Case No. 19-1685

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

AMY BRYANT, M.D., BEVERLY GRAY, M.D., ELIZABETH DEANS, M.D., and PLANNED PARENTHOOD SOUTH ATLANTIC,

Plaintiffs-Appellees,

v.

JIM WOODALL, SATANA DEBERRY, ELEANOR GREENE, and MANDY COHEN, each in his/her official capacity,

Defendants-Appellants.

On Appeal from the United States District Court
for the Middle District of North Carolina

BRIEF OF AMICI CURIAE THE NATIONAL CATHOLIC BIOETHICS CENTER, CHRISTIAN MEDICAL & DENTAL ASSOCIATIONS, AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS, and AMERICAN COLLEGE OF PEDIATRICIANS IN SUPPORT OF DEFENDANTS-APPELLANTS AND SUPPORTING REVERSAL OF THE DISTRICT COURT

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amicus Curiae **The National Catholic Bioethics Center** engages in research, consultation, publishing, and education to promote human dignity in health care and the life sciences, and derives its message directly from the teachings of the Catholic Church. It asserts pre-born children are members of the human family from the moment of conception onward and, that from that moment, a distinct individual organizes herself along a characteristic and determined developmental course culminating in mature adulthood.

Amicus Curiae **Christian Medical & Dental Associations** is a nonprofit national organization of Christian physicians and allied healthcare professionals with 19,000 members. It provides up-to-date information on the legislative, ethical, and medical aspects of abortion and its impact on maternal health.

Amicus Curiae **American Association of Pro-Life Obstetricians & Gynecologists** is a non-profit professional medical organization of 4,800 obstetrician-gynecologist members and associates. AAPLOG seeks to provide the general public with a realistic appreciation and understanding of abortion-related health risks.

[1]No party or party's counsel authored this brief in whole or in part or financially supported this brief, and no one other than amici curiae or their counsel contributed money intended to fund preparing or submitting this brief. Fed. R. App. P. 29(a)(5)(E).

Amicus Curiae **American College of Pediatricians** is a national non-profit organization of pediatricians and other healthcare professionals seeking to ensure that all children reach their optimal physical and emotional health and well-being.

SUMMARY OF ARGUMENT

The district court wrongly viewed "viability" as the exclusive point for assessing the constitutionality of North Carolina's 20-week abortion limitation. The court's application of the "viability" standard was error because it failed to recognize and appreciate the State of North Carolina's legitimate interests in regulating and limiting the practice of abortion. These important interests include using the State's voice and regulatory authority to show its profound respect for the "life of the unborn" and protecting the health of women from "the outset of [] pregnancy." *Planned Parenthood v. Casey*, 505 U.S. 833, 845, 846, 877 (1992). North Carolina also has significant interest in regulating a "brutal and inhumane procedure" to avoid "coarsen[ing] society to the humanity of not only newborns, but all vulnerable and innocent human life" and in protecting the integrity of the medical profession. *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007) (cleaned up).

ARGUMENT

I. "Viability" is not the sole standard for assessing the constitutionality of North Carolina's 20-week abortion limitation.

The primary legal and factual issue the district court considered was whether a pre-born child is viable at 20 weeks. *Bryant v. Woodall*, 363 F.Supp.3d. 611, 627-29 (M.D.N.C. 2019). This was error and conflicts with the Supreme Court's nuanced and evolving abortion jurisprudence. Just as the Supreme Court rejected *Roe v. Wade*'s trimester framework in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), its 2007 decision in *Gonzales v. Carhart*, 550 U.S. 124 (2007) made clear that "viability" is not a bright-line analytical tool.

Roe's trimester framework unsuccessfully attempted to resolve the irreconcilable conflict between the State's interest in the life of the pre-born child and the *Roe*-recognized right of a woman to terminate her pregnancy. *Casey*, 505 U.S. at 871-73 (plurality opinion). As Justice O'Connor had previously recognized, "the *Roe* framework [was] on a collision course with itself." *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting).

Casey's "viability" line is no less on a collision course with itself. The *Casey* plurality held that, at that time, "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 860-61. But this plurality ruling inherently recognizes that "changes of fact" *could* render the viability line inappropriate.

The gruesomeness of partial-birth abortion is a change in fact that tips the balance of interests, as the Supreme Court recognized 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," the Supreme Court upheld a complete ban on partial-birth abortion, 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," "a fetus is a living organism while within the womb, whether or not it is viable outside the womb." *Id*. at 147. *Accord, e.g.*, *id*. at 156 (posing the central question as "whether the [federal partial-birth abortion ban] Act . . . imposes a substantial obstacle to late-term, *but pre-viability*, abortions," and concluding that it does not) (emphasis added).

Significantly, the *Gonzales* Court reversed a district court ruling that treated the "viability" line as dispositive, just like the district court's opinion here. Justice Ginsburg's *Gonzales* dissent candidly acknowledged that the majority "blur[red] the line" between "previability and postviability abortions." 550 U.S. at 171, 186 (Ginsburg, J., dissenting). Legal scholars agree with her assessment. *E.g.*, Khiara M. Bridges, *Capturing the Judiciary: Carhart and the Undue Burden Standard*, 67 WASH. & LEE L. REV. 915, 941 (2010) ("*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) (explaining that *Gonzales* "undermines *Casey*'s attempted defense of the viability rule").

Indeed, "viability" as a standard for evaluating the constitutionality of abortion laws was problematic even before *Casey* and *Gonzales*. *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").

Gonzales made clear what experts have long known: the viability line is problematic because (1) medical advances make it a moving target and (2) any "viability rule" eviscerates "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." 550 U.S. at 145 (citing *Casey*, 505 U.S. at 846 (emphasis added)); *accord, e.g.*, *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").

This failure to accommodate North Carolina's legitimate interest in protecting pre-born life is especially troublesome. As Justice O'Connor explained in *Akron*,

> *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. . . . [T]he State's interest in protecting potential human life exists throughout the pregnancy.

Id. at 461.

In sum, *Casey* "rejected [both] *Roe*'s rigid trimester framework *and* the interpretation of *Roe* that considered all previability regulations of abortion unwarranted." *Gonzales*, 550 U.S. at 145, 146 (citing *Casey*, 505 U.S. at 875-876, 878 (plurality opinion)). After *Gonzales*, no doubt exists that factors other than viability matter in evaluating the constitutionality of North Carolina's law. Yet the district court failed to properly consider those crucial factors. That fundamental mistake conflicts with *Gonzales* and caused the district court to strike down North Carolina's valid law promoting pre-born life.

II. Legitimate State interests in protecting life, advancing maternal health, and protecting the medical profession from brutal procedures support North Carolina's 20-week abortion limitation.

North Carolina has legitimate interests in protecting pre-born human life, in regulating the "brutal and inhumane" procedure of abortions taking place after 20 weeks gestation, in protecting the medical profession, and in advancing maternal

health. Its 20-week abortion limitation advances all these interests; therefore, this Court should uphold the law.

A. North Carolina's 20-week abortion limitation demonstrates "profound respect" for the life of the pre-born.

The Supreme Court has repeatedly recognized that North Carolina "may use its voice and its regulatory authority to show its profound respect for the life within the woman." *Gonzales*, 550 U.S. at 157; *accord, e.g.*, *Casey*, 505 U.S. at 877 (recognizing as a legitimate interest the State's "profound respect for the life of the unborn"). Importantly, by 12 weeks gestation, a pre-born child has taken on "the human form" in all relevant aspects. *Gonzales*, 550 U.S. at 160.

As part of its informed consent law for abortion, the North Carolina Department of Health and Human Services publishes "A Woman's Right to Know" handbook, detailing the development of a pre-born child. N.C. Dep't of Health and Human Servs, *A Woman's Right to Know* (Sept. 2015), https://bit.ly/2HwTP3b. This vital resource notes that among the important milestones attained by a 20-week pre-born child are:

- "The heart begins beating at approximately five weeks and one day." *Id*. at 5.
- "Brainwaves have been measured and recorded before eight and a half weeks." *Id*. at 7.
- "By twenty weeks, almost all the organs have been formed." *Id*. at 11.

These undisputed developmental milestones, and others affirm, that North Carolina has an interest in protecting pre-born life. Even though the "viability" line has not quite yet reached 20 weeks, it is inching closer every year. There is no reason "why the State's interest in protecting potential human life should come into existence only at the point of viability." *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 519 (1989).

Advances in genetic science have undermined one of *Roe's* core assumptions, namely, that a pre-born child is not yet human. The Eighth Circuit has upheld a requirement that a woman considering abortion be informed that an "abortion will terminate the life of a whole, separate, unique, living human being" as truthful and not misleading. *Planned Parenthood of Minn., N.D., S.D. v. Rounds*, 530 F.3d. 724, 734-38 (8th Cir. 2008). But recent evidence on fetal pain brings *Roe's* mistake into sharp relief. Substantial medical evidence shows that pre-born children have the capacity to feel pain after 20 weeks. 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); Charlotte Lozier Institute, *Fact Sheet: Science of Fetal Pain*, Dec. 17, 2018. The courts should not require state legislatures to ignore these facts.

B. North Carolina's 20-week abortion limitation appropriately regulates a "brutal and inhumane" procedure and protects the medical profession.

The Supreme Court has already held that North Carolina may regulate the "brutal and inhumane" partial-birth abortion procedure to avoid "coarsen[ing] society to the humanity of not only newborns, but all vulnerable and innocent human life." *Gonzales*, 550 U.S. at 157 (cleaned up). The Eleventh Circuit recently extended this precept to the dismemberment abortion procedure, the most common method of abortion after 14 weeks gestation, concluding that "[t]he State has an actual and substantial interest in lessening, as much as it can, the gruesomeness and brutality of dismemberment abortions." *W. Alabama Women's Ctr. v. Williamson*, 900 F.3d 1310, 1320 (11th Cir. 2018). It recognized the brutality and inhumanity of this procedure, describing it as "tearing apart and extracting piece-by-piece from the uterus what was until then a living pre-born child. This is usually done during the 15 to 18 week stage of development, at which time the unborn child's heart is already beating." *Id*. at 1314.

Relying on scientific advancements and increasing awareness of the stages of a baby's in utero development, North Carolina validly decided that it blurs the line between abortion and infanticide to take the life of a pre-born infant who is a living human being and virtually indistinguishable from an already-born infant except for age and size. Honoring North Carolina's interest and policy choice does not require

this Court to disregard a single Supreme Court precedent, but rather to uphold the Supreme Court's consistent statements about a State's interest in upholding the value of pre-born human life.

North Carolina also acted to protect the integrity of the medical profession. *Gonzales*, 550 U.S. at 157. As with partial-birth abortion, an abortion after 20 weeks gestation "confuses the medical, legal, and ethical duties of physicians to preserve and promote life, as the physician acts directly against the physical life of a child" and "undermines the public's perception of the appropriate role of a physician." S. 3, 108th Congress, §§ 2(J), 2(K) (2007) (Partial Birth Abortion Ban Act of 2003).

C. North Carolina's 20-week abortion limitation protects maternal health.

The Supreme Court has also recognized that North Carolina has "legitimate interests from the outset of pregnancy in protecting the health of [women]," *Casey*, 505 U.S. at 846, as the "medical, emotional, and psychological consequences of abortion are serious and can be lasting," *H.L. v. Matheson*, 450 U.S. 398, 411 (1981). Current medical evidence demonstrates that North Carolina's 20-week abortion limitation protects women. It also dispels the myths that abortion is generally safe, that abortions performed at or after 20 weeks are safe, and that abortion is safer than childbirth.

1. Abortion's medical risks—including the risk of death—increase exponentially later in pregnancy.

Abortion can cause serious physical and psychological (both short- and long-term) complications for women, including uterine perforation, uterine scarring, cervical perforation or other injury, infection, bleeding, hemorrhage, blood clots, failure to actually terminate the pregnancy, incomplete abortion (retained tissue), pelvic inflammatory disease, endometritis, missed ectopic pregnancy, cardiac arrest, respiratory arrest, renal failure, metabolic disorder, shock, embolism, coma, placenta previa in subsequent pregnancies, preterm birth in subsequent pregnancies, free fluid in the abdomen, organ damage, adverse reactions to anesthesia and other drugs, psychological or emotional complications, including depression, anxiety, sleeping disorders, an increased risk of breast cancer, and even death. *E.g.*, P.K. Coleman, *Abortion and Mental Health: Quantitative Synthesis and Analysis of Research Published 1995-2009*, 199, BRIT. J. OF PSYCHIATRY 180-86 (2011); P. Shah et al., *Induced termination of pregnancy and low birth weight and preterm birth: a systematic review and meta-analysis*, 116(11), B.J.O.G. 1425 (2009); H.M. Swingle et al., *Abortion and the Risk of Subsequent Preterm Birth: A Systematic Review and Meta-Analysis*, 54, J. REPROD. MED. 95 (2009); R.H. van Oppenraaij et al., *Predicting adverse obstetric outcome after early pregnancy events and complications: a review*, 15(4), HUMAN REPROD. UPDATE ADVANCE ACCESS, 409 (2009); J.M. Thorp et al., *Long-Term Physical and Psychological Health*

Consequences of Induced Abortion: Review of the Evidence, 58, OBSTET. & GYNECOL. SURVEY, 67, 75 (2003); J.M. Barrett, *Induced Abortion: A Risk Factor for Placenta Previa*, AM. J. OBSTET. & GYNECOL. 141:7 (1981).

It is undisputed that the later in pregnancy an abortion procedure is performed, the higher the medical risk. Compared to abortion at eight weeks gestation, the relative risk of mortality increases by 38% for each additional week at higher gestations. L. Bartlett et al., *Risk factors for legal induced abortion-related mortality in the United States*, Obstetrics & Gynecology 103(4), 729 (2004). For example, the risk of a woman's death at 8 weeks gestation is one death per one million abortions; at 16 to 20 weeks, that risk rises to one death per 29,000 abortions; and at 21 weeks gestation or later, the risk of death is one per every 11,000 abortions. *Id*. So, a woman seeking an abortion at 20 weeks is 35 times more likely to die from the abortion than she was in the first trimester. At 21 weeks or more, a woman is 91 times more likely to die from the abortion than she was in the first trimester.

Researchers in the Bartlett study concluded that it may not be possible to reduce the risk of death in later-term abortions because of the "inherently greater technical complexity of later abortions." *Id*. at 735. This is because later-term abortions require a greater degree of cervical dilation, an increased blood flow later in pregnancy predisposes the woman to hemorrhage, and the myometrium is relaxed and more subject to perforation. *Id*. Abortion procedures performed after the first

trimester account for "a disproportionate amount of abortion-related morbidity and mortality." E.M. Johnson, *The Reality of Late-Term Abortion Procedures*, Charlotte Lozier Institute, Jan. 20, 2015, at 6.

2. Abortion procedures at or after 20 weeks gestation pose significant risks to women's health.

Any surgical abortion taking place after 20 weeks gestation carries inherent risks to women, including infection, bleeding, damage to genitourinary and gastrointestinal organs, incomplete emptying of the uterus, cervical laceration, and uterine perforation. L. Bartlett et. al., at 729; C. Hammond, *Recent advances in second trimester abortion: an evidence-based review*, AM. J. OBSTET. GYNECOL. 2009;200(4):347-356; J. Diedrich et al., *Complications of Surgical Abortion*, CLIN. OBSTET. GYNECOL. 2009;52(2):205-212. During the second trimester, the uterus thins and softens significantly and there is an increased risk of perforating or puncturing the uterine wall with instruments. Testimony of Anthony Levatino, M.D., Before the Subcomm. on the Constitution and Civil Justice, U.S. House of Representatives (May 23, 2013). And every type of dilator used in a surgical abortion procedure "can migrate into the uterine cavity resulting in ongoing pain, bleeding, or infection." *Id*. at 163.

Inserting dilators also increases the risk that a woman "will experience spontaneous rupture of membranes during or after osmotic dilator insertion," which can lead to infection and fever. *Id*. Insertion can also "traumatiz[e] the cervix" or

"creat[e] a false channel"—that is, it can form a hole or fracture in a woman's vaginal or cervical tissue where there should not be one. *Id*. Leaving the dilators in for multiple days also poses the risk that the woman (and the baby) will contract a serious infection. *Id*. at 163, 165.

3. Childbirth is safer than abortion.

Medical evidence clearly establishes that the later in pregnancy an abortion occurs, the riskier it is, and the greater the chance for significant complications. Notably, recent international studies show that childbirth is safer than abortion.

In August 2012, a Danish study reviewed medical records for almost a half million women who had their first pregnancies between 1980 and 2004, and compared these records with the death register and the abortion register. The results were significant: "Compared to women who delivered, women who had an early or late abortion had significantly higher mortality rates within 1 through 10 years." D.C. Reardon & P.K. Coleman, *Short and long term mortality rates associated with first pregnancy outcome: Population register based study for Denmark 1980-2004*, 18(9), MED. SCI. MONIT., 71-76 (2012).

A May 2012 study out of Chile is particularly telling because it examined trends in maternal death both when abortion was legal in Chile and after abortion was prohibited in 1989. The study found that death rates did not increase after abortion was made illegal. In fact, the maternal mortality ratio decreased from 41.3

deaths per 100,000 live births when abortion was legal, to just 12.7 maternal deaths per 100,000 live births after abortion was made illegal. In addition, the study documented that abortion-related mortality also decreased during the period after abortion was prohibited. E. Koch et al., *Women's Education Level, Maternal Health Facilities, Abortion Legislation and Maternal Deaths: A Natural Experiment in Chile from 1957 to 2007*, 7(5), PLOS ONE, e36613 (May 4, 2012).

In sum, growing medical evidence supports North Carolina's interest in and responsibility to protect women from the dangers inherent in abortion, especially abortions after 20 weeks.

CONCLUSION

North Carolina's 20-week abortion limitation advances important and legitimate interests in protecting the lives of the pre-born, regulating an inhumane procedure (taking the life of a fully formed, pre-born infant), protecting the medical profession, and advancing maternal health. The Supreme Court has rejected mechanical application of the "viability rule" and directed lower courts to properly consider these legitimate state interests. This Court should reverse the district court and uphold the constitutionality of North Carolina's 20-week abortion limitation.

Respectfully submitted this the 3rd day of September, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on the 3rd day of September 2019, the foregoing Brief of Amici Curiae was electronically filed with the Clerk of Court using the ECF system, wtih notice of case activity to be generated and ECF notices to be sent electronically by the Clerk of the Court.

s/ *Kevin H. Theriot*

Dated: September 3, 2019 Attorney for Amici Curiae

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 29(a)(5) and FED. R. APP. P. 32(a)(7)(B) because this brief contains 4,401 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 Times New Roman 14 point font.

Date: September 3, 2019

s/ Kevin H. Theriot

Attorney for Amici Curiae