No. 12-16670

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Paul A. Issacson, M.D.; William Clewell, M.D.; Hugh Miller, M.D.,

Plaintiffs-Appellants
v.

Tom Horne, Attorney General of Arizona, in his official capacity; William Montgomery, County Attorney for Maricopa County, in his official capacity; Barbara LaWall, County Attorney for Pima County, in her official capacity; Arizona Medical Board; and Lisa Wynn, Executive Director of the Arizona Medical Board, in her official capacity,

Defendants-Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT FOR ARIZONA
Civil Action No. 2:12-cv-01501-JAT-PHX
The Honorable James A. Teilborg, Judge

BRIEF OF*AMICUS CURIAE* OF DOCTORS ON FETAL PAIN IN SUPPORT OF STATE APPELLEES AND AFFIRMANCE

Teresa Stanton Collett
Professor of Law
University of St. Thomas
School of Law*
1000 LaSalle Avenue
Minneapolis, MN 55403-2015
(651) 528-7007

Steven H. Aden
M. Casey Mattox
ALLIANCE DEFENDING FREEDOM
801 G Street NW, Suite 509
Washington, D.C. 20001
(202) 393-8690

**Affiliation for identification purposes only*

Attorneys for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 *Amicus Curiae* Doctors on Fetal Pain is an unincorporated association of individuals that has no parent corporation and issues no stock.

Dated: October 10, 2012

/s/ Teresa S. Collett
Teresa S. Collett

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

TREATIES

INTEREST OF *AMICUS CURIAE*

Amicus Curiae Doctors on Fetal Pain is an unincorporated multi-specialty association of physicians and medical researchers who support greater legal protection for the unborn child based on clinical experience and anatomical, behavioral, and physiological research revealing that an unborn child experiences pain prior to twenty-three or twenty-four weeks gestation, the earliest point in a pregnancy at which human fetal "viability" is recognized by the United States Supreme Court. Its members have testified before Congress and state legislatures, including the Arizona legislature, concerning their research on fetal pain. It also educates, maintaining a website at http://www.doctorsonfetalpain.com/ that includes some of this research.

This Brief is being filed with consent of the parties.

FED. R. APP. P. 29(C)(5) CERTIFICATION

No party or party's counsel participated in, or provided financial support for, the preparation and filing of this brief, nor has any entity other than Amicus and its counsel participated in or provided financial support for the brief.

INTRODUCTION

The district court below ruled that 2012 ARIZ. LEGIS. SERV. 250 (H.B. 2036) (West) (to be codified as ARIZ. REV. STAT. § 36-2159 ("H.B. 2036") is a constitutionally permissible regulation of abortion. This ruling was based in part on a finding by the Arizona legislature that "[t[here is substantial and well-documented medical evidence that an unborn child by at least twenty weeks of gestation has the capacity to feel pain during an abortion." H.B. 2036 § 9(7).

In reviewing this legislative determination, the district court opined:

> In choosing to put a limit on abortions past 20 weeks gestational age, the Arizona Legislature cited to the substantial and well-documented evidence that an unborn child has the capacity to feel pain during an abortion by at least twenty weeks gestational age. Defendants presented uncontradicted and credible evidence to the Court that supports this determination. Namely, the Court finds that, by 7 weeks gestational age, pain sensors develop in the face of the unborn child and, by 20 weeks, sensory receptors develop all over the child's body and the children have a full complement of pain receptors. Doc. 25-1, Exhibit 1 at ¶ 4; Doc. 25-1, Exhibit 2 at ¶ 20.
>
> That the unborn child can feel pain is further supported by the fact that when provoked by painful stimuli, such as a needle, the child reacts, as measured by increases in the child's stress hormones, heart rate, and blood pressure. Doc. 25-1, Exhibit 1 at ¶ 5. When the child is given anesthesia, these responses decrease, which is why doctors often give both the mother and the fetus anesthesia separately in the case of fetal surgery. Id.; Doc. 25-1, Exhibit 2 at ¶¶ 27, 29-30. Nowhere in the Record is it suggested that a fetus is given anesthesia before being subjected to a D&E or an induction abortion.
>
> Given the nature of D&Es and induction abortions, as described above, and the finding that the unborn child has developed pain sensors all over its body by 20 weeks gestational age, this Court

concludes that the State has shown a legitimate interest in limiting abortions past 20 weeks gestational age.

This brief is offered to assist this Court in understanding the evidence supporting the existence of fetal pain and the controversy over its relevance to the regulation of abortions at or after 20 weeks gestation. Hormonal, behavioral, and physiologic evidence supports the legislature's conclusion that a fetus at twenty weeks gestation feels pain. Amicus will argue that elimination or reduction of activities that provoke pain is a long-recognized State interest that supports the judgment of the district court.

FACTUAL SUMMARY

Amicus relies on the factual recitation presented in State Appellees' brief.

ARGUMENT

I. ARIZONA HAS THE CONSTITUTIONAL AUTHORITY TO LEGISLATE TO LIMIT OR PREVENT THE INFLICTION OF PAIN.

One of the most basic and widely accepted principles of political governance is that that the State is justified in promulgating laws to protect individuals from harm by others. "The Government of course has an obligation to protect its citizens from harm." *Piedmonte v. United States*, 367 U.S. 556, 559 n. 2 (1961). The exercise of this power is up to the prudential judgment of state legislatures however, and not a constant constitutional imperative. *See DeShaney v. Winnebago County Dept. of Social Servs*., 489 U.S. 189, 195 (1989) (rejecting claim against

local child-protection officials who, after notice of possible abuse, failed to protect a child from beatings by his father that left the child severely brain damaged.

The power of the State to legislate and protect against a variety of harms, including the harm of being made to suffer physical pain, has been recognized in both domestic and international law. *E.g*. 18 U.S.C. § 2340 (criminal prohibition of torture which is defined as "an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control"); and UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: http://www.unhcr.org/refworld/docid/3ae6b3a94.html [accessed 10 October 2012]. This power of protection is so broad that it encompasses all living creatures,[1] as well as developing fetal human life. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 873 (1992) (recognizing State's potentially paramount interest in protecting fetal life without limitation to Roe's trimester categories).

[1] Since the early days of the American Republic animal cruelty has been outlawed, and criminal laws found in all of the fifty states continue to punish the behavior. *United States v. Stevens*, __ U.S. __, 130 S.Ct. 1577, 1598 (2010) (Alito, J., dissenting) ("It is undisputed that the conduct [acts of animal cruelty] depicted in crush videos may constitutionally be prohibited. All 50 States and the District of Columbia have enacted statutes prohibiting animal cruelty.")

Therefore the judiciary's refusal to afford full legal protection to unborn human beings does not foreclose the exercise of legislative power directed toward the elimination of pain.

II. PRIOR JUDICIAL CONSIDERATION OF FETAL PAIN CONFIRMS ITS LEGAL RELEVANCE.

The existence of fetal pain has been the subject of prior judicial review, particularly in cases involving the constitutionality the federal partial-birth abortion bans. Judge Richard C. Casey, a federal district court judge sitting in the Southern District of New York, called the D & X procedure "gruesome, brutal, barbaric, and uncivilized." *Nat'l Abortion Federation v. Ashcroft*, 330 F.Supp. 2d 436, 479 (S.D.N.Y. 2004). He found that abortion procedures "subject fetuses to severe pain." *Id*.

Judge Phyllis J. Hamilton, sitting in the Northern District of California, arrived at a different conclusion. She wrote that "the issue of whether fetuses feel pain is unsettled in the scientific community." *Planned Parenthood Federation v. Ashcroft*, 320 F.Supp.2d 957, 1001 (N.D.Cal. 2004). While these opinions arrive at divergent conclusions regarding the existence and extent of fetal pain during abortion, both opinions recognize that the existence of fetal pain is legally relevant to the regulation of abortion.

In the present litigation, as the district court notes, Defendants presented uncontradicted and credible evidence to the court that a fetus is capable of

experiencing pain at and after twenty weeks gestation. It is beyond imagination that any plausible interpretation of the U.S. Constitution bars legislative action to limit or eliminate that pain. The Court should affirm the decision of the district court that Arizona has a constitutionally recognizable interest in limiting the infliction of pain on the unborn.

III. THE VIABILITY RULE DOES NOT BAR CONSIDERATION OF FETAL PAIN IN REGULATION OF ABORTION.

In *Roe v. Wade*, 410 U.S. 113 (1973), the United States Supreme Court declared that the Constitution contained an implicit right to obtain an abortion. The Court characterized the right as the logical extension of another implied right -- the right to use contraception -- which was grounded in the implied right to privacy. In so holding, however, the Court recognized that the abortion decision was unique.

> As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

Roe v. Wade, 410 U.S. at 152. Unlike contraception, abortion involves both the mother and "a whole, separate, unique, living human being" that she carries. *See Planned Parenthood v. Rounds*, 530 F.3d 724, 736 (8th Cir. 2006) (*en banc*) (upholding a South Dakota law requiring that women be informed that abortion

ends the "life of a whole, separate, unique, living human being," and finding that opponents of the definition provided "no evidence to the contrary").

Roe established what was to become for a period of time a "rigid trimester analysis," permitting virtually no regulation of abortion during the first trimester, with regulations directed only at preserving maternal health permitted in the second trimester. *Webster v. Reproductive Health Services*, 492 U.S. 490, 517 (1989) (plurality opinion). Only in the third trimester or post-viability could the State protect fetal life by prohibiting abortions that were not necessary to preserve the life or the health of the mother. *Roe*, 410 U.S. at 162-165.

This trimester approach to abortion legislation was criticized by four members of the Court in *Webster v. Reproductive Health Services*.

> We think that the doubt cast upon the Missouri statute by these cases is not so much a flaw in the statute as it is a reflection of the fact that the rigid trimester analysis of the course of a pregnancy enunciated in *Roe* has resulted in subsequent cases like *Colautti* and *Akron* making constitutional law in this area a virtual Procrustean bed.

492 U.S. at 517. The plurality opinion recognized that the State's interest in protecting fetal life existed throughout the pregnancy. "[W]e do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability." *Id.*

Ultimately the trimester approach was rejected by the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), noting that the trimester framework "misconceives the nature of the pregnant woman's interest; and in practice it undervalues the State's interest in potential life, as recognized in *Roe*." *Id*. at 873. The Justices, however, retained fetal viability as a measure of constitutional significance. *Id*. at 879.

To date, most cases regarding the ability of states to prohibit abortions after viability have focused on the method of determining viability.[2] The existence of this rule, however, does not foreclose the establishment of a separate and independent State interest in protecting the unborn from experiencing pain or preserving the lives of unborn children at the point when they are capable of feeling pain.

IV. FETAL PAIN IS AN INDEPENDENT STATE INTEREST.

The Supreme Court has never been asked whether the State's interest in protecting unborn children who have the capacity to feel pain is sufficiently compelling to support a limited prohibition on abortion. The case before this Court presents the question of whether the capacity to feel pain, independent of fetal

[2] *See e.g. Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976) (upholding a Missouri law permitting a case-by-case determination of viability); and *Colautti v. Franklin*, 439 U.S. 379 (1979) (viability is reached when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support).

viability, is sufficient to sustain a limited prohibition on abortion. While Appellants argue vigorously that the pain capacity of the unborn should be legally irrelevant, there are several indications by various members of the Supreme Court that suggest the limited protection afforded to pain-capable unborn children in AZ HB 2036 may be constitutional.

Just as the issue of abortion deeply divides the American people, abortion cases divide the Supreme Court, with many of the most significant rulings being plurality opinions. Among the most prominent examples are the plurality opinions in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). Recent abortion cases such as *Planned Parenthood v. Casey* and *Gonzales v. Carhart*, 550 U.S. 124 (2007), however, suggest a growing willingness of the Court to recognize and weigh multiple state interests in assessing the constitutionality of an abortion regulation, just as the district court below did.

In *Stenberg v. Carhart*, 530 U.S. 914 (2000), Justice Kennedy emphasized that *Casey* held it was "inappropriate for the Judicial Branch to provide an exhaustive list of State interests implicated by abortion" and that "*Casey* is premised on the states having an important constitutional role in defining their interests in the abortion debate." 550 U.S. at 877. Justice Kennedy described the State's interest in the protection of fetal life as substantial at all points. "*Casey*

struck a balance that was central to its holding, and the Court applies *Casey's* standard here. A central premise of *Casey's* joint opinion…[is] that the government has a legitimate, substantial interest in preserving and promoting fetal life…" 550 U.S. at 126.

In *Gonzales v. Carhart*, the Court upheld the federal Partial Birth Abortion Ban Act which made no distinction based on viability. "The Act does apply both previability and postviability because, by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb." 550 U.S. at 147. Justice Kennedy, author of the majority opinion, emphasized the State's interest in protecting the fetus. **"***Casey* struck a balance that was central to its holding, and the Court applies *Casey's* standard here. A central premise of *Casey's* joint opinion…[is] that the government has a legitimate, substantial interest in preserving and promoting fetal life…" 550 U.S. at 126.

Recognition of a compelling State interest in the protection of pain-capable unborn children does **not** require the Court to reject a woman's liberty interest in obtaining an abortion or the balancing framework of *Casey* —it only asks the Court to recognize the legislature's ability to weigh and rely upon new scientific

evidence supporting a strong state interest in regulating abortions at twenty weeks gestation.[3]

Even former U.S. Supreme Court Justice Stevens, who during his tenure on the Court repeatedly voted to strike down abortion regulations, listed the "organism's capacity to feel pain" as a ground on the basis of which "the State's interest in the protection of an embryo increases progressively and dramatically…."[4] He noted that "[t]he development of a fetus -and pregnancy itself- are not static conditions, and the assertion that the government's interest is static simply ignores this reality."[5]

AZ HB 2036 is innovative only in so far as it relies upon scientific evidence establishing the unborn child's capacity to feel pain at twenty weeks gestation, and concludes that the acquisition of this capacity makes that child sufficiently like the rest of us to mark a tipping point – a tipping point at which it becomes reasonable for Arizona to restrict abortion.

---

[3] The Centers for Disease Control reports that in 2008, the latest national data available, 1.3% of abortions were obtained at 21 weeks or later. CDC, Abortion Surveillance – United States 2007 (2008) (available at http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6015a1.htm?s_cid=ss6015a1_w).

[4] *Thornburgh v. Amer. Coll. of Obst. & Gyn.*, 476 U.S. 747, at 778 (1986) (Stevens, J., concurring).

[5] *Id*. at 778-79 (1986).

V. ARIZONA'S LEGISLATIVE FINDINGS SHOULD BE GIVEN WEIGHT IN REVIEWING THE DISTRICT COURT'S RULING BELOW.

This evidence is incorporated into findings that support the legislative distinction between abortions when the fetus can feel pain and when he or she does not. As Justice Kennedy observed in *Stenberg v. Carhart*,

> The issue is not whether members of the judiciary can see a difference between the two procedures. It is whether Nebraska can. The Court's refusal to recognize Nebraska's right to declare a moral difference between the procedures is a dispiriting disclosure of the illogic and illegitimacy of the Court's approach to the entire case.

530 U.S 914, 962 (2000) (Kennedy, J. dissenting).

The findings contained in AZ H.B. 2036 resolve the questions of whether unborn children feel pain based on a substantial body of scientific and medical evidence, similar to the body of evidence that resolved the question of whether partial-birth abortion was ever necessary to preserve the health of a woman. The fact that the existence of fetal pain is disputed is not sufficient to preclude action by this legislature. "The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty." 550 U.S. 163 (2007). "Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts." *Id.*

AZ H.B. 2036 modestly expands upon the State's interests in protection of fetal life. This is permissible and in accord with the Constitution. *Gonzales v. Carhart*, 550 U.S. at 124 (2007).

CONCLUSION

Certainly, the issue of at what point the unborn experience pain is an important one that should inform best medical practice. It is of concern to the women who obtain abortions, the providers who serve them, and the public who demand that we not be indifferent to those capable of suffering. The Arizona law reflects the political judgment that abortion should be limited at the point when the unborn experience pain. They accepted and relied upon a substantial body of scientific and medical evidence when crafting the regulation at stake in this case. It restricts abortion only at or after twenty weeks gestation, and providing access when the mother's life or physical health is at stake. Abortion remains freely available to women during almost the full four months at the beginning of their pregnancies.

The judgment of the district court should be affirmed.

Respectfully submitted this the 10th day of October, 2012.

By: s/ Teresa S. Collett
Teresa S. Collett
Attorney for Amicus Curiae

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 2,645 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 2007 in 14-point Times New Roman.

Dated: October 10, 2012

s/ Teresa S. Collett

Teresa S. Collett

Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2012, I electronically filed the foregoing with the Clerk of the Court for the United Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system:

United States Court of Appeals
Ninth Circuit
P.O. Box 193939
San Francisco, CA 94119-3939

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

s/ Teresa S. Collett
Teresa S. Collett
Attorney for Amicus Curiae