No. 13-402
In the Supreme Court of the United States

TOM HORNE,
Attorney General of Arizona, et al.,
Petitioners,
v.
PAUL A. ISAACSON, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS BRIEF OF THE STATES OF OHIO, MONTANA, AND 14 OTHER STATES SUPPORTING PETITIONERS

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QUESTIONS PRESENTED

The petition for certiorari that was filed in this case identifies the following 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 signifi-

cantly 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?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND RULES

OTHER AUTHORITIES

INTRODUCTION AND STATEMENT OF *AMICI* INTEREST

The Ninth Circuit's decision in this case facially invalidates an Arizona law that seeks to channel elective abortions to before twenty weeks' gestation—just weeks before an unborn child can survive outside the womb—to prohibit the severe fetal pain that could arise from later-term abortions. *See* Ariz. Rev. Stat. § 36-2159. The *Amici* States have an interest in this case because many States have recently enacted similar laws, and many more across the country are currently debating those laws in their own legislatures.

The *Amici* States also have an interest in furthering the goals that underlie this recent legislation. At the outset, it should be noted that this legislation does not attempt to invalidate the central "undue burden" framework established by *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). The laws have neither that purpose nor that effect. As for their purpose, the laws arise from a growing body of scientific literature showing that a fetus can suffer physical pain at twenty weeks' gestation. The States seek to prevent this pain, recognizing the gruesome abortion methods used then. As for their effect, the laws have been tailored to apply only once a fetus can suffer pain. It is thus more accurate to say that the laws *channel* a woman's right to an elective abortion to before an unborn child can feel pain than it is to say that they *prohibit* a woman from making the ultimate decision. In short, this legislation imposes, at most, an incidental burden on the abortion right established by this Court, and it does so to further a newly realized interest that can only be described as compelling.

Given the ongoing legislative activity, moreover, the *Amici* States seek the Court's guidance on this issue. As far as the States are aware, the Court has not yet had the opportunity to consider this interest in preventing fetal pain. That is perhaps unsurprising. The evidence driving the new legislation has arisen only in recent years. Accordingly, the States need the Court's instruction on how they can implement this vital interest and on how it affects the "balance" struck by the Court's prior cases. *See Gonzales v. Carhart*, 550 U.S. 124, 146 (2007).

Finally, the *Amici* States seek to preserve their ability to act in the face of medical uncertainty. They acknowledge that the evidence on fetal pain remains contested. But legislatures have always been permitted to reach conclusions in that kind of public-policy debate. *See id.* at 164 ("Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts."). That is especially true here—where even the mere risk of substantial pain is unworthy of a society valuing the dignity of all circumstances of life. To the extent the Ninth Circuit's decision casts doubt on this traditional state prerogative, it needs to be quickly corrected.

In sum, Arizona sought—and sister States seek—to operate in areas that the Court has left open, by responding to new scientific knowledge and adopting views on the scientific debate. But the Ninth Circuit has read the Court's abortion jurisprudence after *Casey* as imposing a *per se* rule as rigid as the trimester framework that it replaced, preventing States from

enacting reasonable pre-viability laws to address new concerns and new science. The Ninth Circuit was wrong, and, regardless, the *Amici* States' concerns warrant the Court's review.[1]

REASONS FOR GRANTING THE WRIT

I. THE PETITION RAISES QUESTIONS THAT AFFECT MANY STATE LAWS

The Court should grant the petition because the Ninth Circuit's decision resolves questions that affect more than just Arizona's law. Many other States have passed, or are presently considering passing, similar laws. These laws follow on the heels of recent evidence suggesting that unborn children can feel pain from twenty weeks' gestation. The state laws explain their purpose as upholding the important interests implicated by this evolving evidence, and they seek to do so in a manner that comports with *Casey*'s undue-burden standard.

A. Substantial Scientific Evidence Indicates That An Unborn Child Can Feel Pain By Twenty Weeks' Gestation

A growing body of evidence suggests that an unborn child can suffer pain by twenty weeks' gestation. Scientific literature has shown that a fetus at this stage has the human attributes necessary to feel pain. To suffer pain, a human must have a nervous system capable of responding to the stimuli causing the pain. *See* Derbyshire, Foetal Pain?, 24 *Best Prac-*

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[1] Under Supreme Court Rule 37.2, the *Amici* States provided notice to the parties more than 10 days before filing.

tice & Research Clinical Obstetrics & Gynaecology 647, 653 (2010). In other words, the "first essential requirement for nociception [pain perception] is the presence of sensory receptors" in the human's body. Myers, Fetal Endoscopic Surgery, 18 *Best Practice & Research Clinical Anaesthesiology* 231, 241 (2004). By twenty weeks, unborn children have pain receptors throughout their bodies. *See* Brusseau, Developmental Perspectives, 46 *International Anesthesiology Clinics* 11, 14 (2008).

In addition, a human can suffer pain only with a brain capable of reacting to the negative stimuli sent to it by the pain receptors. By twenty weeks, unborn children possess a brainstem and thalamus, which, evidence shows, permit the brain to receive, react to, and process pain. *See id.* at 20; Anand, Fetal Pain?, 14 *Pain: Clinical Updates*, June 2006, at 3. To prove this fact, scientists have looked to hydranencephalic infants, who are born with only a brainstem and thalamus. These infants "show responsiveness to their surroundings in the form of emotional or orienting reactions to environmental events." Merker, Consciousness Without A Cerebral Cortex, 30 *Behavioral & Brain Sciences* 63, 79 (2007). They also "express pleasure by smiling and laughter, and aversion by 'fussing,' arching of the back and crying (in many gradations), their faces being animated by these emotional states." *Id.* By analogy, unborn children at twenty weeks possess the same abilities to feel, as their brain development at least matches that of a hydranencephalic infant.

Reinforcing this literature on fetal development, scientific studies have illustrated that unborn children at twenty weeks exhibit numerous observable indications of pain. By that time, a fetus reacts to touch and exhibits complex movements observable through real-time ultrasound. *See* Myers at 241. A twenty-week fetus, for example, reacts negatively to a needle prick with vigorous body and breathing movements, which the infant does not demonstrate during needling of the placenta, precisely because the placenta lacks pain receptors. *See* Giannakoulopoulos, Fetal Plasma Cortisol & Beta-endorphin Response to Intrauterine Needling, 344 *Lancet* 77, 77 (1994).

Painful stimuli, moreover, cause a twenty-week fetus to exhibit a hormonal stress response, another indication of advancing neural development. *See* Myers at 242; Derbyshire, Can Fetuses Feel Pain?, 332 *Controversy* 909, 910 (2006); *see also* Giannakoulopoulos at 77 ("[A]s with neonates, the fetus mounts a similar hormonal response to that which would be mounted by older children and adults to stimuli which they would find painful."). Rapid movement, breathing, and cardiovascular changes accompany this stress response. *See* Gupta, Fetal Surgery and Anaesthetic Implications, 8 *Continuing Education in Anaesthesia, Critical Care & Pain* 71, 74 (2008); Fisk, Effect of Direct Fetal Opioid Analgesia on Fetal Hormonal & Hemodynamic Stress Response to Intrauterine Needling, 95 *Anesthesiology* 828, 828 (2001).

Painful stimuli in utero also correlate with long-term harm to a child's neurodevelopment, including altered pain sensitivity and developmental disabilities later in life. Van de Velde, Fetal & Maternal Analgesia/Anesthesia for Fetal Procedures, 31 *Fetal Diagnosis & Therapy* 201, 206-07 (2012). That is why doctors use analgesia or anesthesia when operating on an unborn child, including at twenty weeks' gestation. Myers at 236 ("Since substantial evidence exists demonstrating the ability of the second trimester fetus to mount a neuroendocrine response to noxious stimuli . . . , fetal pain management must be considered in every case.").

For all of these reasons, the district court in this case found "uncontradicted and credible" the evidence illustrating that a twenty-week fetus can feel pain. Pet. App. 63a.

B. Many States Have Passed Legislation In Response To This New Medical Evidence

In addition to Arizona, twelve other States have passed legislation seeking to further the same interests that Arizona's law does. *See* Ala. Code §§ 26-23B-2, 26-23B-5; Ark. Code Ann. §§ 20-16-1303, 20-16-1305; Ga. Code Ann. § 16-12-141; Idaho Code Ann. §§ 18-503(11), 18-505; Ind. Code §§ 16-34-1-9, 16-34-2-1; Kan. Stat. Ann. §§ 65-6722, 65-6724(a); La. Rev. Stat. Ann. § 40:1299.30.1; Neb. Rev. Stat. §§ 28-3,104, 28-3,106; N.C. Gen. Stat. §§ 14-44, 14-45.1; N.D. Cent. Code § 14-02.1-05.3; Okla. Stat. tit. 63, §§ 1-738.7, 1-738.8; Act of July 18, 2013, 83rd Leg., 2nd C.S., ch. 1, Tex. Gen. Laws. Several more States are presently considering similar legislation.

See S. File 45, 2013 G.A., 85th Sess. (Iowa 2013); H.B. 412, 2013 Leg., Reg. Sess. (Ky. 2013); S.B. 456 and H.B. 1312, 2013 Leg., Reg. Sess. (Md. 2013); H.B. 1660, 2012 Leg., Reg. Sess. (N.H. 2012) (introduced Dec. 2011); S.B. 553, 2013 Leg., Reg. Sess. (Or. 2013); S.B. 626 and H.B. 4223, 120th G.A., 1st Reg. Sess. (S.C. 2013); H.B. 1285, 2012 G.A., Reg. Sess. (Va. 2012); S.B. 589 and H.B. 2364, 81st Leg., Reg. Sess. (W.V. 2013). And the U.S. House of Representatives recently passed legislation serving the same ends. *See* Pain-Capable Unborn Child Protection Act, H.R. 1797, 113th Cong. (2013).

In pursuing this legislation, the States have made clear their purpose to protect against pain. As Alabama's law notes, its "purpose" is "to assert a compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that they are *capable of feeling pain*." Ala. Code § 26-23B-2(12) (emphasis added). This newly understood interest in preventing fetal pain is "separate from and independent of" the traditional interest in protecting fetal life. La. Rev. Stat. Ann. § 40:1299.30.1(B)(2)(b). Indeed, States have long furthered a general interest in preventing pain, as evident, for example, by the ubiquity of laws criminalizing the cruel infliction of pain on animals. *See, e.g.*, Alaska Stat. § 11.61.140 (criminalizing infliction of "severe and prolonged physical pain or suffering on an animal"); Fla. Stat. § 828.12 (criminalizing "infliction of unnecessary pain" on animals).

To show the compelling nature of this interest, the States have cited the "substantial medical evi-

dence recogniz[ing] that an unborn child is capable of experiencing pain by not later than 20 weeks after fertilization." Act of July 18, 2013, 83rd Leg., 2nd C.S., ch. 1, Tex. Gen. Laws, § 1(a)(1). Indiana's statute, for example, identifies the "evidence that a fetus of at least twenty (20) weeks of postfertilization age seeks to evade certain stimuli in a manner similar to an infant's or adult's response to pain." Ind. Code § 16-34-1-9(a)(2). Kansas's notes that "[p]ain receptors (nociceptors) are present throughout the unborn child's entire body by no later than 16 weeks after fertilization and nerves link these receptors to the brain's thalamus and subcortical plate by no later than 20 weeks." Kan. Stat. Ann. § 65-6722(a). And Nebraska's highlights that "[a]nesthesia is routinely administered to unborn children who have developed twenty weeks or more past fertilization who undergo prenatal surgery." Neb. Rev. Stat. § 28-3,104(3).

Nor have the States ignored the contrary evidence; they have reasonably rejected it. Alabama's law, for example, disagrees with "[t]he position, asserted by some medical experts, that the unborn child remains in a coma-like sleep state that precludes the unborn child experiencing pain." Ala. Code § 26-23B-2(10). That view is undermined both by "the documented reaction of unborn children to painful stimuli" and by "the experience of fetal surgeons who have found it necessary to sedate the unborn child with anesthesia to prevent the unborn child from thrashing about in reaction to invasive surgery." *Id.* Similarly, Louisiana's law rejects the view that "the ability to experience pain depends on the cerebral cortex and requires nerve connections

between the thalamus and the cortex." La. Rev. Stat. Ann. § 40:1299.30.1(B)(f). That is so because "recent medical research and analysis, especially since 2007, provides strong evidence for the conclusion that a functioning cortex is not necessary to experience pain." *Id.*

The state laws' substantive provisions confirm that they seek to further this interest in preventing fetal pain. The laws do not affect the vast majority of abortions, which occur well before twenty weeks' gestation. Instead, based on the medical evidence, the laws focus on the period when unborn children can feel pain and when the common abortion method would cause severe pain. Under the "dilation and evacuation" procedure, an abortion doctor dismembers the fetus by pulling the fetus out of the womb piece by piece. *See Gonzales*, 550 U.S. at 135. To prevent the obvious pain that would result, most of these state laws restrict abortion after twenty weeks' gestation, permitting those late abortions only in certain circumstances. Alabama's law, for example, restricts abortions after twenty weeks to circumstances where the abortion is necessary "to avert [a woman's] death or to avert serious risk of substantial and irreversible physical impairment of a major bodily function." Ala. Code § 26-23B-5(a). Texas's law, by comparison, permits abortions after twenty weeks in those circumstances as well as in cases where "severe fetal abnormalities" are discovered. Tex. Gen. Laws, § 1(a)(4)(B).

In sum, the Court should grant the petition for certiorari because the petition does not request re-

view of some idiosyncratic state law starkly departing from the laws of sister sovereigns. Rather, the petition raises an issue of nationwide import, as illustrated by the number of jurisdictions that have enacted, or are presently considering enacting, similar laws for the same important reasons.

II. THE COURT SHOULD CONSIDER THE VALIDITY OF THESE STATE LAWS NOW

To be sure, the Ninth Circuit is the first circuit court to consider this recent legislation. For many reasons, however, the Court should not wait for other circuits to resolve the questions presented before reviewing them itself: The questions presented address critical issues of public policy; the Court's guidance is sorely needed on the issues; this case provides a good vehicle to consider them; and no other case is in sight for the Court to do so soon.

A. The State Laws Address Questions Of The Highest Importance To Our Society

This Court has repeatedly recognized the weighty interests on all sides of the abortion debate. On the one hand, the Court has said that "the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law." *Casey*, 505 U.S. at 852. Significantly, however, the States have "'important and legitimate interest[s]'" of their own. *Id.* at 871 (joint opinion) (quoting *Roe v. Wade*, 410 U.S. 113, 162 (1973)). "On this point *Casey* overruled the holdings in two cases because they undervalued the State's interest[s] . . . in potential life." *Gonzales*, 550 U.S. at 146. Further, the interest involved here—the protection of unborn children from severe

pain—can only be described as one of the highest order. Whether one views an unborn child as a "life or a potential life," *Casey*, 505 U.S. at 852, allowing abortions to unnecessarily impose substantial pain "is incompatible with the concept of human dignity and has no place in a civilized society," *see Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011).

These opposing interests, moreover, can directly collide when it comes to abortion. That is precisely why *Casey* overruled *Roe*'s "rigid" "trimester framework," which gave inadequate respect to the States' interests. *Casey*, 505 U.S. at 872 (joint opinion). The Ninth Circuit's decision here, too, gives no weight to the State's interest in preventing fetal pain, finding that no "state interest is strong enough to support" even narrow bans only in certain circumstances on pre-viability abortions. Pet. App. 31a. If incorrect, this decision hampers vital state interests.

Confirming the important interests at stake in the abortion context, this Court has often granted certiorari to evaluate abortion laws even where there was ostensibly no disagreement in the lower courts. In *Gonzales*, for example, the Court granted review to consider the federal ban on partial-birth abortion in spite of the lower courts' agreement on the question at issue. *See* 550 U.S. at 132-33. The Court has even granted certiorari "solely to review what purports to be an application of state law" in the abortion context. *Leavitt v. Jane L.*, 518 U.S. 137, 144 (1996) (per curiam); *see also, e.g.*, *Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997) (per curiam) (grant-

ing review of a non-final order because of the immediate effect for States in the Ninth Circuit).

As these cases show, abortion laws raise some of the most important issues of our time. These interests have repeatedly led the Court to grant certiorari to resolve legal questions surrounding the abortion debate. This case should be no different.

B. The Court Has Never Considered Fetal Pain In Its Constitutional Calculus

The Court should also grant review because its instruction is needed on the specific issue that this case presents. As far as the *Amici* States are aware, the interest in preventing fetal pain has been cited only in passing by only one member of the Court. *See Webster v. Reprod. Health Servs.*, 492 U.S. 490, 569 (1989) (Stevens, J., concurring in part and dissenting in part); *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 778 (1986) (Stevens, J., concurring). In *Thornburgh*, for example, Justice Stevens opined that a State's interest "increases *progressively and dramatically* as the organism's capacity to *feel pain*, to experience pleasure, to survive, and to react to its surroundings increases day by day." 476 U.S. at 778 (emphases added). The full Court, by contrast, has never referenced how this interest should impact the constitutional question.

The Court's lack of guidance, moreover, is concerning. Its precedents emphasize that the validity of laws regulating abortion depends on delicate balances that weigh the State's articulated interests along with a woman's liberty interest. *See Gonzales*, 550 U.S. at 146. Accordingly, the Court has analyzed

all interests asserted by the State when assessing whether a law passes muster. These have included the "interest in protecting fetal life" and "in preserving and protecting the health of the pregnant woman.'" *Casey*, 505 U.S. at 875-76 (joint opinion) (citation omitted). They have also included such subsidiary interests as "express[ing] respect for the dignity of human life," *Gonzales*, 550 U.S. at 157; "'protecting the integrity and ethics of the medical profession,'" *id.* at 157 (citation omitted); ensuring that a woman makes her decision with "informed consent," *Casey*, 505 U.S. at 883 (joint opinion); and encouraging a minor "to seek the help and advice of her parents," *Hodgson v. Minnesota*, 497 U.S. 417, 480 (1990) (Kennedy, J., concurring in the judgment in part and dissenting in part); *see Casey*, 505 U.S. at 899 (joint opinion).

Noticeably absent from the Court's list of evaluated state interests is any interest in preventing fetal pain. In other words, while *Roe* "undervalue[d] the State's interest in the potential life within the woman," *Casey*, 505 U.S. at 873 (joint opinion), the Court's current cases have not even valued the States' newly ascertained interest at all. That is precisely because the evidence on which the States rely has only recently coalesced on the issue of pain capacity, and because States have only recently begun legislating in response to that evidence. The lack of guidance on this topic warrants the Court's review, particularly considering that, as noted, *see* Part I.B, several States are debating similar legislation.

C. This Case Provides A Good Vehicle To Resolve The Questions Presented

The Court should grant review because this case presents an ideal procedural posture. To begin with, the Ninth Circuit found the statute "*entirely* invalid," striking it down for "*every* woman affected by its prohibition on abortions" no matter the divergent circumstances in which the law might be applied. Pet. App. 33a (emphases added). Under the court's logic, the statute is unconstitutional in all applications, including, for example, as applied to a woman who decides to obtain a late abortion because "her partner, upon noticing her previously undisclosed pregnancy, pressures her to do so" or because her partner wanted a boy and discovers late that she is having a girl. *See* Pet. App. 38a (Kleinfeld, J., concurring). The Ninth Circuit's broad holding thus puts the basic legal question front and center.

Conversely, that broad holding relieves the Court of having to answer whether the statute is unconstitutional in "certain unique circumstances." Pet. App. 59a. It need not consider, for example, whether the Constitution compels or permits the Texas law's exception when certain "severe fetal abnormalities" are discovered after twenty weeks. Tex. Gen. Laws, § 1(a)(4)(B); *see* Pet. App. 37a (Kleinfeld, J., concurring) (recognizing that "plaintiffs are not entitled to prevail in this facial challenge case by showing that in some cases, such as the gross fetal deformity not detectable until after 20 weeks, the statute poses an 'undue burden'"). As the Court has instructed, "the proper means to consider exceptions" for any discrete

factual situations "is by as-applied challenge." *Gonzales*, 550 U.S. at 167.

The Ninth Circuit's decision also did not weigh the evidence regarding the fetal capacity for pain. Instead, the Ninth Circuit found this interest irrelevant. It concluded that this Court's "binding precedent" invalidated all abortion prohibitions before viability, Pet. App. 11a, and that "no state interest" could justify even the most narrowly drawn limit, Pet. App. 31a; *see also* Pet. App. 11a (noting that "the factual record or the district court's factual findings" were not "of pertinence to our decision"). As a result, the Ninth Circuit's analysis—relying as it does on a stark, absolute, *per se* rule—does not require the Court to delve into a voluminous factual record.

In short, the Ninth Circuit's holding directly and efficiently presents the basic issue—whether the States' interest in preventing fetal pain can ever suffice for narrow limits on pre-viability abortions.

D. A Circuit Split Is Unlikely To Develop Anytime Soon

The Court should also immediately consider the questions presented because it likely will not have another vehicle to do so for quite some time. Arizona enacted its law in April 2012. *See* 2012 Ariz. Legis. Serv. Ch. 250 (H.B. 2036) (West). Several States, by comparison, enacted their laws a year or so ahead of Arizona, including, for example, Nebraska in April 2010, Kansas in April 2011, Indiana in May 2011, and Alabama in June 2011. *See* 2010 Nebraska Laws L.B. 1103; 2011 Kansas Laws Ch. 41 (H.B. 2218); 2011 Ind. Legis. Serv. P.L. 193-2011 (H.E.A.

1210) (West); 2011 Alabama Laws Act 2011-672 (H.B. 18). Aside from Arizona's law, however, only Idaho's has been enjoined by a federal court. *See McCormack v. Hiedeman*, 900 F. Supp. 2d 1128, 1149-51 (D. Idaho 2013). And the only other potential vehicle on this issue (a case involving a state-law challenge to the Georgia law) remains mired in state trial court for further proceedings after the court granted a preliminary injunction. *Lathrop v. Deal*, No. 2012-cv-224423 (Ga. Super. Ct. Dec. 21, 2012). Thus, all federal challenges to this legislation have flowed through the Ninth Circuit.

Indeed, some state laws might remain on the books because opponents do not challenge them. During the debate over Texas's law, for example, abortion advocates vociferously opposed its provisions requiring abortions to be undertaken before twenty weeks. *See, e.g.*, Texas Senate Hears Abortion Testimony, As Activists Flood Capitol Again, Austin American-Statesman, July 9, 2013 [2013 WLNR 16647137]. Despite that vigorous opposition, however, the only filed suit seeks to enjoin *other* portions of the law. *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, No. 1:13-cv-862, W.D. Tex., complaint, filed Sep. 27, 2013 (challenging requirements affecting clinic standards and physician admissions). When asked why they did not target the twenty-week limit, a lawyer responded: "The simple answer is you can only do so much at once." Planned Parenthood Sues Texas Over Abortion Restrictions, Reuters, Sep. 27, 2013, accessible at http://goo.gl/ooWROX.

This difference in litigation strategy inside and outside the Ninth Circuit shows that the lack of a circuit split does not undermine the need for immediate review. If Texas's law, like the laws of the other States outside the Ninth Circuit, remains indefinitely binding, a split in legal regimes will continue to persist whether or not a court-endorsed split does. And all sides in this debate ought to wish that situation to be resolved—whether those who believe, as the *Amici* States do, that the Ninth Circuit has wrongly stymied Arizona's interests, or those who believe, as the plaintiffs do, that the other States' laws have wrongly stymied late abortions.

III. ARIZONA'S TWENTY-WEEK ABORTION LIMIT COMPORTS WITH *CASEY*'S CENTRAL FRAMEWORK

The Court should grant the petition because the Ninth Circuit got it wrong. Like the law upheld in *Gonzales*, Arizona's law "can survive this facial attack." 550 U.S. at 163. That law has neither the purpose nor the effect of imposing a substantial obstacle on the abortion right established by this Court's cases, and so cannot be considered an "undue burden." The Ninth Circuit's decision, by contrast, reads other language from *Casey* in a manner that puts it on a collision course with *Casey*'s general undue-burden test.

A. As its principal framework for judging abortion laws, the controlling decision in *Casey* adopted the "undue burden" standard to balance the competing interests that it found to be at stake. 505 U.S. at 869-78 (joint opinion). Under that standard, a state

law violates the Constitution "if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Id.* at 878. The controlling decision emphasized, however, that "not all regulations must be deemed unwarranted," *id.* at 876, so "[t]he fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it," *id.* at 874. Arizona's law satisfies this standard when assessed against the broad, facial attack in this case.

Purpose. As described above, *see* Part I.B, the States enacting the recent legislation have sought to ensure that the life being ended does not suffer severe physical pain during the procedure. *See, e.g.*, Tex. Gen. Laws, § 1(a)(1); Ala. Code § 26-23B-2(13). Arizona is no exception. The legislative findings justifying its law cite the "well-documented medical evidence that an unborn child by at least twenty weeks of gestation has the capacity to feel pain during an abortion." 2012 Ariz. Legis. Serv. Ch. 250, § 9(A)(7).

Additionally, Arizona's law invokes recent studies showing that the risk to a woman's health "increases exponentially at higher gestations" and that "[t]he incidence of major complications is highest after twenty weeks of gestation." 2012 Ariz. Legis. Serv. Ch. 250, § 9(A)(2)-(3). The Court has long viewed this goal of promoting the long- and short-term health of women as a compelling interest. *See Casey*, 505 U.S. at 875-76. It would be equally traumatic, if not more so, for a woman to "learn[] only after the

event" of her unborn child's suffering during the abortion than to learn of the grisly method itself. *See Gonzales*, 550 U.S. at 159-60. These goals to protect against fetal pain and promote maternal health are compelling ones, and lack any intent to impose any obstacle on the abortion right that *Casey* reaffirmed.

Effect. Nor does Arizona's law have the effect of imposing a substantial obstacle on abortion—at least not in the context of this facial challenge. Under Arizona's law, *all* women may choose an elective abortion for a full twenty weeks of pregnancy, meaning that *all* women have near five months in which to decide. Only during the next three or four weeks, at a time that an abortion causes pain to an unborn child and magnifies the health risks to the woman, does Arizona generally prohibit a woman from obtaining an abortion before viability. *See* Ariz. Rev. Stat. § 36-2159(B). Even then, the law permits abortions when the pregnancy threatens the woman's life or health. *See* Ariz. Rev. Stat. § 36-2151(6). In other words, Arizona's law merely channels elective abortions to the time before a fetus may suffer great pain and before the risks to the woman's health are greatest. This channeling is not undue, as a "woman has adequate time to decide whether to have an abortion in the first 20 weeks after fertilization." Tex. Gen. Laws § 1(a)(4)(A); *see also* Pet. App. 55a-56a.

Statistics bear out that Arizona's law, in its effect, does not impose any substantial obstacle on elective abortions. As the district court noted, "90% of abortions take place during the first trimester of pregnancy, through approximately the thirteenth week."

Pet. App. 57a; *see also* Centers for Disease Control and Prevention, No. 61(SS08), Abortion Surveillance – United States, 2009 (2012) (91.9% of abortions performed at or before thirteen weeks' gestation). On top of that, 7.1% of reported abortions occur at 14-20 weeks' gestation, almost entirely outside the operation of Arizona's law, leaving only 1.3% of all abortions at twenty-one weeks' gestation or more. *Id.* And, in the words of one late-term abortion provider: "I'll be quite frank: Most of my abortions are elective in that 20 to 24 week range. … In my particular case, probably 20 percent are for genetic reasons and the other 80 percent are purely elective." 141 Cong. Rec. S16761-03, 1995 WL 656011, attachment, American Medical News Transcript. Arizona's law thus imposes no obstacle—let alone a substantial obstacle—on most abortions today.

Further, for those who might find it relevant, *see Lawrence v. Texas*, 539 U.S. 558, 576-77 (2003); *cf. Roper v. Simmons*, 543 U.S. 551, 575-76 (2005), the position of the *Amici* States on what qualifies as an "undue burden" is hardly extreme when compared to the laws of other countries. Germany, for example, bans abortion after twelve weeks, and, even then, permits abortion only when a doctor performs the procedure after a three-day waiting period. Strafgesetzbuch [StGB] [Penal Code] Nov. 13, 1998, BGBI. I, § 218a. France likewise prohibits abortions after twelve weeks unless two physicians certify that it will be done to prevent severe harms to the woman's life or health or because of severe infant abnormalities. Law No. 2001-588 of July 4, 2001, Journal Officiel de la République Française [J.O.] [Official Ga-

zette of France], July 7, 2001, p. 10823; *see* Larsen, *Importing Constitutional Norms from a "Wider Civilization,"* 65 Ohio St. L.J. 1283, 1320 (2004) (noting that "[t]he vast majority of the world's countries (187 of 195) forbid abortion after 12 weeks gestation").

In sum, Arizona's law—when assessed against this facial challenge—satisfies the undue-burden test, the central test for judging pre-viability laws.

B. To reach its contrary result, the Ninth Circuit held that this undue-burden framework does not even apply here. Rather, the court interpreted *Casey* as holding that all abortion prohibitions before viability are *per se* invalid—*whether or not* they impose an undue burden. *See* Pet. App. 16a. As support, the Ninth Circuit quoted various statements from *Casey*, including, for example, the language that, "'[b]efore viability, the State's interests are not strong enough to support a *prohibition of abortion* or the imposition of a substantial obstacle to the woman's effective right to elect the procedure.'" *Id.* (quoting *Casey*, 505 U.S. at 846) (emphasis added).

The Court should reject the Ninth Circuit's reading of what *Casey* meant by an invalid "prohibition." To begin with, other language from *Casey* suggests that *Casey*'s use of "prohibition" refers only to a *complete ban* on a woman's right to choose, not to *narrower bans* on certain pre-viability abortions. When noting that a State cannot prohibit abortion before viability, for example, the controlling decision refers to *Roe*'s "central holding"—i.e., that the State cannot *eliminate* a woman's right to choose a pre-viability abortion. *See* 505 U.S. at 879. When discussing that

"central holding," the Court said that, "[r]egardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from *making the ultimate decision* to terminate her pregnancy before viability." *Id.* (emphasis added). Likewise, *Casey* stated that "[w]hat is at stake is the woman's right to make the ultimate decision, *not a right to be insulated from all others in doing so*." *Id.* at 877 (emphasis added). *Casey* also opined that *Roe* erected its trimester framework to prevent a woman's choice from "exist[ing] *in theory* but not in fact." *Id.* at 872 (emphasis added). And it criticized this framework because it "led to the striking down of some abortion regulations which *in no real sense* deprived women of the ultimate decision." *Id.* at 875 (emphasis added).

Under this narrower reading, Arizona's law is not subject to any *per se* invalidation as a "prohibition" on a woman's right to choose. The law in "no real sense" deprives women of the decision, and in no way gives them a choice "in theory but not in fact." *Id.* To the contrary, each pregnant woman in the State retains the ultimate choice. The law merely requires women to make that choice in the first half of pregnancy before unborn children can feel pain and before the risk of medical complications dramatically rises. The law, in other words, is not a "prohibition" on abortion under *Casey*, because it merely regulates the manner in which abortions should be performed. It thus should be analyzed like every other previability regulation under the undue-burden standard. *See id.* at 874 ("*Only* where state regulation imposes an *undue burden* on a woman's ability to make

this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.") (emphases added).

Indeed, *no* pre-viability regulation could survive if the Ninth Circuit correctly interpreted *Casey*. The Ninth Circuit's view rests on the notion that Arizona's law prohibits elective abortion for women in their twentieth week of pregnancy, and so qualifies as a *per se* invalid "prohibition" for those specific women. But that logic would equally apply to every other abortion regulation. A law prohibiting abortions by unlicensed individuals would be unconstitutional, for example, because it *prohibited* those specific women without access to a physician from exercising their right to choose. This Court, however, denied a preliminary injunction that would have suspended a state law requiring that only licensed physicians perform abortions. *See Mazurek*, 520 U.S. at 971-72. So too, a law prohibiting partial-birth abortion would be unconstitutional, because it *prohibited* those specific women who refused any other method from exercising their right to choose. Yet this Court upheld such a ban. *See Gonzales*, 550 U.S. at 156-67.

As these examples show, the Ninth Circuit's decision interprets *Casey* as effectively reinstituting the very trimester framework that it replaced. All pre-viability regulations *prohibit* those pre-viability abortions performed inconsistently with the regulations. *See Casey*, 505 U.S. at 875 (joint opinion) ("All abortion regulations interfere to some degree with a woman's ability to decide whether to terminate her

pregnancy."). But that does not mean that all pre-viability regulations prohibit a woman from making the ultimate decision to terminate her pregnancy. Rather, to analyze regulations that fall short of a complete ban, the Court replaced the trimester framework with the undue-burden framework.

Finally, even assuming the Ninth Circuit's interpretation, *Casey* left its own safety valve—noting that "no changes of fact have rendered viability more or less appropriate as the point at which the balance of interests tips." 505 U.S. at 861. Here, however, the Arizona law relies on those very changes—the recent evidence showing that the fetal capacity for pain develops before fetal viability and that late abortions greatly increase health risks. *See* 2012 Ariz. Legis. Serv. Ch. 250, § 9(A)(7). This evidence suggests—at the least—that the undue-burden test should apply to laws, like Arizona's, that merely channel the woman's choice rather than prohibit it.

CONCLUSION

The Court should grant the petition for certiorari.

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