No. 13-402

In The

Supreme Court of the United States

TOM HORNE, Attorney General of Arizona, in his official capacity, et al.,

Petitioners,

v.

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

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS AND OTHER NATIONAL MEDICAL ORGANIZATIONS IN SUPPORT OF PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

Amici Association of American Physicians & Surgeons, American Association of Pro-Life Obstetricians and Gynecologists, Christian Medical & Dental Associations, Catholic Medical Association, Physicians for Life, National Association of Catholic Nurses, U.S.A., and National Association of Prolife Nurses are nongovernmental corporate entities, but they have no parent corporations and no publicly held corporations hold 10 percent or more of their stock.

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STATEMENT OF INTEREST OF AMICI CURIAE

Both parties have given consent to file this amicus curiae brief. Counsel for Amici has prepared this brief supporting Petitioner.[1]

This case is of great national importance and consequence because it pertains to the state legislatures' wide discretion to protect women's health. The Amici are seven national medical organizations whose members include physicians and other healthcare professionals. They are the Association of American Physicians & Surgeons (AAPS); American Association of Pro-Life Obstetricians and Gynecologists (AAPLOG); Christian Medical & Dental Associations (CMDA); Catholic Medical Association (CMA); Physicians for Life (PFL); National Association of Prolife Nurses (NAPN); and, National Association of Catholic Nurses, U.S.A. (NACN). These organizations are long-standing groups dedicated to the highest ethical standards. They have a deep interest in insuring women have good medical care

[1] The parties were notified ten days prior to the due date of this brief of the intention to file. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Trinity Legal Center is a nonprofit corporation and is supported through private contributions of donors who have made the preparation and submission of this brief possible. No person other than amici curiae, their counsel, or donors to Trinity Legal Center made a monetary contribution to its preparation or submission. The parties have consented to this brief.

and that they know the physical and psychological risks of abortion based on the extensive reliable scientific data, particularly abortions after twenty weeks gestation. Amici have members across the United States, including in Arizona.

SUMMARY OF THE ARGUMENT

I.

This Court has long recognized that legislatures should be given broad deference in their findings and enactments. Because abortion issues are complex factual medical issues that involve policy, they are best left to the legislative branch of government. The Arizona Legislature made findings based on the extensive reliable scientific data concerning significant risks to women considering an abortion after twenty weeks gestation. This is a legitimate exercise of the state's interest in protecting women.

II.

Abortion has significant short-term and long-term health risks to women, including both physical and psychological harm due to major physical complications and death as well as long-term psychological risks. The extensive medical and scientific research since 1973 confirms these risks. It is universally accepted that the mother's health risks increase as the unborn child's gestational age increases. In fact, the risk increases exponentially the greater the

gestational age of the unborn child. The Arizona Legislature correctly reviewed the scientific data and came to its conclusions to protect women, and therefore, the legislation should be upheld.

ARGUMENT

I. THIS COURT HAS RECOGNIZED THAT BROAD DEFERENCE SHOULD BE GIVEN TO LEGISLATIVE FINDINGS AND ENACTMENTS, AND THEREFORE, THE COURT OF APPEALS ERRED.

A. Abortion Issues Are Complex Issues That Are Fact Bound and Involve National and State Policy That Are Best Left to the Legislative Branches of Government.

For over a century prior to *Roe v. Wade*[2] and *Doe v. Bolton*,[3] health issues such as abortion were traditionally state issues.[4] This Court recognized that under what was later called the state's "police power," the states could regulate "health laws of every description."[5]

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[2] 410 U.S. 113 (1973).

[3] 410 U.S. 179 (1973).

[4] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 204 (1824).

[5] *Id*. at 203.

In addition, this Court has given deference to legislative judgments.[6]

Since *Roe*, this Court has continued to recognize that states may make reasonable regulations concerning abortion for the health and safety of women.[7] In *Planned Parenthood v. Casey*, this Court recognized that because the State has a substantial interest in the life of the unborn child, the State may promulgate regulations that do not create an undue burden on the woman's right to decide.[8] In particular, regulations that are "designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden."[9] This Court recognized that "[a]s with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion."[10]

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[6] Gonzales v. Carhart, 550 U.S. 124, 163 (2007) (stating state and federal legislatures have wide discretion to pass legislation where there is medical and scientific uncertainty); Turner Broadcasting System, Inc. v. F.C.C., 520 U.S. 180, 195 (1997) (stating substantial deference should be given because legislature is better equipped to amass and evaluate the vast amounts of data on legislative issues and out of respect for legislative authority); Dominion Hotel v. State of Arizona, 249 U.S. 265, 268 (1919) (stating deference due to legislative judgments has been repeatedly emphasized).

[7] Gonzales v. Carhart, 550 U.S. 124 (2007); Planned Parenthood v. Casey, 505 U.S. 833, 876 (1992).

[8] Planned Parenthood v. Casey, 505 U.S. 833, 876 (1992).

[9] *Id.* at 877.

[10] *Id.* at 878.

Furthermore, this Court has upheld abortion regulations that "are not efforts to sway or direct a woman's choice, but rather are efforts to enhance the deliberative quality of that decision or are neutral regulations on the health aspects of her decision."[11] As long as there is a "commonly used and generally accepted method" of abortion, there is not a "substantial obstacle to the abortion right."[12] Specifically, this Court stated in *Gonzales*[13] that "[c]onsiderations of marginal safety, including balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends.[14]

Even the United States Court of Appeals for the Ninth Circuit has recognized that "[h]istorically, laws regulating abortion have sought to further the state's interest in protecting the health and welfare of pregnant women. . . ."[15] In furtherance of its interest, the State of Arizona passed House Bill (H.B.) 2036 to protect pregnant women from the significant known risks of abortion after twenty weeks gestation.

The State can legitimately pass legislation concerning the risks of abortion and such legislation is

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[11] *Id*. at 917 (Stevens, J., concurring in part and dissenting in part) (providing examples of valid regulations).

[12] Gonzales v. Carhart, 550 U.S. 124, 165 (2007).

[13] 550 U.S. 124 (2007).

[14] *Id*. at 166.

[15] McCormack v. Hiedeman, 694 F.3d 1004, 1010 (9th Cir. 2012).

within the competence of the legislature. In fact, state and federal legislatures are given "wide discretion to pass legislation in areas where there is medical and scientific uncertainty."[16]

Over the years, the Arizona Legislature properly exercised its authority to protect women who are considering an abortion. For example, the Arizona Legislature passed the state's Woman's Right to Know law[17] and the Arizona Department of Health Services produced "A Woman's Right to Know" booklet[18] to provide accurate information for women considering an abortion. It warns:

> The risks are fewer when an abortion is done in the early weeks of pregnancy. The further along in the pregnancy, the greater the chance of serious complications and the

[16] *Id*. at 163. This Court stated: "The medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden." *Id*. at 164.

[17] ARIZ. REV. STAT. ANN. § 36-2153 (2012).

[18] Arizona is just one of twenty-six states that have "A Woman's Right to Know" law so that a woman will know the medical risks associated with abortion and have scientifically accurate medical facts about the development of her unborn child. *See A Woman's Right to Know: Casey-style Informed Consent Laws*, *available at* http://www.nrlc.org/uploads/stateleg/WRTKStatus0612.pdf. The Arizona booklet is *available at* http://www.azdhs.gov/phs/owch/informed-consent/right-to-know/documents/a-womans-right-to-know.pdf.

greater the risk of dying from the abortion procedure.[19]

Mortality rates are significantly greater the later the abortion.[20] This is also confirmed by record linkage studies in Finland, Denmark, and the United States which clearly demonstrate that abortion is associated with significantly higher mortality rates.[21]

The Arizona Legislature's enactment of H.B. 2036, Section 9 is another step in protecting women and banning abortions after twenty weeks because of the serious risks associated with later term abortions. The increased risk of abortion at this stage is a universally accepted medical fact which is undisputed. Based on this well established fact, thirteen states and, at this time, one house of the United States

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[19] Arizona "A Woman's Right to Know" booklet, *available at* http://www.azdhs.gov/phs/owch/informed-consent/right-to-know/documents/a-womans-right-to-know.pdf.

[20] *Id*. Using Center for Disease Control statistics, the booklet states that there is one death per every 1,000,000 abortions if you are at 8 weeks or less; one death per 29,000 abortions for pregnancies at 16-20 weeks; and one death per 11,000 abortions at 21 weeks and more.

[21] *See, e.g.,* 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*, MED. SCI. MONITOR 18(9):71-76 (Aug. 2012); M. Gissler et al., *Injury Deaths, Suicides and Homicides Associated with Pregnancy, Finland 1987-2000*, EUR. J. PUB. HEALTH 15:459 (2005); M. Gissler et al., *Suicides After Pregnancy in Finland, 1987-94: Register Linkage Study*, BRIT. MED. J. 313:1431 (1996).

Congress have passed legislation limiting abortion beyond twenty weeks except where there are serious health risks or the risk of the mother's death.[22] Thus, Arizona has taken a reasonable position to protect women based on reliable scientific data.

B. The Arizona Legislature Based Its Legislation on Extensive Reliable Scientific Research Concerning the Greater Risks of Abortion After Twenty Weeks, and Therefore, the Legislation Is Within the Legislature's Broad Discretion.

In *Gonzales*, this Court recognized the "bond of love the mother has for her child" and that "abortion requires a difficult and painful moral decision."[23] Based on an amicus brief citing sworn affidavits from post-abortive women, this Court also recognized that

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[22] Pain-Capable Unborn Child Protection Act, H.R. 1797, 113th Cong. (2013) (20 weeks or greater); ALA. CODE ANN. § 26-23B-5 (2013) (20 weeks or more); ARIZ. REV. STAT. § 36-2159 (2012) (20 weeks); ARK. CODE ANN. § 20-16-1305 (2013) (20 weeks or more); GA. CODE ANN. § 16-12-141 (2012) (20 weeks or more) and GA. CODE ANN. § 31-9B-3 (2012) (20 weeks or more); IDAHO CODE ANN. § 18-505 (2011) (20 weeks or more); IND. CODE § 16-34-2-1 (2013) (20 weeks); KAN. STAT. ANN. § 65-6724 (2011) (22 weeks or more); LA. REV. STAT. ANN. § 40:1299.30.1 (2012); NEB. REV. STAT. § 28-3,106 (2010) (20 weeks or more); N.C. GEN. STAT. § 14-45.1 (2013) (after 20 weeks); N.D. CENT. CODE § 14-02.1-05.3 (2013) (20 or more weeks); OKLA. STAT. tit. 63, § 1-745.5 (2011) (20 weeks or more); TEX. HEALTH & SAFETY CODE § 171.044 (2013) (20 weeks or more).

[23] Gonzales v. Carhart, 550 U.S. 124, 159 (2007).

some women regret their abortion and suffer from psychological consequences such as depression and loss of self-esteem.[24] This Court concluded: "While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained."[25]

The Arizona Legislature based its decision on reliable data and best medical evidence[26] which is

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[24] *Id*.

[25] *Id*.

[26] The Legislature based its decision on the following reliable scientific data: P.K. Coleman, *Abortion and Mental Health: Quantitative Synthesis and Analysis of Research Published 1995-2009*, BRIT. J. PSYCHIATRY 199:180-86 (2011); P. Shah et al., *Induced Termination of Pregnancy and Low Birth Weight and Preterm Birth: A Systematic Review and Meta-Analysis*, B.J.O.G. 116(11):1425 (2009); H.M. Swingle et al., *Abortion and the Risk of Subsequent Preterm Birth: A Systematic Review and Meta-Analysis*, J. REPROD. MED. 54:95 (2009); R.H. van Oppenraaij et al., *Predicting Adverse Obstetric Outcome After Early Pregnancy Events and Complications: A Review*, HUMAN REPROD. UPDATE ADVANCE ACCESS 1:1 (Mar. 7, 2009); R.E. Behrman, PRETERM BIRTH: CAUSES, CONSEQUENCES, AND PREVENTION 519 (2006); L.A. Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, OBSTET. & GYN. 103(4):729-737 (2004); J.M. Thorp et al., *Long-Term Physical and Psychological Health Consequences of Induced Abortion: Review of the Evidence*, OBSTET. & GYN. SURVEY 58(1):67, 75 (2003); J. PREGLER & A. DECHERNEY, WOMEN'S HEALTH: PRINCIPLES AND CLINICAL PRACTICE 232 (2002); K. Anand, *Pain and Its Effects in the Human Neonate and Fetus*, NEW ENGLAND J. MED. 317:1321-29 (1987); J.M. Barrett, *Induced Abortion: A Risk Factor for Placenta Previa*, AM. J. OBSTET. & GYN. 141:7 (1981).

now squarely before this Court. Each of the studies cited by the Legislature:

- was based on reliable and well accepted research methodology;
- was published in prestigious, nationally or internationally recognized, peer reviewed journals;
- has been accepted by the scientific community and often cited in other articles or medical websites;
- some studies were a quantitative analysis of research that was published over a period of almost two decades;
- was based on scientific knowledge, methods, and procedures and not mere speculation or belief; and,
- the scientific researchers who conducted these studies are nationally and internationally known and recognized for their work.

In reviewing this research, the district court found that the Legislature had "cited to substantial and well-documented evidence" and "presented uncontradicted and credible evidence."[27] The district was correct in its finding.

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[27] Isaacson v. Horne, 884 F. Supp. 2d 961, 971 (2012).

Based on these reliable scientific studies, the Arizona Legislature found that "[a]bortion can cause serious both short-term and long-term physical and psychological complications for women."[28] Based on the studies, the Legislature correctly found a long list of physical and psychological complications, including death.[29]

In addition, based on the reliable scientific studies and what the Department of Health Services had already determined in "A Woman's Right to Know" booklet,[30] the Legislature found that abortion "has a higher medical risk when the procedure is performed later in pregnancy," including the fact that the highest risk of major complications and death occur after twenty weeks gestation.[31]

The Arizona Legislature articulated its legitimate interest in the woman's health and safety in accordance with this Court's precedent.[32] It recognized that women can experience serious physical and psychological harm[33] and that the unborn child by twenty weeks gestation can feel pain during an

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[28] H.B. 2036, Sec. 9(A)(1).

[29] *Id*.

[30] Arizona "A Woman's Right to Know" booklet, *available at* http://www.azdhs.gov/phs/owch/informed-consent/right-to-know/documents/a-womans-right-to-know.pdf.

[31] H.B. 2036, Sec. 9(A)(2) to (4).

[32] *Id*. Sec. 9(A)(5) and (6) (*citing* key cases).

[33] *Id*. Sec. 9(A)(1) to (4) and (9) to (15).

abortion.[34] This Court has recognized that legislatures have wide discretion and a substantial interest in protecting women and the unborn child. The district court properly interpreted and applied this Court's rulings. The Court of Appeals for the Ninth Circuit erred in refusing to recognize the State's interest in protecting women from significantly higher risk of physical and psychological harm and upholding the integrity of the medical profession to make abortion decisions based on the reliable scientific data.[35] Therefore, the Petition for Writ of Certiorari should be granted.

II. IT IS WELL-RECOGNIZED THAT ABORTION HAS SIGNIFICANT SHORT-TERM AND LONG-TERM HEALTH RISKS, AND THEREFORE, ARIZONA HAS A LEGITIMATE INTEREST TO PROTECT WOMEN FROM HARM.

The Arizona Legislature carefully reviewed the reliable scientific and medical data and made its findings. Its stated purposes were to (1) "prohibit abortions at or after twenty weeks of gestation, except in cases of a medical emergency, based on the documented risks to women's health and the strong

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[34] *Id*. Sec. 9(A)(7) (*citing* reliable scientific data).

[35] Isaacson v. Horne, 716 F.3d 1213, 1222 (2013) (although stating the state has an interest in safeguarding health, in maintaining medical standards, and in protecting potential, but reversing the district court).

medical evidence that unborn children feel pain during an abortion at that gestational age;" and, (2) "protect women from the dangerous and potentially deadly off-label use of abortion inducing drugs, such as, for example, mifepristone."[36] In its findings, the Legislature expressed legitimate concern over women's physical health and safety, the unborn child's ability to feel pain, and the psychological harm of abortion that women experience.

A. The State Has a Legitimate Interest in Protecting Women Because Abortion Poses Significant Risk of Physical Harm to the Mother.

It is universally accepted that risks of abortion to the mother's health and safety increase as the unborn child increases in gestational age. Furthermore, the reliable, peer-reviewed studies which the Arizona Legislature based its decision demonstrates that there are significant risks to a woman when the unborn child is at twenty weeks or more gestation. In fact, "the risk increases exponentially at higher gestations"[37] with the greatest risk of major complications after twenty weeks gestation.[38]

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[36] H.B. 2036, Sec. 9(B)(1) and (2).

[37] *Id*. Sec. 9(A)(2) (*citing* L.A. Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, OBSTET. & GYN. 103(4):729-737 (2004)).

[38] *Id*. Sec. 9(A)(3) (*citing* J. PREGLER & A. DECHERNEY, WOMEN'S HEALTH: PRINCIPLES AND CLINICAL PRACTICE 232 (2002)).

In addition to greater risk of major complications, there is a greater risk of death. In 1973 when *Roe v. Wade*[39] was decided, there was no evidence that abortion would be safer than childbirth. This Court identified that "abortion *may* be safer than childbirth *up to gestational ages of 16 weeks*."[40] However subsequently, national and international studies have demonstrated that childbirth is safer than abortion.[41]

In the Bartlett study cited by the Legislature, the researchers concluded that "gestational age at the time of abortion was the strongest risk factor for abortion-related mortality."[42] Significantly, after eight

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[39] Roe v. Wade, 410 U.S. 113 (1973).

[40] City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 429, n.11 (1983) (emphasis added).

[41] *See, e.g.*, 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*, MED. SCI. MONITOR 18(9):71-76 (Aug. 2012); E. Koch et al., *Women's Education Level, Maternal Health Facilities, Abortion Legislation and Maternal Deaths: A Natural Experiment in Chile from 1957 to 2007*, PLoS ONE 7(5):e36613 (May 4, 2012), *available a*t http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3344918/; P. Carroll, *Ireland's Gain: The Demographic Impact and Consequences for the Health of Women of the Abortion Laws in Ireland and Northern Ireland since 1968,* at Figure 8 (Dec. 2011), *available at* http://papriresearch.org/ESW/Files/Irelands_Gain.pdf; L.A. Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, OBSTET. & GYN. 103(4):731 (2004).

[42] L.A. Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, OBSTET. & GYN. 103(4):729 (2004).

weeks gestation, the risk of death increased by 38% for each additional week of gestation.[43] Tragically, 87% of maternal mortality could have been avoided if the woman had aborted her unborn child prior to eight weeks gestation.[44]

The Bartlett study determined that the risk of death that women face may not be able to be reduced because of the "inherently greater technical complexity of later abortions" due to the "anatomical and physiological changes that occur as pregnancy advances."[45] The reasons are because the "increased amount of fetal and placental tissue requires a greater degree of cervical dilation, the increased blood flow predisposes to hemorrhage, and the relaxed myometrium is more subject to mechanical perforation."[46] Simply put, there are greater technical challenges for a second trimester abortion than there are for a first trimester one, and therefore, there is inherently greater risk of complications and death.[47]

Even pro-abortion groups agree that there is an increased risk to women the later the gestational age of the unborn child. For example, the Guttmacher

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[43] *Id*.

[44] *Id*.

[45] *Id*. at 735.

[46] *Id*.

[47] *Id*.; *see also* D. Grossman et al., *Complications After Second Trimester Surgical and Medical Abortion*, REPROD. HEALTH MATTERS 16:173 (May 2008), *available at* http://societyfp.org/_documents/publications/grossman_ReprodHlthMatters_2008.pdf.

Institute cites the Bartlett study and states: "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 to one per 29,000 at 16-20 weeks – and one per 11,000 at 21 or more weeks."[48]

Record linkage studies in Finland, Denmark, and the United States all prove that abortion is significantly associated with higher mortality rates than childbirth.[49] Record linkage studies are accurate and free of bias.

> There are literally no studies showing that abortion reduces physical risks to women.

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[48] Guttmacher Institute, *Facts on Induced Abortion in the United States* (July 2013), *available at* http://www.guttmacher.org/pubs/fb_induced_abortion.html#14 (L.A. Bartlett et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, OBSTET. & GYN. 2004, 103(4):729-737).

[49] *See, e.g.*, D.C. Reardon et al., *Deaths Associated with Abortion Compared to Childbirth – A Review of New and Old Data and the Medical and Legal Implications*, originally published in 20 J. CONTEMP. HEALTH L. & POL'Y 279-327 (2004), *available at* http://www.afterabortion.org/pdf/DeathsAssocWithAbortionJCHLP.pdf; Elliot Institute, *Death Rate of Abortion Three Times Higher than Childbirth* (2004), *available at* http://afterabortion.org/2004/death-rate-of-abortion-three-times-higher-than-childbirth/; 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*, MED. SCI. MONITOR 18(9):71-76 (Aug. 2012), *available at* http://www.medscimonit.com/fulltxt.php?ICID=883338; Elliot Institute, *Multiple Abortions Increase Risk of Maternal Death: New Study* (2012), *available at* http://afterabortion.org/2012/multiple-abortions-increase-risk-of-maternal-death-new-study/.

> Instead, *every record linkage study examining mortality rates associated with abortion* show that abortion is also linked with an elevated risk of maternal death in both the short term and the longer term.[50]

A woman is at even greater risk if she has had multiple abortions.[51] The Danish record linkage study showed that "women who had two abortions were 114 percent more likely to die" during the twenty years that were examined and "women who had three or more abortions had a 192 percent increased risk of death."[52]

One of the long-term effects of abortion is the risk of subsequent preterm birth. Preterm birth is defined as a birth prior to the thirty-seventh week of pregnancy.[53] Each year, more than half a million babies are born prematurely; in 2007, this represented 12.7% of the babies born in the United States.[54]

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[50] Elliot Institute, *Abortion Has No Benefits, But Does Have Risks, New Research Shows* (2013), *available at* http://afterabortion.org/2013/abortion-has-no-benefits-but-does-have-risks-new-research-shows/ (emphasis in original).

[51] Elliot Institute, *Multiple Abortions Increase Risk of Maternal Death: New Study*, *available at* http://afterabortion.org/2012/multiple-abortions-increase-risk-of-maternal-death-new-study/.

[52] *Id*.

[53] E. Johnson & S. Calvin, *Induced Abortion and Risk of Subsequent Preterm Birth* at 3 (Dec. 2012), *available at* http://www.lozierinstitute.org/wp-content/uploads/2012/12/On-Point-Johnson-and-Calvin-PDF-.pdf.

[54] *Id*.

"Preterm birth is one of the most significant challenges facing the field of obstetrics and remains a considerable public health issue."[55]

There are over 130 published studies showing a significant link between induced abortion and preterm birth of subsequent children. For example, Finland's National Institute for Health and Welfare conducted the study of over 300,000 first-time mothers for a 12-year time period. After adjusting for background variables, women with a history of one or more induced abortions showed increased odds of delivering prior to 28 weeks gestation in a future pregnancy.[56] They also found that the odds of having a very preterm delivery increased with repeated induced abortions.[57] Significantly, there was a 20% increase after one induced abortion, but that number increased to 278% after three or more induced abortions.[58] The researchers reported that the odds of preterm delivery prior to 37 weeks were reported at a 35% increase.[59]

Preterm birth has serious consequences for both the mother and her subsequent children.[60] The Center

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[55] *Id.*

[56] *Id*. at 4 (discussing the study).

[57] *Id*.

[58] *Id.*

[59] *Id*.

[60] *See, e.g.,* P. Shah et al., *Induced Termination of Pregnancy and Low Birth Weight and Preterm Birth: A Systematic Review and Meta-Analysis*, B.J.O.G. 116(11):1425 (2009); H.M. Swingle

(Continued on following page)

for Disease Control states: "Preterm-related causes of death together accounted for 35% in 2008 of all infant deaths, more than any other single cause. Preterm birth is also a leading cause of long-term neurological disabilities in children."[61] These disabilities include: breathing problems, feeding difficulties, cerebral palsy, developmental delay, vision problems, and hearing impairment.[62] For the mother, abortion poses an increased risk of premature rupture of membranes, hemorrhage, and cervical and uterine abnormalities which may create an additional risk of preterm birth.[63]

The Arizona Legislature cited studies demonstrating the risk of preterm subsequent births in its

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et al., *Abortion and the Risk of Subsequent Preterm Birth: A Systematic Review and Meta-Analysis*, J. REPROD. MED. 54:95 (2009); R.H. van Oppenraaij et al., *Predicting Adverse Obstetric Outcome After Early Pregnancy Events and Complications: A Review*, HUMAN REPROD. UPDATE ADVANCE ACCESS 1:1 (Mar. 7, 2009); W.M. Callaghan et al., *The Contribution of Preterm Birth to Infant Mortality Rates in the U.S.*, PEDIATRICS 118(4):1566 (Oct. 2006); C. Moreau et al., *Previous Induced Abortions and the Risk of Very Preterm Delivery: Results of the EPIPAGE Study*, BRIT. J. OBSTET. & GYN. 112:430, 431 (2005); B. Rooney & B.C. Calhoun, *Induced Abortion and Risk of Later Premature Births*, J. AM. PHYSICIANS & SURGEONS 8(2):46, 46-47 (2003).

[61] Center for Disease Control and Prevention, *Preterm Birth* (2013), *available at* http://www.cdc.gov/reproductivehealth/maternalinfanthealth/pretermbirth.htm.

[62] *Id*.

[63] C. Moreau et al., *Previous Induced Abortions and the Risk of Very Preterm Delivery: Results of the EPIPAGE Study*, BRIT. J. OBSTET. & GYN. 112:430, 431 (2005).

findings.[64] In addition, the Arizona Department of Health Services has reported actual state data as well as studies showing "the risk of preterm birth is higher in women who have undergone induced abortion, and that the risk is related to the number of abortions."[65] Thus, the Legislature had a legitimate state interest to protect women's health.

The Arizona Legislature also correctly expressed concern in its findings about the use of abortion drugs.[66] In reviewing and assessing the scientific literature, researchers have concluded that there are increased risks of physical problems with the RU-486 regimen.[67] These include: more pain, more nausea or vomiting, higher failure rate, greater risks of acute bleeding requiring surgery, post-procedure bleeding continues for a longer period of time, more women require surgery for persistent bleeding, more total blood loss, and greater risk of massive, life-threatening hemorrhage.[68] They also report that "Mifepristone abortion has 10 times more risk of

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[64] H.B. 2036, Sec. 9(A)(1).

[65] Arizona Department of Health Services, *Abortions in Arizona: 2012 Abortion Report* at 19 (issued Aug. 1, 2013), *available at* http://www.azdhs.gov/diro/reports/pdf/2012-arizona-abortion-report.pdf.

[66] H.B. 2036, Sec. 9(A)(8) to (15).

[67] M. Shuping, D. Harrison, C. Gacek, *Medical Abortion with Mifepristone (RU-486) Compared to Surgical Abortion*, *available at* http://www.rachelnetwork.org/images/Medical_Abortion_with_Mifepristone.pdf.

[68] *Id*.

death from infection than surgical abortion and 50 times more risk of death from infection compared to childbirth."[69]

The risks of RU-486 may be with the current pregnancy as well as transgenerational. Dr. Bernard Nathanson, co-founder of the National Association for the Repeal of Abortion Laws (NARAL) and who presided over 60,000 abortions, warned that if a woman starts taking the regimen but then changes her mind and wants to carry the baby to term, the newborn may have serious deformities.[70]

In addition, Dr. Nathanson warned there may be the possibility that disorders could be passed down to surviving offspring of women who have taken the drug.[71] "RU-486 is the drug which acts on the female reproductive system, and anything that does that we have to be keenly aware of what are called transgenerational effects."[72]

These risks are a reality for Arizona women. During the 2012 reporting year, there were 13,340 reported elective abortions performed in Arizona.[73] Of

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[69] *Id*. (citations omitted).

[70] The Silent Scream, *Former Abortionist Bernard Nathanson, M.D. Warns of RU-486 Dangers*, *available at* http://www.silentscream.org/ru486-drnat.htm.

[71] *Id*.

[72] *Id*.

[73] Arizona Department of Health Services, *Abortions in Arizona: 2012 Abortion Report* at 1 (issued Aug. 1, 2013),

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that number, slightly more than 68% were performed using a surgical procedure and approximately 32% were medication-induced procedures.[74] About 2% of abortions were between 18-20 weeks of gestation and about 1% of the abortions were performed at 21 weeks of gestation or greater, which was a 12% decrease from the number performed in 2011.[75] Thus, 186 abortions were performed at 20 weeks or greater gestational age.[76]

Arizona women face serious physical risks of harm from second and third trimester abortions, and therefore, the Arizona Legislature had a legitimate state interest to protect their health and safety. As this Court has required, women are entitled to truthful and accurate information concerning the risks to her physical and psychological health before having an abortion.[77]

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available at http://www.azdhs.gov/diro/reports/pdf/2012-arizona-abortion-report.pdf.

[74] *Id*. at 9.

[75] *Id*. at 27 (Table 10 provides an overview of the gestational age of the fetus at the time of abortion for 2012).

[76] *Id*.

[77] Planned Parenthood v. Casey, 505 U.S. 833 (1992).

B. Post-Abortive Women Have a High Risk of Psychological Harm, and Therefore, the Legislature Correctly Exercised Its Broad Discretion.

Reliable scientific studies[78] demonstrate that abortion hurts women psychologically. It is a short-term "solution" with long-term negative consequences. The courts and state legislatures have recognized these consequences.

This Court and lower courts have recognized that there are negative psychological consequences of abortion[79] and that abortion as practiced is "almost always a negative experience for the patient. . . ."[80]

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[78] *See, e.g.*, P.K. Coleman, *Induced Abortion and Increased Risk of Substance Abuse: A Review of the Evidence*, CURRENT WOMEN'S HEALTH ISSUES 1:21, 23 (2005); J.R. Cougle et al., *Depression Associated with Abortion and Childbirth: A Long-Term Analysis of the NLSY Cohort*, MED. SCI. MONITOR 9(4):CR157 (2003); Z. Bradshaw & P. Slade, *The Effects of Induced Abortion on Emotional Experiences and Relationships: A Critical Review of the Literature*, CLINICAL PSYCHOL. REV. 23:929-58 (2003); D.C. Reardon et al., *Deaths Associated with Delivery and Abortion Among California Medicaid Patients: A Record Linkage Study*, S. MED. J. 95:834 (2002). For a bibliography of peer reviewed studies, *see* We Care Experts, *Psychological, Relationship, and Behavioral Implication of Abortion: Bibliography of Peer-Reviewed Studies, available at* http://www.wecareexperts.org/sites/default/files/articles/Bibliography%20of%20Peer%20Reviewed%20Studies%20on%20Psychology%20of%20Abortion.pdf.

[79] Gonzales v. Carhart, 550 U.S. 124 (2007).

[80] Women's Medical Center v. Bell, 248 F.3d 411, 418 (5th Cir. 2001).

The Arizona Legislature recognized that there could be "psychological or emotional complications such as depression, anxiety or sleeping disorders and death."[81] The State had previously warned of emotional complications such as anger, guilt, sadness, or emptiness that could last for a long time.[82]

In the largest governmental study since *Roe v. Wade*, the South Dakota Task Force on Abortion found that: " . . . it is simply unrealistic to expect that a pregnant mother is capable of being involved in the termination of the life of her own child without risk of suffering significant psychological trauma and distress."[83]

The Task Force heard testimony from Dr. Vincent Rue, Ph.D., who is a psychotherapist, professor, and was special consultant to then-U.S. Surgeon General Dr. C. Everett Koop on abortion morbidity. The Task Force stated: "In 1981, Dr. Rue provided the first clinical evidence of post-abortion trauma, identifying this psychological condition as 'Post-abortion

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[81] H.B. 2036, Sec. 9 (A)(1) (*citing* studies).

[82] Arizona Department of Health Services, "A Woman's Right to Know" booklet at 15, *available at* http://www.azdhs.gov/phs/owch/informed-consent/right-to-know/documents/a-womans-right-to-know.pdf.

[83] REPORT OF THE SOUTH DAKOTA TASK FORCE TO STUDY ABORTION at 47-48 (Dec. 2005), *available at* http://www.dakotavoice.com/Docs/South%20Dakota%20Abortion%20Task%20Force%20Report.pdf.

Syndrome' in testimony before the U.S. Congress."[84] Individuals with Post-Abortion Syndrome "experience symptoms of avoidance (efforts to escape from reminders of the event), intrusion unwanted thoughts, nightmares, and flashbacks related to the event), and arousal (exaggerated startle reflex, sleep disturbance, irritability) for a month or more following exposure to a traumatic event.[85] Although for some women, the initial response is one of relief, many women later avoid the problem through repression and denial, usually for years – "5 years is common, 10 or 20 is not unusual."[86]

Numerous peer-reviewed studies that have examined the psychological effect of abortion have confirmed that abortion poses increased risk of depression, anxiety, and even suicide. In a landmark study published in the prestigious British Journal of Psychiatry, Dr. Priscilla Coleman found that women face an 81% increased risk of mental health problems following abortion.[87] Specifically, women with a history of abortion had a 34% increased risk of anxiety, a 37% increased risk of depression, a 110%

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[84] *Id*. at 53.

[85] *Id*. at 44; *see also* P.K. Coleman et al., *Late-Term Elective Abortion and Susceptibility to Posttraumatic Stress Symptoms*, J. PREGNANCY 2010:1 (2010).

[86] J. WILLKE & B. WILLKE, ABORTION 50 (Hayes Pub. Co. 2003).

[87] P.K. Coleman, *Abortion and Mental Health: Quantitative Synthesis and Analysis of Research Published 1995-2009*, BRIT. J. PSYCHIATRY 199:180 (2011).

increased risk of alcohol use, and a 155% increased risk of suicide following abortion.[88] It is significant that the study examined the results of 22 studies published between 1995 and 2009, included 877,181 women (163,831 who had aborted) from six countries, and utilized very stringent criteria.

Dr. David Fergusson, a pro-choice researcher, conducted another leading study.[89] His findings were significant and recognized internationally. He found that 42% of the women in the study who aborted reported major depression; 39% suffered from anxiety disorders; 27% experienced suicidal ideation; 6.8% indicated alcohol dependence, and 12.2% abused drugs.[90]

Dr. Fergusson and his colleagues challenged the American Psychological Association's assertion that the risk of psychological harm from abortion was low.

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[88] *Id*.

[89] D.M. Fergusson et al., *Reactions to Abortion and Subsequent Mental Health*, BRIT. J. PSYCHIATRY 195:420-426 (2009) (conducting study of 1,265 women and finding significantly higher risk for depression, anxiety, suicidal behaviors, and substance abuse); D.M. Fergusson et al., *Abortion in Young Women and Subsequent Mental Health*, J. CHILD PSYCHOLOGY & PSYCHIATRY 47:16 (2006) (concluding young women may be associated with increased risks of mental health problems including elevated rates of subsequent mental health problems including depression, anxiety, suicidal behaviors and substance use disorders).

[90] D.M. Fergusson et al., *Abortion in Young Women and Subsequent Mental Health*, J. CHILD PSYCHOLOGY & PSYCHIATRY 47:16 at 19 (2006) (Table 1).

Dr. Fergusson determined that this claim was based on a small number of studies that suffered from significant methodological problems and disregarded studies showing negative effects.[91]

Ten months after the Fergusson study was published, a prestigious group of fifteen senior psychiatrists and obstetricians wrote an open letter to the *London Times* citing the Fergusson study and advocating that women be given more accurate pre-abortion information. They stated: "Since women having abortions can no longer be said to have a low risk of suffering from psychiatric conditions such as depression, doctors have a duty to advise about long-term adverse psychological consequences of abortion."[92]

There is an extensive amount of research demonstrating the psychological harm of abortion.[93] For example, Mika Gissler and associates conducted two studies[94] in Finland on the post-abortion suicide rate

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[91] *Id*. at 23.

[92] Open Letter, *London Times* (Oct. 27, 2006), *available at* http://www.abortionreview.org/index.php/site/article/89/.

[93] For a bibliography of peer reviewed studies, *see* We Care Experts, *Psychological, Relationship, and Behavioral Implication of Abortion: Bibliography of Peer-Reviewed Studies, available at* http://www.wecareexperts.org/sites/default/files/articles/Bibliography%20of%20Peer%20Reviewed%20Studies%20on%20Psychology%20of%20Abortion.pdf.

[94] M. Gissler et al., *Injury Deaths, Suicides and Homicides Associated with Pregnancy, Finland 1987-2000*, EUR. J. PUB. HEALTH 15:459 (2005); M. Gissler et al., *Suicides After Pregnancy in Finland, 1987-94: Register Linkage Study*, BRIT. MED. J. 313:1431 (1996).

and found that the suicide rate after abortion was "six times that associated with birth."[95] This increased risk was observed especially in the age group of 15-24 years of age.[96] Because of the significantly higher risk, follow-up visits are necessary to detect signs of depression and to identify psychosis after an induced abortion.[97]

In a comparison study of American and Russian women, Dr. Vincent Rue and associates reported that "65% of American women and 13.1% of Russian women experienced multiple symptoms of increased arousal, re-experiencing and avoidance associated with posttraumatic stress disorder (PTSD), 14.3% of American and 0.9% of Russian women met the full diagnostic criteria for PTSD."[98] Based on extensive studies, Dr. Rue testified that "it is false and misleading to suggest to women that abortion has no significant mental health risks, much less is 'psychologically safer' than carrying to term."[99]

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[95] M. Gissler et al., *Suicides After Pregnancy in Finland, 1987-94: Register Linkage Study*, BRIT. MED. J. 313:1431 (1996).

[96] M. Gissler et al., *Injury Deaths, Suicides and Homicides Associated with Pregnancy, Finland 1987-2000*, EUR. J. PUB. HEALTH 15:459 (2005).

[97] *Id*.

[98] V.M. Rue et al., *Induced Abortion and Traumatic Stress: A Preliminary Comparison of American and Russian Women*, MED. SCI. MONITOR 10:SR5 (2004).

[99] Testimony of Dr. Vincent Rue on Senate Bill 398 before the Senate Committee on Health, Human Services, Insurance, and Job Creation (Feb. 27, 2008), *available at* http://

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The extensive medical and scientific research since 1973 confirms that abortion has significant long-term psychological risks to women. Therefore, the Arizona Legislature properly exercised its broad discretion to protect women.

CONCLUSION

The Arizona Legislature should be given broad deference to protect the health and safety of women considering a later term abortion because of well-documented, reliable, scientific evidence of the physical and psychological harm. Therefore, the Petition for Writ of Certiorari should be granted.

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www.wrtl.org/legislation/currentlegislation/documents/Legis_Info_Center_940.04_VinceRueTestimony_on_SB398.pdf (discussing numerous studies and providing appendices of studies).