No. 13-402

IN THE

Supreme Court of the United States

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

Petitioners,

—v.—

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

Respondents,

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in light of this Court's precedents articulating constitutional protection for the right of a woman to obtain an abortion before the point of viability, an Arizona abortion ban is unconstitutional as applied to pre-viability procedures.

2. Whether, given this Court's repeated rulings that the Constitution protects the right of a woman to obtain an abortion before the point of viability, this Court should revisit forty years of precedent based on Petitioners' asserted state interests.

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INTRODUCTION

Consistent with forty years of this Court's jurisprudence and Petitioners' concession that the abortion ban here at issue applies before viability, the United States Court of Appeals for the Ninth Circuit correctly held that that ban cannot stand as applied to pre-viability procedures. That decision faithfully follows this Court's precedents, is in conflict with the decision of no other court, and thus merits no further review. Since this Court first articulated the constitutional protection for pre-viability abortion decisions that necessarily condemns this ban, two generations of American women and families have come of age, depending on constitutional protection for their reproductive decisions. Far from being on any collision course, the central viability line that this Court has repeatedly reaffirmed has proved enduringly "workable," and there remains "no line other than viability which is more" so. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 870 (1992). Certainly the case Petitioners ask this Court to review offers no more workable line. Rather, Petitioners' defense of the Arizona ban (which relies on claims roundly rejected in the medical field) rests on the proposition that there should be no line at all—no limit on when a state may wrest from a woman and her family the decision of whether to continue or to end a pregnancy.

Arizona House Bill 2036 of 2012 (the "Act") is not, as Petitioners would have it, a "regulation," a "limitation," or a "restriction." Rather, Arizona's ban is exactly that—a "ban" with the stated purpose of

"[p]rohibit[ing] abortions at or after twenty weeks of gestation, except in cases of a medical emergency." ER 67 (H.B. 2036, 50th Leg., 2d Reg. Sess. § 9(B)(1) (Ariz. 2012)).[1] Of course, it would not change the outcome here if the Act were a "regulation," subject to the undue burden/substantial obstacle test, for as this Court reiterated in *Gonzales v. Carhart*, "[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." 550 U.S. 124, 145 (2007) (emphasis added). "Before viability," therefore, a law is unconstitutional if it is *either* "a prohibition" on *or* "a substantial obstacle" to abortion. *Id.* The Act fails under either standard, for it is a prohibition and it is a substantial obstacle. It would prevent all women for whom it is relevant—those seeking pre-viability abortion care starting at twenty weeks for any reason other than a medical emergency—from making the ultimate decision to terminate a pregnancy.

Hence, the decision below correctly applied long-established precedent, which plainly condemns the Act. *See infra* Point I. Further, the decision below is consistent with the decisions of every other federal court of appeals and state court of last resort that has reviewed the constitutionality of a ban on abortion before viability, and there is therefore no conflict of authority for this Court to resolve. *See*

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[1] ER sites refer to the Excerpted Record in the Court of Appeals for the Ninth Circuit.

infra Point II. Finally, nothing in the Petition merits overturning the core principle, reaffirmed repeatedly over forty years, that the Constitution protects a woman's decision whether to continue a pregnancy until viability. *See infra* Point III. Accordingly, this Court should deny the writ.

COUNTER-STATEMENT OF THE CASE

It is uncontested that viability—the point at which a normally-developing fetus has a reasonable likelihood of sustained survival outside the woman, albeit with lifesaving medical care—occurs around twenty-four weeks lmp (twenty-four weeks as measured from the woman's last menstrual period). Pet. App. 7a n.4, 56a–57a. It is also uncontested that no fetus is viable at twenty weeks lmp, when the Act applies. Pet. App. 7a n.4, 22a. The Act thus bans pre-viability abortions, as Petitioners concede. Pet. at 9 (the Act restricts "abortions before the current medical viability line of about twenty-four weeks"). Long before passage of the Act, Arizona law prohibited abortions after the point of viability, except as "necessary to preserve the life or health of the woman." Pet. App. 68a (Ariz. Rev. Stat. § 36-2301.01(A)(1)). The ban imposed by the Act is thus intended to, and does, apply before viability, and Respondents challenged the Act only as applied in that period of pregnancy.

The ban applies in all circumstances except a "medical emergency," defined as a condition "necessitat[ing] the immediate abortion of [a woman's] pregnancy to avert her death or for which a delay will create serious risk of substantial and

irreversible impairment of a major bodily function." Pet. App. 67a, 69a (H.B. 2036 §§ 3, 7 (codified at Ariz. Rev. Stat. §§ 36-2159(B), -2301.01(C)(2))). Violation of the Act is a criminal offense. Pet. App. 67a (H.B. 2036 § 7 (codified at § 36-2159(C))); Ariz. Rev. Stat. § 13-707(A)(1).

Prior to the Act taking effect, Respondents, three Arizona obstetrician-gynecologists, challenged it as applied to pre-viability abortion care. Dr. Paul A. Isaacson, an obstetrician-gynecologist, provides pre-viability abortions as part of his comprehensive gynecological and abortion care practice; over 70% of his abortion patients who make the decision to end a pregnancy at or after 20 weeks lmp do so after receiving a diagnosis of a fetal anomaly, or to protect their health. ER 51 (Isaacson Decl. ¶¶ 11–14). Drs. William H. Clewell and Hugh Miller—maternal-fetal medicine specialists who provide largely hospital-based prenatal care, high-risk pregnancy management care, and labor and delivery services for women seeking to carry high-risk pregnancies to term—provide pre-viability abortions in cases of fetal anomaly, maternal medical complications, and pregnancy failure (miscarriage). ER 36–37 (Clewell Decl. ¶¶ 1, 6); ER 25 (Clewell Supp. Decl. ¶ 2); ER 57 (Compl. ¶¶ 8–9). Their patients seeking abortion care at or after twenty weeks are women who have tried to continue pregnancies complicated by conditions that grew too severe as pregnancy progressed, or women who learned that they were carrying a fetus with a serious anomaly that doctors could not definitively diagnose before that point. *See infra* pp.16–18 & nn.3–4. Thus, Respondents'

patients whom the Act would preclude from obtaining abortion care are, for example, women with severe cardiac disease at risk of irreversible heart damage if they continue their pregnancies, and women who learn that their fetuses lack kidneys, which leads to death before or shortly after birth.

Respondents sought a preliminary injunction, and supported their motion with declarations from Respondent-Physicians Isaacson and Clewell and from the Centers for Disease Control and Prevention's former "Chief of the Abortion Surveillance Branch, the group responsible for studying abortion safety for the U.S. Government." ER 20 (Grimes Decl. ¶ 1). These experts described the impact the Act would have on Respondents' patients and established the single, uncontested fact that condemns the Act under this Court's binding precedent—namely, that viability never occurs at twenty weeks lmp. Although deciding their motion thus required very limited fact finding, Respondents made clear that they disputed the Legislature's findings as to both maternal health and fetal development as it relates to pain perception, which have been rejected by the major medical organizations in the field. *See infra* Point III. Following a hearing on the Motion for Preliminary Injunction, the district court denied the motion; in addition, without prior notice to the parties, the court consolidated the preliminary proceedings with a trial on the merits under Federal Rule of Civil Procedure 65 and awarded final judgment to Petitioners.

Respondents appealed to the Ninth Circuit, which granted an emergency stay of the Act and

ultimately overruled the district court. The court noted that "[a]s *Roe* and its many progeny make clear, viability, although not a fixed point, is the critical point" concerning an outright ban. Pet. App. 20a. It therefore concluded that because the "parties here agree that no fetus is viable at twenty weeks," the Act's ban on abortions starting at twenty weeks cannot stand. *Id.* at 22a. Based on that conclusion, the court of appeals held that the Act is "per se unconstitutional," *id.* at 5a, and therefore that the district court had improperly applied the substantial obstacle test, *id.* at 22a–24a. It also criticized the district court's characterization of the ban as a regulation, *id.* at 22a–25a, and noted that the medical emergency exception could not transform the ban into a regulation, *id.* at 26a–28a. As the Ninth Circuit recognized, the Act is a ban because it "eliminates a woman's 'right to choose abortion itself'" in a pre-viability period of pregnancy. Pet. App. 23a (quoting *Stenberg v. Carhart*, 530 U.S. 914, 930 (2000)). Finally, the appeals court noted that, because this Court's precedents make clear that state interests are not sufficient to justify a ban before the point of viability, neither the district court's findings regarding maternal health and fetal pain perception nor "the truncated nature of the record" could change the result in this case. *Id.* at 11a, 28a–31a. A separate concurrence agreed that the majority's decision was correct under this Court's binding precedent. *Id.* at 35a, 42a.

REASONS FOR DENYING THE PETITION

I. The Decision Below Was a Straightforward Application of this Court's Well-Established Precedent.

A. Over Four Decades, this Court Has Consistently Held that the State May Not Ban Abortion at a Point Before Viability.

The Ninth Circuit's decision is a straightforward application of this Court's precedents and does not merit further review. Recognizing "the urgent claims of the woman to retain the ultimate control over her destiny and her body, claims implicit in the meaning of liberty," this Court has made explicit that "the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy." *Casey*, 505 U.S. at 869–70. Indeed, this Court has described the right of each woman to obtain an abortion before the point of viability as "the most central principle of *Roe v. Wade*." *Id.* at 871; *see also Gonzales*, 550 U.S. at 146 ("assuming" the principle that, "[b]efore viability, a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy'" (quoting *Casey*, 505 U.S. at 878–79)); *Stenberg*, 530 U.S. at 921 (declining to "revisit" the legal principle reaffirmed in *Casey* that "before 'viability . . . the woman has a right to choose to terminate her pregnancy'" (quoting *Casey*, 505 U.S. at 870)).

Thus, a ban on abortion at any point prior to viability is impermissible. "Before viability, the

State's interests are not strong enough to support a prohibition of abortion . . . . Regardless 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." *Casey*, 505 U.S. at 846, 879. Nor can the State diminish this protection by setting any single factor, including a fixed number of weeks of pregnancy, as the point at which "the State has a compelling interest in the life or health of the fetus. Viability is the critical point." *Colautti v. Franklin*, 439 U.S. 379, 389 (1979); *accord Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 64 (1976) ("[I]t is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period.").

The Ninth Circuit's holding that the Arizona ban is per se unconstitutional as applied to pre-viability abortions thus faithfully applies this Court's precedents. Given Petitioners' concession that the Act bans abortion at a point in pregnancy at which no fetus is viable, the Ninth Circuit could reach no other conclusion. The line that this Court has drawn at viability, and that this Court has repeatedly reaffirmed, leads inexorably to the result the Ninth Circuit reached. That result is correct, and calls for no review by this Court.

B. *Gonzales v. Carhart* in No Way Altered the Core Principle that Before Viability, the State May Not Ban Abortion, and May Not Impose a Substantial Obstacle.

Ignoring this Court's explicit language and holding, Petitioners incorrectly suggest that *Gonzales* altered the core principle this Court has repeatedly reaffirmed: until viability, it is a woman, and not the State, who holds the authority to decide whether or not she will continue her pregnancy. But this Court could not have been clearer in that decision: the government may "use its voice and its regulatory authority to show its profound respect for the life within the woman"—but if and only if such actions do not "strike at the right itself." *Gonzales*, 550 U.S. at 157–58. The Act's pre-viability ban does precisely that.

The issue before the Court in *Gonzales* was not the validity of a ban on abortion, but the validity of a prohibition on the use of a single *method* of abortion. 550 U.S. at 146–47. The holding—that the State may determine how a woman's doctor will perform an abortion, not whether a woman may obtain one at all—provides no support for Petitioners' defense of the Act, and no justification for reviewing forty years of precedent. Indeed, this Court made plain that it upheld the law in *Gonzales* only because it did "*not* prohibit standard D&E," the most common method at that point in pregnancy, which "both sides agreed . . . was safe." 550 U.S. at 154, 164 (emphasis added) (internal quotation omitted); *see also id*. at 164–65 (distinguishing *Danforth*, 428 U.S. at 77–79, because

it "invalidated a ban on . . . the then-dominant second-trimester abortion method"). Petitioners are simply ignoring this Court's actual ruling in insisting that *Gonzales* stands for the proposition that the Act—which bans *all* methods at the given pre-viability point in pregnancy—is somehow constitutional.

Petitioners thus err in asserting that *Gonzales* ushered in a new era in which state interests may trump the rule that viability is the earliest point at which the State may ban abortion. This Court did indeed find state interests adequate to uphold the method ban at issue in *Gonzales*, and did indeed note that that law applied both before and after viability. *Id.* at 147, 156–60. But in doing so, it explicitly "appl[ied *Casey's*] standard." *Id.* at 146. Hence, in *Gonzales—as in* Casey *itself*—this Court upheld a regulation that applied both before and after viability, but did so only after concluding that it imposed no substantial obstacle. *See id.* at 156, 165; *Casey,* 505 U.S. at 877–78, 882–83, 886–87, 900–01.

Petitioners likewise err in insisting that under *Gonzales*, the Act—which is not a regulation but an outright ban—is subject to the substantial obstacle test. This assertion is inconsistent with forty years of precedent, including *Gonzales* itself. But even if the Act were subject to the substantial obstacle test, it would not change the result here, and thus would provide no reason for the Court to review this case. Whereas the law upheld in *Gonzales* did not prevent a single woman from obtaining a pre-viability abortion, the Act will prevent every woman to whom it applies from doing so. Thus, the Act plainly fails

the substantial obstacle test: outside the extremely narrow emergency exception, it imposes not merely a substantial obstacle, but an absolute obstacle, for all women seeking pre-viability abortion care starting at twenty weeks.

This Court's precedents have been clear and simple. First, an outright ban is unconstitutional before viability. Second, a regulation that imposes a substantial obstacle is unconstitutional before viability. Third, a regulation that furthers state interests and imposes no substantial obstacle is constitutional without regard to the viability line. Those principles have been the law for many years, and far from altering them, *Gonzales* fully applied them. 550 U.S. at 146. *Gonzales* therefore provides no reason why this Court should grant the Petition.

II. There is No Conflict of Authority for the Court to Review or Resolve.

The most common reason for this Court to exercise its authority to grant certiorari is to resolve an important conflict among either the decisions of federal courts of appeals or state courts of last resort. Eugene Gressman et al., *Supreme Court Practice* § 4.3 (9th ed. 2007); U.S. Sup. Ct. R. 10(a). Here, there is no such conflict to resolve. More than twenty years ago, this Court, affirming the "central principle" of its earlier decision in *Roe v. Wade*, 410 U.S. 113, clarified that "[b]efore viability, the State's interests are not strong enough to support a prohibition of abortion . . . ." *Casey*, 505 U.S. at 846. Since then, every federal appellate court and state court of last resort faced with the question has ruled

that a law prohibiting abortions before viability, with or without exceptions, violates the Fourteenth Amendment; furthermore, this Court has affirmed or denied certiorari in each one of those cases it has been asked to review. *Carhart v. Stenberg*, 192 F.3d 1142, 1151 (8th Cir. 1999) (striking down ban on the methods used in "the vast majority" of abortions after thirteen weeks lmp), *aff'd*, 530 U.S. 914, 922 (2000); *Women's Med. Prof'l Corp. v. Voinovich*, 130 F.3d 187, 201 (6th Cir. 1997) (same), *cert. denied*, 523 U.S. 1036 (1998); *Jane L. v. Bangerter*, 102 F.3d 1112, 1114, 1117–18 (10th Cir. 1996) (striking down ban on pre-viability abortions at twenty-two weeks lmp with exceptions), *cert. denied sub nom Leavitt v. Jane L.*, 520 U.S. 1274 (1997); *Sojourner T. v. Edwards*, 974 F.2d 27, 29, 31 (5th Cir. 1992) (striking down ban on all abortions with exceptions), *cert. denied*, 507 U.S. 972 (1993); *Guam Soc'y of Obstetricians & Gynecologists v. Ada*, 962 F.2d 1366, 1368–69 (9th Cir. 1992) (same), *cert. denied*, 506 U.S. 1011 (1992); *DesJarlais v. State, Office of Lieut. Gov.*, 300 P.3d 900, 904 (Alaska 2013) (invalidating proposed pre-viability ban on all abortions with exception for "necessity"); *In re Initiative Petition No. 395, State Question No. 761*, 286 P.3d 637, 637–38 (Okla. 2012) (invalidating proposed definition of a fertilized egg as a "person" under due process clause), *cert. denied sub nom. Personhood Okla. v. Barber*, 133 S. Ct. 528 (2012); *Wyo. Nat'l Abortion Rights Action League v. Karpan*, 881 P.2d 281, 287 (Wyo. 1994) (ruling proposed ban on abortions would be unconstitutional); *In re Initiative Petition No. 349, State Question No. 642*, 838 P.2d 1, 7 (Okla. 1992) (striking down proposed abortion ban with

exceptions). The appellate decision below, which is entirely consistent with all those before it addressing bans on abortion care before the point of viability, does not merit the Court's review.

III. The Petition Offers No Persuasive Reason to Reconsider the Core Principle Announced in *Roe* and Reaffirmed in *Casey*.

Contrary to Petitioners' assertions, this case does not warrant reconsideration of the Court's "unbroken commitment . . . to the essential holding of *Roe*" and *Casey*, *Casey*, 505 U.S. at 870, the imperatives of which ring true today as forcefully as they did forty years ago and twenty years ago. Today no less than then, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Id.* at 851. Today no less than then, the moral significance of fetal life is not a question of purely scientific dimension; rather, it implicates ideological beliefs of a fundamental and deeply personal nature, which is central to this Court's conclusion that the Constitution guarantees a woman's liberty to decide to terminate a pregnancy before viability. As the Court wrote in *Casey*: "The underlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter, except perhaps in . . . rare circumstances . . . ." *Id.* at 850–51. The Court has repeatedly answered this question with a resounding "no" because "the liberty of the woman is at stake in a sense unique to

the human condition and so unique to the law . . . . The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society." *Id.* at 852. Petitioners present no basis for reexamining the settled principles that have led this Court to repeatedly reaffirm that state interests cannot justify a ban before the point of viability. They simply ignore the Court's precedents and ignore the facts in claiming that the asserted interests in women's health and fetal pain perception—which they describe as "the subject of some debate in academic and medical professional circles," Pet. at 20—undermine the basis of decision in *Roe* and *Casey*.[2]

First, the Court has repeatedly considered the state interest in women's health, and has repeatedly held that it may justify regulation, but not an outright ban (or even a regulation tantamount to a ban), before viability. *See, e.g.*, *Danforth*, 428 U.S. at 79 (notwithstanding the State's assertion that an

[2] Petitioners assert facts with, at best, marginal support in the medical field. Indeed, the American College of Obstetricians and Gynecologists ("ACOG"), "the nation's leading experts on the health care of women," filed an amicus brief in the court of appeals in this case "to correct the inaccurate and misleading medical data relied upon by the Arizona legislature, Defendants" (Petitioners here), and "the district court." Brief for Amici Curiae Am. Coll. of Obstetricians & Gynecologists & Am. Cong. of Obstetricians & Gynecologists in Support of Plaintiffs-Appellants & Reversal at 1, *Isaacson v. Horne*, 716 F.3d 1213 (9th Cir. 2013) (No. 12-16670) ("ACOG Br.").

alternative method was safer, striking down ban on then-dominant abortion method because it "inhibit[s] the vast majority of abortions after the first 12 weeks"). Petitioners seek to escape this core principle by citing alleged recent advances in medical knowledge showing that abortion carries fewer medical risks in the first trimester than later in pregnancy, and that the medical risks of second-trimester abortion equal or exceed the medical risks of continued pregnancy and childbirth. *See* Pet. at 21–29.

That the risks of abortion increase as pregnancy advances has always been true and has always been known to this Court, but has never justified an outright ban; that second-trimester abortion is riskier for women than childbirth, although contradicted by overwhelming medical consensus today, *see* ACOG Br. at 14, was assumed to be true by this Court based on then-existing medical practice when it decided *Roe*. *See Roe*, 410 U.S. at 163. Indeed, those very factual claims formed the basis for the Court's conclusion that states' interest in regulating abortion to protect women's health becomes compelling at the end of the first trimester. *See id.* Notwithstanding those same facts, the Court held in *Roe* that states lack interests sufficient to justify a ban on abortion prior to viability. *See id.* at 163–64. Thus, Petitioners' factual allegations—even if true—would not warrant reconsideration of *Roe*'s central holding. As the Court stated in *Casey*, medical and scientific advancements occurring subsequent to *Roe* "have no bearing on the validity of *Roe*'s central holding, that

viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a . . . ban." 505 U.S. at 860.

Petitioners' argument fundamentally misconstrues the right protected by this Court's decisions, which guarantees that it is for a woman, and not the State, to weigh medical risks and other equally important factors to determine whether or not to continue her pre-viability pregnancy. *Id.* at 852 (recognizing that the State cannot subject a woman who decides to end her pre-viability pregnancy to the "anxieties," "physical constraints," and "pain" that come with carrying a pregnancy to term); *id.* at 856 ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."). Petitioners' reliance on concern for maternal health to support a ban on abortion before viability is thus foreclosed.[3]

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[3] Weighing medical risks and other equally important factors is precisely what Respondents' high-risk patients do, and many of them, "fac[ing] grave risks," nonetheless decide to "remain pregnant as long as possible, in many cases for several weeks or months," attempting to deliver a healthy baby. ER 25 (Clewell Supp. Decl. ¶ 4). The Constitution guarantees that it is a woman, her family, and her doctor who make this decision, not Arizona. This Court has of course upheld laws that, for example, require physicians to inform patients of "the health risks of the abortion and of childbirth." *Casey*, 505 U.S. at 881. Petitioners, however, argue not for the power to regulate in ways that respect a woman's decision-making by "ensur[ing] an informed choice," *Casey*, 505 U.S. at 883, but for the power to

In addition to ignoring this history, Petitioners misrepresent the facts: far from protecting women, the Act seriously threatens women's health and lives. As an initial matter, as both ACOG and Respondents argued below, there is simply no credible evidence that, as Petitioners insist, legal induced abortion is riskier for a woman at twenty weeks than carrying to term. *See* ACOG Br. at 14–21; ER 41–43 (Clewell Decl. ¶¶ 11, 16–17); ER 26 (Clewell Supp. Decl. ¶ 6); ER 22 (Grimes Decl. ¶¶ 6–8). Moreover, it is indisputable that the ban imposes grave medical harm on many of Respondents' patients trying to carry high-risk pregnancies to term. ER 41–42, 44–45 (Clewell Decl. ¶¶ 16–17, 21, 24); ER 25 (Clewell Supp. Decl. ¶¶ 1–3); ER 57–58 (Compl. ¶¶ 8–9). These patients have ended pre-viability pregnancies at or after twenty weeks when, for example, because of pulmonary hypertension and severe cardiac disease, their cardiovascular status worsened as the pregnancy progressed until they were at risk of irreversible heart damage; or they required immediate breast cancer treatment that posed serious risks to the fetus; or they were losing the pregnancy, with advanced cervical dilation and serious bleeding caused by detachment of the placenta from the uterine wall. ER 41–43 (Clewell Decl. ¶¶ 16, 17); ER 25–26 (Clewell Supp. Decl. ¶¶ 3–4); ER 52 (Isaacson Decl. ¶¶ 13–14). Many of these patients struggled desperately to carry their

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ban her decision altogether, "strik[ing] at the right itself." *Gonzales*, 550 U.S. at 157–58 (citing *Casey*, 505 U.S. at 874).

pregnancies at least until the fetus became viable, only to see their conditions worsen such that they ultimately decided that the diminishing prospects for a live birth no longer justified the escalating risks to their own health. ER 41–45 (Clewell Decl. ¶¶ 16–17, 23–24); ER 25 (Clewell Supp. Decl. ¶ 3).[4] For these "patients who face greatly elevated risks from pregnancy . . . it is irrefutable that termination is safer, including after 20 weeks." ER 26 (Clewell

[4] Other of Respondents' patients learn that their fetus has a serious or lethal problem, many of which—particularly those that are structural rather than chromosomal—simply cannot be definitively diagnosed until the point when the Act would foreclose the decision of a woman and her family to end the pregnancy. ER 40–41 (Clewell Decl. ¶¶ 13–15); ER 26–27 (Clewell Supp. Decl. ¶¶ 7–10); ER 51 (Isaacson Decl. ¶¶ 11–12); ACOG Br. at 4 ("[T]here are numerous fetal anomalies that are regularly only detected after 20 weeks" and "many patients in whom" the relevant "ultrasound examination will not reveal structural anomalies . . . until . . . after 20 weeks.") (footnote omitted). These diagnoses include anencephaly, a significant malformation or absence of the brain, and renal agenesis, the absence of kidneys—both of which lead to death before or shortly after birth. ER 40–41 (Clewell Decl. ¶¶ 14, 15). After receiving such tragic diagnoses, some of Respondents' patients decide to continue the pregnancy, and Respondents have long supported them in planning for perinatal hospice care; others decide to terminate because "the prospect of remaining pregnant is agonizing." ER 26–27 (Clewell Supp. Decl. ¶¶ 7–8); *see also* ER 82 (H.B. 2036 § 7 (codified at Ariz. Rev. Stat. § 36-2158(A)(1))) (section of the Act requiring physicians to inform patients with lethal fetal diagnoses of the availability of perinatal hospice services).

Supp. Decl. ¶ 6).[5] "Given the utter disregard for women's health discussed above, [Petitioners'] attempt to justify [the ban] on maternal health grounds is neither credible nor persuasive." ACOG Br. at 14.

Second, Petitioners' assertions about fetal pain perception have been rejected by the major medical organizations in the field to address the question. *See, e.g.*, ACOG Br. at 22–26 (citing Royal Coll. of Obstetricians & Gynecologists, Fetal Awareness: Review of Research and Recommendations for Practice (Mar. 2010), *available at* http://www.rcog.org.uk/files/rcog-corp/RCOGFetalAwarenessWPR0610.pdf). As ACOG summarized in its brief below, "[s]cientific evidence

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[5] It is also indisputable that the ban's exceedingly narrow exception, which applies only when an "*immediate* abortion" is necessary "to avert . . . death or . . . substantial and irreversible" damage, Pet. App. 69a (H.B. 2036 § 3 (codified at § 36-2301(C)(2))) (emphasis added), does not protect most of these patients. That is because "[t]he great majority of these circumstances that gravely threaten a woman's life or health are not emergencies that will kill or harm her imminently." ER 25 (Clewell Supp. Decl. ¶ 4). Petitioners' insistence that the Act has a general "'health exception'" protecting women, Pet. at 14 n.6, is thus false. While this Court upheld the twenty-four-hour waiting period at issue in *Casey* with this same exception, a woman who was not in an imminent crisis could still end her pregnancy to protect her health under that law—she just had to wait twenty-four hours. *Casey*, 505 U.S. at 880–81. Under the Act, a woman who is not in an imminent crisis cannot end her pregnancy to protect her health—unless and until her condition deteriorates to the point of an immediate emergency. *See* ACOG Br. at 8–13.

establishes that previability abortion does not cause fetal pain," and the "reasoning" on which Petitioners rely "has been roundly rejected by the scientific community." ACOG Br. at 21, 25. Thus, while Respondents argued that such assertions could not change the result under forty years of this Court's precedent, they made plain that they disputed Petitioners' assertions, *e.g.*, Pls.' Mem. Supp. Mot. Prelim. Inj. & Expedited Consid. or in Alternative for Temp. Restr. Order at 9 n.6, which are discredited within the medical field, *see* ACOG Br. at 27 ("[T]he current scientific *consensus* is that (1) the human fetus does not develop the capacity to perceive pain until much later than 20 weeks . . . . In finding otherwise, the District Court relied on" witnesses "who lack relevant expertise, and a skewed portion of the medical and scientific literature that is not only incomplete, but contains no credible evidence.") (emphasis added).

Nevertheless, Petitioners argue that such findings—on maternal health and fetal pain perception—justify a ban before viability. If Petitioners were correct—if a legislature could ban abortion weeks before viability based on findings with such meager medical support—then the right of a woman to make this most personal decision would be subject to majority rule as surely as if it had no constitutional protection whatsoever. And that is because, in an area as intensely controversial as abortion, there is virtually no fact that a legislature

could not find some medical opinion to support.[6] Indeed, it is plain on the face of the Petition that it seeks no mere "revisiting" of precedent, *see* Pet. at 19, but the wholesale evisceration of constitutional protection for the liberty of a woman and her family—rather than politicians—to make the intensely personal, medical and moral decision whether to continue or to end a pre-viability pregnancy.

This has not been the law for forty years, and the Petition offers no reasons why this case is an appropriate vehicle for reversing that well-established precedent. As this Court has assured generations of Americans, a "woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce." *Casey*, 505 U.S at 871.

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[6] For example, notwithstanding the overwhelming medical consensus that "abortion is much safer for women than carrying to delivery in terms of both mortality and morbidity," ER 22 (Grimes Decl. ¶ 7) (citations to studies based on data from the Centers for Disease Control and Prevention omitted); *accord* ACOG Br. at 14–15 (same), the Petition asserts: "Studies . . . have found that mortality rates from abortion are significantly higher than those associated with childbirth." Pet. at 26. Were Petitioners correct that such "findings" could justify a ban, it would be the State, and not a woman, who would make the ultimate decision of whether she would continue or end her pre-viability pregnancy.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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