numerous studies); Pet.App.63a ("Defendants presented uncontradicted and credible evidence to the Court").

This risk "increases exponentially at higher gestations," *id.*, and the "incidence of major complications is highest after twenty weeks of gestation." *Id.*, § 9(A)(3); *see also id.*, § 9(A)(4) ("The risk of death associated with abortion increases with the length of pregnancy, from one death for every one million abortions at or before eight weeks gestation to one per 29,000 abortions at sixteen to twenty weeks and one per 11,000 abortions at twenty-one or more weeks"). When considering the Partial-Birth Abortion Ban Act, Congress likewise addressed the relative health risk of partial-birth abortion compared to other abortion procedures, finding that "[t]here is no credible medical evidence that partial-birth abortions are safe or are safer than other abortion procedures." H.R. Conf. Rep. 108-288, p. 4, para. 14(B), 2003 U.S.C.C.A.N. 1273.

And perhaps most germane for present purposes, both Arizona and Congress evaluated the developing medical evidence and made findings regarding fetal pain. "There is substantial and well-documented medical evidence that an unborn child by at least twenty weeks of gestation has the capacity to feel pain during an abortion," the Arizona legislature found. Chapter 250, Laws of 2012 § 9(A)(7). Congress made the same finding, albeit in a more gruesome elaboration:

> The vast majority of babies killed during partial-birth abortions are alive until the end of the procedure. It is a medical fact, however, that unborn infants at this stage can feel pain when subjected to painful stimuli and that their perception of this pain is even more intense than that of newborn infants and older

> children when subjected to the same stimuli. Thus, during a partial-birth abortion procedure, the child will fully experience the pain associated with piercing his or her skull and sucking out his or her brain.

H.R. Conf. Rep. 108-288, p. 6, para. 14(M), 2003 U.S.C.C.A.N. 1273.

Given such similarities in the legislative findings made by Arizona in the case *sub judice* and by Congress in support of the Act *upheld* by this Court in *Gonzales*, the Ninth Circuit erred in refusing to afford to Arizona the same level of deference this Court afforded to Congress. Certiorari is therefore warranted to clarify whether state legislative findings are due the same deference that this Court extended to Congress in *Gonzales* and whether the Ninth Circuit erred in failing to defer to the Arizona legislature's findings that the District Court found to be both "uncontradicted and credible." Pet.App.63a.

III. If the Ninth Circuit Correctly Determined that This Court's Existing Precedent Requires that Arizona's Statute Be Deemed Unconstitutional, Certiorari Is Warranted to Revisit That Precedent.

Much of the evidence relied upon by the Arizona legislature is developing medical knowledge. This recent evidence has led a number of states to pass limits on post-twenty-week abortions in just the past few years, as legislatures meaningfully confront the gruesome reality of the threat to human dignity, maternal health, and the integrity of the medical profession that continued unfettered access to late-term

abortion poses. *See supra* n. 4. The evidence of fetal pain is particularly important, as it confirms the humanity of the unborn child. Quite simply, a mere mass of tissue does not feel pain, and the fact that fetuses do feel pain by twenty weeks gives rise to a "disturbing similarity" between "abortion and infanticide" akin to what this Court confronted in *Gonzales*. Moreover, the recent evidence of fetal pain, combined with the evidence of significant, indeed exponential, increased risk to maternal health, is the kind of changed factual background that has recently led this Court to reverse course in other areas of law. *See, e.g.*, *Shelby County v. Holder*, 133 S.Ct. 2612, 2629 (2013) (noting that continued imposition of voting law preclearance requirement on the legislative judgments in certain covered jurisdictions "cannot rely simply on the past" but must be assessed "in light of current conditions").

Arizona offered "substantial and well-documented evidence" in the District Court in support of its legislative findings "that an unborn child has the capacity to feel pain during an abortion by at least twenty weeks gestational age" and "that the instance of complications [to the health of the pregnant woman] is highest after twenty weeks of gestation." Pet.App.63a-64a. The District Court found that the evidence was both "uncontradicted and credible." *Id.*, at 63a. Nevertheless, because the evidence upon which the Arizona legislature relied is the subject of some debate in academic and medical professional circles, a brief review of the evidence is appropriate for this Court to assess whether it presents the kind of changed circumstances that would warrant revisiting this Court's abortion precedents.

A. Recent Scientific Evidence Indicates that the Risk to Maternal Health Increases Significantly, Even Exponentially, Later in Pregnancy, Such that by Twenty Weeks, Abortion Is Far Riskier than Childbirth.

Arizona's legislative finding that post-twenty-week abortion results in a significant and even exponential increase of risk to maternal health has substantial evidentiary support. H.B.2036, § 9, ¶¶ 2-3. That evidence is significant because *Roe* rests in part on the medical assumption that abortion is safer than childbirth. 410 U.S. 113, 149, 165 (1973).[8] Indeed, *Roe* specifically deferred to "present medical knowledge" at that time when it held that the State's interest in protecting maternal health becomes "compelling" "at approximately the end of the first trimester," "because of the now-established medical fact . . . that until the end of the first trimester mor-

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[8] In his concurring opinion below, Judge Kleinfeld expressed the view that a change in the relative risk of abortion and childbirth is immaterial because "people are free to do many things risky to their health" and "[t]here appears to be no authority for making an exception to this general liberty regarding one's own health for abortion." Pet.App.42a. But the *Roe* Court considered this to be a material issue, and Judge Kleinfeld appears to have overlooked the innumerable ways in which government limits private choice because of its determinations about health risk. *See, e.g.*, *Holden v. Hardy*, 169 U.S. 366 (1898) (upholding Utah statute that limited the hours one could work in underground mines because of increased risk to the miner's health); Food, Drug, and Cosmetic Act of 1938, Section 505(a), 52 Stat. 1052, codified at 21 U.S.C. § 355 (prohibiting the marketing of drugs that have not been determined to be safe by the Food and Drug Administration); 18 U.S.C. § 116 (prohibiting female genital mutilation).

tality in abortion may be less than mortality in normal childbirth." 410 U.S., at 162-63.

The "compelling" State interest in maternal health past the first trimester allowed the *Roe* Court to acknowledge that the State could regulate abortion after that point "to the extent that the regulation reasonably relates to the preservation and protection of maternal health." 410 U.S., at 163; *see also id.*, at 149-50 ("[t]he State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient"). Among the "[e]xamples of permissible state regulation" that would be permitted, *Roe* noted, were "requirements . . . as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status." *Id.* Nevertheless, advances in abortion surgical procedures led the Court a decade later to invalidate a requirement that all post-first trimester abortions be performed in a full-service hospital, a requirement that "had strong support at the time of *Roe v. Wade*." *Akron*, 462 U.S., at 435, 439 (citing *Roe*, 410 U.S., at 143-146). This was because of the development of what was then thought to be a relatively safe Dilation and Evacuation procedure for abortions between twelve and sixteen weeks gestation that could be "performed as safely in an outpatient clinic as in a full-service hospital." That development in medical knowledge undercut the safety justification for Akron's requirement "that *all* second-trimester abortions be performed in a hospital." *Id.*, at 437; *compare Simopoulos v. Virginia*, 462 U.S. 506, 519

(1983) (upholding, the same day *Akron* was decided, "Virginia's requirement that second-trimester abortions be performed in licensed outpatient clinics").

The more recent advances in medical knowledge relied upon by the Arizona legislature here cut the other direction, however. We now know, as the Arizona legislature found, that the risk to maternal health increases significantly, even exponentially, with each passing week of pregnancy. Chapter 250, Laws of 2012 § 9(A)(2) (citing L. Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103:4 Obs. & Gyn. 729-737 (2004)); Priscilla K. Coleman et al., *Late-Term Elective Abortion and Susceptibility to Posttraumatic Stress Symptoms*, 2010 J. OF PREGNANCY 1, 7 (citing S. V. Gaufberg, *Abortion Complications* (2008); Bartlett, *Risk Factors*). The incidence of major complications from an abortion is highest after twenty weeks. Chapter 250, Laws of 2012 § 9(A)(3) (citing J. Pregler & A. DeCherney, *Women's Health: Principles and Clinical Practice* 232 (2002)). The risk of death from an abortion is about thirty-five times greater at sixteen to twenty weeks than it is before eight weeks gestation, and nearly *one hundred times greater after twenty weeks*. Chapter 250, Laws of 2012 § 9(A)(4) (citing Bartlett, *Risk Factors*). Risks to the woman's mental health also increases significantly with later-term abortions. Chapter 250, Laws of 2012 § 9(A)(1) (citing, *e.g.*, P. K. Coleman, *Abortion and Mental Health: Quantitative Syntheses and Analysis of Research Published 1995-2009*, 199 Brit. J. of Psychiatry 180-86 (2011)).

These findings are well supported by peer-reviewed scientific studies and the legislative record

here. *See, e.g.,* SER at 0094-96; Coleman, *Late-Term Elective Abortion*, at 7 (finding that women who underwent later abortions (thirteen weeks and beyond) reported "more disturbing dreams, more frequent reliving of the abortion, and more trouble falling asleep"); *see also* Brian D. Wassom, Comment, *The Exception that Swallowed the Rule?* Women's Professional Corp. v. Voinovich *and the Mental Health Exception to Post-Viability Abortion Bans*, 49 Case W. Rev. L. Rev. 799, 853 (1999) ("[T]he one fact that seems nearly axiomatic in psychological literature on abortion is that the later in pregnancy one aborts, the greater the woman's risk for negative emotional sequelae").[9]

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[9] To be sure, some medical studies have found no increased risk of pre-term birth or mental trauma after abortion. *See, e.g.,* C. Oliver-Williams et al., *Changes in Association between Previous Therapeutic Abortions and Preterm Birth in Scotland*, *1980 to 2008: A Historical Cohort Study*, PLoS Med. 10(7) (2013) (no risk of pre-term birth) (available at http://www.plosmedicine.org/article/info%3Adoi%2F10.1371%2Fjournal.pmed.1001481); Major B, et al., *Psychological Responses of Women After First Trimester Abortion*, 57 Arch Gen Psychiatry 777 (2000) (no risk of mental trauma). But there are over 130 peer-reviewed studies in international medical journals that have found an increased risk of pre-term birth after abortion. *See*, *e.g.*, John M. Thorp Jr., *Public Health Impact of Legal Termination of Pregnancy in the US: 40 Years Later*, Scientifica, Article ID 980812 (2012) (available at http://www.hindawi.com/journals/scientifica/2012/980812/); Byron C. Calhoun et al., *Cost-Consequences of Induced Abortion as an Attributable Risk for Preterm Birth and Impact on Informed Consent*, 52 J. Reprod. Med. 929 (2007)). And dozens of peer-reviewed studies have found an increased risk of mental trauma after abortion. *See, e.g.*, Coleman, *Abortion and Mental Health, supra*; D. M. Fergusson et al., *Does Abortion Reduce the Mental Health Risks of Unwanted or Unintended Pregnancy? A Re-appraisal of the Evidence*, 47(9) Aust.

The factual findings were also demonstrated and unrebutted at the district court level. *See, e.g.*, Aff. of Allan T. Sawyer, M.D., SER at 0030 ¶ 4, 5 (the medical literature supports the conclusion that the risk of complications of abortion increases significantly every week the abortion is delayed beyond the eighth week of gestation, with an alarming thirty-eight percent increase in risk of abortion related maternal death for each additional week of gestation).

Moreover, medical knowledge about the relative risk of abortion compared to childbirth has changed since the time *Roe* was decided. The relative risk comparison of abortion and childbirth is significant; it led this Court in *Roe* to identify "the end of the first trimester as the compelling point [for protecting the State's interest in maternal health] because until that time—according to the medical literature available in 1973—'mortality in abortion may be less than mortality in normal childbirth.'" *Akron*, 462 U.S., at 429 n.11 (quoting *Roe*, 410 U.S., at 163); *see also id.*, at 460 (O'Connor, J., dissenting) (noting that States have a compelling interest to "ensur[e] maternal safety," "once an abortion may be more dangerous than childbirth").

Developing scientific evidence now demonstrates that at least by twenty weeks, abortion has greater short-term and long-term[10] risks than childbirth.

& N.Z. J. Psych. 819-27 (2013). *See also* J. M. Thorp Jr. et al., *Long Term Physical and Psychological Health Consequences of Induced Abortion: A Review of the Evidence*," 58:1 Obs. and Gyn. Survey 67–79 (2003), D.Ct. Dkt. No. 25-10, SER 0138.

[10] The *Roe* Court did not consider long-term risks from abortion before making its assumption that abortion is safer than childbirth. *See, e.g.,* Clarke D. Forsythe & Bradley N. Kehr, *A Road*

Testimony, D.Ct. Dkt. No. 25-4, Ex. 4-C-1 (citing Bartlett, *Risk Factors*); *see also* Letter of Allen T. Sawyer, M.D., to Legislature, D.Ct. Dkt. No. 25-15, SER 0253 (describing as "fallacious" the claim that allowing post-twenty-week abortion "reduces the risk of significant maternal morbidity or mortality" because "the risk of maternal morbidity and mortality with termination of pregnancy after twenty weeks is still significant and arguably no safer than carrying the pregnancy to term."). Studies that employ record linkage have found that mortality rates from abortion are significantly higher than those associated with childbirth. *See, e.g.*, D. C. Reardon et al., *Deaths Associated with Pregnancy Outcome: A Record Linkage Study of Low Income Women*, Southern Med. J. 834-841 (August 2002); Priscilla K. Coleman

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Map Through the Supreme Court's Back Alley, 57 Vill. L. Rev. 45, 48 (2012). Since this Court's decision in *Casey*, though, dozens of studies have been published in international medical journals documenting the existence of several long-term risks from abortion, especially the increased risk of pre-term birth (PTB) after abortion. A landmark analysis published in 2003, for example, concluded that women should be informed of the increased risk of pre-term birth as a "major long-term health consequence" of abortion. Thorp, *Long-Term Health Consequences*, 58 Obst. & Gyn. Survey, D.Ct. Dkt. No. 25-10, at 13. And in 2009, three systematic-evidence reviews demonstrating the increased risk of pre-term birth after abortion were published. P. S. Shah & J. Zao, *Induced Termination of Pregnancy and Low Birthweight and Preterm Birth: A Systematic Review and Meta-analyses*, 116 Brit. J. of Ob. Gyn. 1425 (2009); Hanes M. Swingle et al., *Abortion and the Risk of Subsequent Preterm Birth: A Systematic Review with Meta-analyses*, 54 J. Reprod. Med. 95 (2009); R. Freak-Poli et al., *Previous Abortion and Risk of Preterm Birth: A Population Study*, 22 J. Maternal-Fetal Med. 1 (2009).

et al., *Reproductive History Patterns and Long-term Mortality Rates: A Danish, Population-based Record Linkage Study*, Eur. J. of Public Health, (Sept. 5, 2012).[11] And recent mental health literature has shown that abortion is also "associated with significantly higher risks of mental health problems compared with carrying a pregnancy to term." Coleman, *Abortion and Mental Health*, 199 Brit. J. of Psychiatry at 183-84.[12]

As the bill's findings indicate, Chapter 250, Laws of 2012 § 9(A)(1-4) (citing numerous studies), the

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[11] Available at http://www.scotusblog.com/case-files/cases/cline-v-oklahoma-coalition-for-reproductive-justice/?wpmp_switcher=desktop.

[12] Plaintiffs claimed below that the only evidence before the Arizona legislature involved the relative risk of late-term abortion compared to earlier-term abortions, not compared to childbirth. Although the relative risk of late-term to early-term abortion is itself sufficient to sustain Arizona's limitation on abortions after twenty weeks, Plaintiffs' claim is also inaccurate. The Legislature had before it, *inter alia*, testimony describing that "[c]ontemporary medical data indicate that abortion becomes more dangerous than childbirth—in terms of short-term risks—at least by 20 weeks gestation." Testimony, D.Ct. Dkt. No. 25-4, Ex. 4-C-1 (citing Bartlett, *Risk Factors*). It had before it letter testimony from Dr. Sawyer describing as "fallacious" the claim that allowing post-twenty-week abortion "reduces the risk of significant maternal morbidity or mortality" because "the risk of maternal morbidity and mortality with termination of pregnancy after twenty weeks is still significant and arguably no safer than carrying the pregnancy to term." D.Ct. Dkt. No. 25-15; SER 0253. And it had before it the Priscilla Coleman article in the British Journal of Psychiatry reviewing the mental health literature that showed "significantly higher risks of mental health problems compared with carrying a baby to term." D.Ct. Dkt. No. 25-5, Ex. 4 C-3, at 183-84.

Arizona legislature relied on such medical evidence in enacting H.B.2036, just as this Court in *Akron* said it should do. *See Akron*, 462 U.S., at 430 n.12 ("the State retains an interest in ensuring the validity of *Roe*'s factual assumption that 'the first trimester abortion (is) as safe for the woman as normal childbirth at term'"). Arizona concluded, based on the development of this scientific knowledge in the forty years since *Roe*, that a regulation that channels the abortion decision to the pre-twenty week period when health risks are significantly lower is critically important to maternal health. If that does not qualify as a regulation that "reasonably relates to the preservation and protection of maternal health," as sanctioned by *Roe*, then the *Roe* analysis needs to be revised to allow for it. Otherwise, *Roe* would become a straitjacket for women's health, locking in the medical understanding of forty years ago to the detriment of women.

This Court has had numerous opportunities to review statutes that limit late term abortions. *See, e.g.*, *Women's Medical Prof. Corp. v. Voinovich*, 130 F.3d 187 (6th Cir.), *cert. denied*, 523 U.S. 1036 (1998); *Jane L. v. Bangerter*, 809 F.Supp. 865 (D. Utah 1992), *aff'd in part, rev'd in part*, 61 F.3d 1493 (10th Cir. 1995), *rev'd and rem'd sub. nom.*, *Leavitt v. Jane L.*, 518 U.S. 137 (1996), *on remand*, 102 F.3d 1112 (10th Cir. 1996), *cert. denied*, 520 U.S. 1274 (1997). But none of these cases contained the uncontroverted record and data on the increasing rate of maternal mortality and morbidity that this case does. In light of the real risks to women's health from late term abortions, it is long overdue for this Court to review the nature and strengths of the

States' interests in regulating late-term abortions, based on *current* medical knowledge.

B. The Recent Evidence on Fetal Pain Highlights How The Dignity of The Unborn Child Is Particularly Undermined By Late-Term Abortion.

Advances in genetic science have already undermined a core assumption of *Roe,* namely, that the fetus is not yet human. But the recent evidence on fetal pain really brings that fact into sharp relief. For not only is it now clear that the fetus is, genetically, a unique human being, the fact that it feels pain perhaps at sixteen weeks gestation, and in all likelihood by twenty weeks, really does change the calculus on late-term abortion regulation for any but the most doctrinaire legislator. The old saw that a fetus is just a mere mass of tissue simply cannot be squared with the mounting evidence of fetal pain.

State regulation of abortion after twenty weeks recognizes that there is substantial medical evidence that the unborn child feels pain by that point. K. J. Anand & P. R. Hickey, *Pain and Its Effects in the Human Neonate and Fetus*, 317 New Eng. J. Med. 1321 (1987); Antony Kolenc, *Easing Abortion's Pain: Can Fetal Pain Legislation Survive the New Judicial Scrutiny of Legislative Fact-Finding?*, 10 Tex. Rev. of Law & Politics 171 (2005); Teresa Collett, *Fetal Pain Legislation: Is it Viable*?, 30 Pepperdine L. Rev. 161 (2003).

The Arizona legislature relied on such evidence before making its legislative 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 abor-

tion." Chapter 250, Laws of 2012 § 9(A)(7) (citing Anand, *Fetal Pain*). The Legislature's findings are consistent with medical evidence presented to (and uncontradicted in) the trial court that scientific knowledge in the fields of embryology, fetology, neurobiology, perinatology, neonatology, pediatric anesthesia and pediatric surgery have increased greatly in the past thirty years. Decl. of Jean A. Wright, M.D., Excerpts of Record ("ER") 031 ¶ 15. Authoritative studies have shown that "neonates" have the physiological and chemical brain processes required for mediating pain and noxious stimuli. *Id.*, ¶ 19.

There is also substantial evidence that an unborn child is even more sensitive to pain than a newborn. It takes fewer stimuli to create pain in an unborn child. *Id.,* ER at 032 ¶ 24. Studies have provided evidence for a therapeutic response in pain receptors for unborn children at sixteen to twenty-one weeks of gestation for the administration of anesthesia. *Id.*, ER at 033 § 27.

An unborn child begins to develop pain sensors on its face in the seventh week of life, and sensory receptors all over the body by the twentieth week. Aff. of Paul H. Liu, M.D., SER at 0001 ¶ 4. By the twentieth week, sensory receptors are fully functional, and when provoked by a painful stimulus, react by increasing stress hormones and with cardiovascular changes. *Id.*, SER at 0002 ¶ 5. These changes, which are similar to those of a newborn infant, decrease when the unborn child is given anesthesia. *Id.*

This evidence demonstrates just how significantly the Ninth Circuit's absolutist position on the viability line threatens the dignity of both the unborn

child and the society that would tolerate abortion at a time when the baby being aborted feels the limb-ripping and brain-crushing pain of the abortionist's tools. If *Roe* and its progeny really do require such a result, it is time for this Court to revisit *Roe*.

CONCLUSION

For the forty years since this Court's decision in *Roe v. Wade*, the lower courts, our national and state legislatures, and the nation itself have been wandering in the wilderness as they try to apply a rule from *Roe* that was on a collision course with itself. Confronted with the "gruesome and inhumane" nature of partial-birth abortion, Congress acted a decade ago to ban that procedure both pre- and post-viability, and this Court upheld the constitutionality of Congress's work. Now, confronted with equally abhorrent late-term abortion and the mounting evidence that the fetus feels excruciating pain inflicted by the procedure, a number of States and the House of Representatives have acted to restrict access to abortions after twenty weeks gestational age, in order to protect women against a significant, exponential increase in risk to their own health and the unborn child against brain-crushing pain from a practice that must certainly undermine the dignity not only of the baby *in utero* but of our own humanity. The profound moral judgment reflected in these legislative actions deserved greater deference from the judiciary than was afforded by the Ninth Circuit's absolutist, this-restricts-previability-abortions-and-is-therefore-unconstitutional holding.

Certiorari is warranted to correct the Ninth Circuit's absolutist interpretation of this Court's precedent and to clarify the appropriate deference due to

legislative fact-finding and policy judgments in this sensitive and scientifically developing area. Alternatively, if existing precedent is deemed to compel the Ninth Circuit's decision below, certiorari is warranted to revisit that precedent.

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