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

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF

Respondents' Brief in Opposition ("BIO") reads like the line from the movie *The Naked Gun*, delivered by detective Frank Drebin while standing in front of an exploding fireworks factory: "Move along, nothing to see here." The Ninth Circuit's decision below is, Respondents claim, "[c]onsistent with forty years of this Court's jurisprudence," "is in conflict with the decision of no other court, and thus merits no further review." BIO at 1. Yet the nothing-to-see-here mantra is belied by Respondents' own actions:

- Respondents filed a brief in opposition instead of waiving opposition, the usual course for Respondents who believe the case "clearly does not warrant review." Eugene Gressman, *et al.*, SUPREME COURT PRACTICE, § 6.37(k) (9th ed. 2007);
- Respondents claim *here* that they disputed the factual record upon which the Arizona legislature relied "as to both maternal health and fetal development as it relates to pain perception," BIO at 5, even though the District Court found the evidence of fetal pain presented by Defendants to be "uncontradicted and credible," Pet.App.63a; *see also* Pet.App.51a ("The Court notes that the parties do not materially dispute the facts in this case"); Complaint ¶ 34 (not contesting the legislative findings but rather alleging that "even if true … [neither] could support a ban on previability abortions");[1]

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[1] Much of the alleged factual dispute now claimed by Respondents is based on an *amicus curiae* brief filed *in the Court of Appeals*. BIO at 14 n.2. But because Respondents did not contest

- Respondents hypothesize about possible applications of the statute that might give rise to future "as applied" challenges, BIO at 16-18 and n.4, even though their complaint mounted a facial challenge, Complaint ¶¶ 1-3; Pet.App.32a ("realistically, [this lawsuit] challenges Section 7 on its face"); Pet.App.48a (same), and the district court specifically recognized that "if the statute would be unconstitutional as applied to a particular woman …, such a challenge should be entertained at that time," Pet.App.59a;
- Perhaps most tellingly, Respondents' counsel appear to have been part of a strategic effort to engineer an absence of a circuit split to make review by this Court less likely, leaving similar laws in effect in ten other States. *See infra*, Part II.B.

The simple truth is, as Justice Ginsburg noted in her *Gonzales* dissent and as we noted in our petition, *Gonzales* "blur[red] the line" between "previability and postviability abortions" because there were compelling state interests at stake there (as here) not captured by the viability line. *Gonzales v. Carhart*, 550 U.S. 124, 171, 186 (2007) (Ginsburg, J., dissenting); Pet. at 11 and n.5. Since *Gonzales*, thirteen states have adopted pre-viability restrictions in response to new evidence of fetal pain and significant increases in risk to maternal health that result from late-term

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the factual record at the district court or in their complaint, there is no factual dispute in this case. Moreover, as Judge Kleinfeld noted in his concurrence, even if the evidence is in dispute, "legislatures have 'wide discretion to pass legislation in areas where there is medical and scientific uncertainty.'" Pet.App.41a-42a (citing *Gonzales*, 550 U.S., at 163).

abortions. Whether the holding in *Gonzales* is broad enough to countenance such efforts, or if it is not, whether this Court's abortion jurisprudence should be revisited in light of that evidence, are extremely important legal issues that warrant this Court's review.

I. *Gonzales* merely "assumed" that viability remains the dispositive point for abortion regulations.

Like the Ninth Circuit, Respondents believe that even after *Gonzales*, "a ban on abortion at any point prior to viability is impermissible." BIO at 7.

As a preliminary matter, the Arizona statute does not "ban" abortion, notwithstanding Respondents' oft-repeated claim that it does. *See, e.g.*, BIO at 3 ("The Act thus bans pre-viability abortions, as Petitioners concede"). Petitioners have certainly not "conceded" that the Act "*bans* pre-viability abortions" or that it prevents a woman from "obtain[ing an abortion] *at all*," as Respondents claim, BIO at 3 (emphasis added), but have consistently argued that the Act regulates the timing of the abortion decision based on new evidence of fetal pain and maternal health risk.

This is not a semantic point. Rather, it concerns compelling state interests and the scope of the Arizona Act. As the record below reflects (supported by Respondents themselves), the overwhelming number of abortions performed in this country occur before the twentieth week. *See* D.Ct. Doc. 25-4, Ex. 4-C-1, p.5 (only 1.3% of abortions performed after twentieth week); D.Ct. Doc. 2, Ex.2, ¶9 (Respondent Clewell acknowledging that 90% of abortions take place in the first trimester). The Act does not "ban" any of those pre-viability abortions. The district court also found,

based on expert testimony, "that it would be extremely rare to find a condition that could not be diagnosed after 20 weeks that could not have been diagnosed earlier," and noted that in the "unique circumstanc[e]" that a fetal anomaly diagnosis did not occur until after the twentieth week, an as-applied challenge could be brought. Pet.App.58a-59a.

In other words, the Act does not *ban* any woman from obtaining an abortion; it merely regulates the time when an abortion may be performed. The Act is therefore analogous to a time, place, or manner regulation of speech. *Compare* Pet.App.58a (describing the Act as a "time limitation") *with Grayned v. City of Rockford*, 408 U.S. 104, 107-08 (1972) (upholding time limitation in speech context); *compare also Gonzales*, 550 U.S., at 156, *with Kovacs v. Cooper*, 336 U.S. 77, 89 (1949) (upholding regulations on "manner" of abortion and speech, respectively); and *Simopoulos v. Virginia*, 462 U.S. 506, 519 (1983), *with Grayned*, 408 U.S., at 107-08 (upholding "place" regulations in abortion and speech contexts, respectively). Just as time, place, and manner regulations in the speech context do not "ban" speech, the time regulation at issue here does not "ban" abortion.

Building on their infirm claim that the Act "bans" abortion, Respondents next argue that *Gonzales* "in no way altered the core principle that before viability, the State may not ban abortion." BIO at 9. *Gonzales upheld* a restriction on abortion that operated pre-viability, of course, and contrary to Respondents' claim, *Gonzales* did not "ma[k]e plain" that it did so "only because [the Partial-Birth Abortion Ban Act] did '*not* prohibit standard D&E" abortions. BIO at 8. *Gonzales* is more nuanced than that. Indeed, the Court took

note of the fact that the D&E procedure that was *not* covered by the Act was "in some respects as brutal, if not more so, than the Intact D&E" procedure that was covered by the Act. *Gonzales*, 550 U.S., at 160. And it explicitly noted that "no one would dispute that, for many, D&E is a procedure itself laden with the power to devalue human life." *Id.*, at 158.

Whether there are any state interests sufficiently important to allow pre-viability restrictions on that procedure as well, in order to advance the government's "legitimate and substantial interest in preserving and promoting fetal life"—an interest that the *Gonzales* majority called "a premise central to [the] conclusion" in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992)—is therefore left open in *Gonzales*. *Gonzales* merely "assumed" the ongoing vitality of the viability line, 550 U.S., at 146, because not everyone joining the *Gonzales* majority opinion had agreed with that line in *Casey, id.*, at 145.

Moreover, viability is tied only to the state's interest in fetal life, not to the state's interest in maternal health, which has been deemed a "compelling" interest throughout the second trimester ever since *Roe v. Wade*, 410 U.S. 113, 163 (1973). Evidence of a significant increase in health risk to the mother for post-20-week abortions was also before the Arizona legislature, but the Ninth Circuit rejected that important interest because it viewed the Act as a "prohibition" on pre-viability abortions. Pet.App.30a. *Gonzales* suggests that such significant governmental interests are entitled to greater deference from the courts than the Ninth Circuit gave.

The issues presented here are therefore not settled, and certiorari is warranted to address them.

II. Under the Circumstances Presented Here, the Lack of a Circuit Split Is Not a Barrier to Review.

Respondents raise a putative lack of conflict of authority as their second ground for urging that the petition be denied. BIO at 11. That argument is ill-founded for two reasons. First, most of the cases upon which Respondents rely were decided *prior to Gonzales*; they hardly support denying review of issues that turn on the impact of *Gonzales*. Second, the lack of a split among the Circuit Courts of Appeals in addressing 20-week-restriction statutes similar to the Arizona statute at issue here is the result of strategic decisions by abortion advocates—including counsel for Respondents—not to challenge such statutes in circuits thought likely to uphold them. If Respondents' counsel felt it strategically necessary to engineer an absence of a circuit split, then the issues presented must be serious enough to warrant review under Rule 10(c).

A. When the issues presented turn on the impact of *Gonzales* on this Court's abortion jurisprudence, the existence of lower court rulings decided *prior* to *Gonzales* is reason to *grant* rather than *deny* the petition.

Respondents' claimed lack of conflict among the lower courts is based on their assertion that "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 …." BIO at 11-12. Yet all but two of the cases contained in Respondents' lengthy string cite pre-date *Gonzales*. BIO

at 12.[2] Because *Gonzales upheld* an abortion restriction that explicitly applied to pre-viability as well as post-viability abortions, the slew of lower court decisions cited by Respondents that adhered to a strict viability line rejected by *Gonzales* is no reason to *deny* review. Quite the contrary, that those lower courts might erroneously believe their prior holdings are not affected by *Gonzales*, as the Ninth Circuit did here, Pet.App.19a, is reason enough to *grant* the petition for writ of certiorari.

As for the two cases cited by Respondents that were decided after *Gonzales*, neither dealt with a 20-week restriction. See BIO at 12 (citing *DesJarlais v. State*, 300 P.3d 900 (Alaska 2013); *In re Initiative Petition No. 395,* 286 P.3d 637 (Okla. 2012)). Consequently, none of the cases Respondents rely upon further the theory that the issues presented here have been uniformly settled by the lower courts. Indeed, prominent abortion advocates have acknowledged that *Gonzales* "paved the way" for twenty-week restrictions such as Arizona's at issue here. *See, e.g.*, NARAL Pro-Choice America, "Abortion Bans at 20 Weeks," at 4 (Jan. 1, 2013).[3] That the Ninth Circuit's holding adheres to the pre-*Gonzales* view that viability is the dispositive line means either that it "has decided an important question of federal law that has

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[2] Only one of these cases, *Jane L. v. Bangerter*, 102 F.3d 1112 (10th Cir. 1996), even involved a statute comparable to Arizona's. That case was decided in 1996, more than a decade before *Gonzales*, and only the interest in fetal life, not maternal health, was relied on by the State.

[3] Available at http://www.prochoiceamerica.org/media/fact-sheets/abortion-bans-at-20-weeks.pdf (all websites last visited Dec. 19, 2013).

not been, but should be, settled by this Court," or that it "has decided an important federal question in a way that conflicts with relevant decisions of this Court." Either way, Rule 10(c) provides adequate ground for granting the petition.

B. The lack of a circuit split addressing the constitutionality of 20-week restrictions is the result of strategic decisions by Respondents' own counsel to forego challenging similar state laws in other circuits.

As noted in the Petition, thirteen States have, since *Gonzales*, adopted restrictions on abortions past twenty weeks. Pet. at 7, n.3. Abortion advocates have characterized these laws as "blatantly unconstitutional." *See, e.g.,* NARAL, "Abortion Bans," at 4; Center for Reproductive Rights, Press Release, "U.S. House Passes Harmful, Unconstitutional Bill Banning Abortion at 20 Weeks Nationwide" (June 18, 2013).[4] Yet apart from the two challenges brought in the Ninth Circuit against the Arizona statute here and the Idaho statute in *McCormack v. Hiedeman*, 900 F.Supp.2d 1128 (D. Idaho 2013), abortion advocates have not challenged the twenty-week restrictions in federal court.[5] *See* Guttmacher Institute,

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[4] Available at http://reproductiverights.org/en/press-room/us-house-passes-harmful-unconstitutional-bill-banning-abortion-at-20-weeks-nationwide.

[5] The ACLU challenged the Georgia statute only *on state constitutional grounds*. *Lathrop v. Deal*, No. 2012-cv-224423, Verified Complaint ¶ 1; Order Granting Preliminary Injunction (Fulton Cty. Super. Ct., filed Nov. 30, 2012, preliminary injunction issued Dec. 20, 2012).

"State Policies on Later Abortions," p.3 (Dec. 1, 2013);[6] Kathryn Smith, "Abortion-rights groups absent on fetal pain laws," Politico (Aug. 13, 2012).[7]

No challenge was brought to the first of the State "fetal pain" laws, for example, adopted in 2010 by Nebraska. *See, e.g.*, Steven Ertelt, "Fetal Pain Abortion Law Takes Effect in Nebraska," LifeNews.com (Oct. 15, 2010) ("Planned Parenthood of the Heartland confirmed … that it would not file a lawsuit against the new law").[8] This, despite the fact that the law forced LeRoy Carhart, one of the nation's most prominent providers of late-term abortions, to move his late-term abortion practice out of Nebraska. *See* "Carhart to do late-term abortions elsewhere," Omaha World-Herald, p. 01B (Nov. 10, 2010).

Nor is the twenty-week provision of the Texas statute part of the pending lawsuit against that statute recently filed by the same abortion advocacy groups serving as counsel in this case. *See* Complaint, *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, No. 1:13CV00862, 2013 WL 5496925 (W.D.Tex. Sept. 27, 2013); *see also* Irin Carmon, "Planned Parenthood takes Texas abortion laws to court," MSNBC (Sept. 27, 2013, updated Oct. 3, 2013) ("Notably, the groups are not challenging the provision of the law that bans abortion after 20

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[6] Available at http://www.guttmacher.org/statecenter/spibs/spib_PLTA.pdf.

[7] Available at http://www.politico.com/news/stories/0812/79681.html.

[8] Available at http://www.lifenews.com/2010/10/15/state-5554/.

weeks").[9] The litigation strategy appears to have been deliberately designed to avoid a conflict between the Fifth and Ninth Circuits. As one national news account described it after asking an attorney for the Texas Plaintiffs why the 20-week restriction was not challenged, there was "a strategic reason to avoid challenging that [20-week] ban.... [A] Texas challenge would go to the conservative Fifth Circuit. Not only would that court potentially uphold the law ... , the combination of decisions would create a split in the circuits that would make the Supreme Court likelier to hear it." *Id.*

This Court does not require a circuit split before it will consider important issues. S.CT. RULE 10(c). Indeed, "When state statutes on matters of significant public concern have been declared unconstitutional, [this Court has] not hesitated to review the decisions in question, even in the absence of a circuit split." *Voinovich v. Women's Medical Professional Corp.*, 523 U.S. 1036, 1038 (1998) (Thomas, J., dissenting) (citing *Romer v. Evans*, 517 U.S. 620 (1996)). The lack of a circuit split here is even less significant, given the litigation strategy that appears to have been designed to avoid one.

In sum, twenty-week restrictions are in effect in Alabama, Arkansas, Indiana, Kansas, Louisiana, Nebraska, North Carolina, North Dakota, Oklahoma, and Texas because they have not been challenged. Only in Idaho and Arizona, by virtue of federal constitutional judgments in the Ninth Circuit, and in Geor-

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[9] Available at http://www.msnbc.com/msnbc/planned-parenthood-takes-texas-abortion-laws.

gia, by virtue of a preliminary injunction on state constitutional grounds, have the restrictions been barred from taking effect. Certiorari is warranted to restore uniformity.

III. Respondents' Absolutist View Ignores Important Caveats in *Gonzales, Casey* and *Roe*.

The Arizona legislature was confronted with evidence that late-term abortions cause fetal pain and a significant increase in risk to maternal health. Yet despite this new-found scientific evidence, Respondents aver that nothing has changed in the forty years since *Roe*; that "[t]oday, 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." BIO at 13 (quoting *Casey*, 505 U.S., at 851).

Of course, the liberty "to define *one's own* concept of existence" does not confer a liberty to define (or define away) the existence *of others*, or even to take actions inherently risky to oneself without regard to legitimate health and safety regulations. The joint opinion in *Casey* thus reaffirmed the premise "that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child." 505 U.S., at 846; *see also Gonzales*, 550 U.S., at 145 (describing that premise as "central" to the conclusion of the joint opinion in *Casey*). "[T]he women's interest in terminating her pregnancy [begins the analysis] but cannot end it," noted the *Casey* plurality, because

abortion "is an act fraught with consequences for others," including "for the woman who must live with the implications of her decision" and "for the life or potential life that is aborted." *Id.*, at 852.

Only in notorious, later disavowed cases has the liberty of some been interpreted so broadly as to allow them to define away the basic rights of others. *See, e.g.*, *Dred Scott v. Sandford*, 60 U.S. (19. How.) 393, 407 (1856) (holding that the Declaration of Independence's self-evident truth that "all men are created equal" did not apply to "negroes," because "[t]hey had … been regarded as … so far inferior, that they had no rights which the white man was bound to respect"). The caveats in *Gonzales* recognizing compelling state interests in fetal life and in the protection of maternal health are now the subject of momentous statute statutes. The uncontested factual record in this case and the pure questions of law that are thereby presented make this an ideal case for addressing their constitutionality.

CONCLUSION

Respondents offer no procedural problems that would prevent review of this case. The Ninth Circuit decided an important issue of federal constitutional law that is either at odds with this Court's decision in *Gonzales* or has not been, but should be, addressed by this Court. The petition should be granted.

Respectfully submitted,

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