No. 13-402

In The
Supreme Court of the United States

TOM HORNE, ATTORNEY GENERAL OF ARIZONA, ET AL.,

Petitioners,

v.

PAUL A. ISAACSON, M.D., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amicus, *e.g.*, *Gonzalez v. Carhart*, 550 U.S. 124 (2007), addressing a variety of issues of constitutional law. The ACLJ is dedicated, *inter alia*, to the defense of the sanctity of human life.

SUMMARY OF ARGUMENT

The Ninth Circuit decision below struck down Arizona's post-20-week abortion ban. In the course of its opinion, the court below staked out an extreme view of this Court's precedents on abortion, holding that a ban on *any* abortions prior to fetal viability is *per se* unconstitutional, no matter how broad a health exception the law might contain, no matter how dangerous the procedure might be to the mother, and no matter how much evidence there might be that the unborn child feels pain. While the Ninth Circuit was mistaken in its reading of the case law, that reading

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[1]Counsel of record for the parties received timely notice of the intent to file this brief. Sup. Ct. R. 37.2(a). The parties in this case have consented to the filing of this brief. A copy of the joint consent letter is on file with the Court. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

can – as the opinion below well illustrates – claim justification by reliance upon select excerpts of this Court's abortion precedents. In other words, ambiguity in this Court's abortion cases leaves the door open for extreme interpretations like the one embraced below. Accordingly, this Court should grant review to clarify the governing standards and to provide guidance to the lower courts in this important area of law.

ARGUMENT

In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), this Court sought to moderate its case law in the area of abortion to allow for sensible, humane regulation of the procedure. To that end, the Court jettisoned, *id.* at 873, the rigid trimester framework of *Roe v. Wade*, 410 U.S. 113 (1973), and overruled, in whole or in part, prior decisions that had been particularly intolerant of commonsense regulations like informed consent requirements, *see* 505 U.S. at 882-885 (overruling all or parts of *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), and *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986)). When a narrow majority of this Court veered back toward an excessive rigidity, disallowing even a ban on the killing of a partially born child, *Stenberg v. Carhart*, 530 U.S. 914 (2000), this Court again took corrective measures, *Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding federal ban on partial-birth abortions).

Disregarding this Court's steps toward moderation, the Ninth Circuit in the decision below

embraced a rigid, intolerant approach to abortion regulation. The gist of that ruling was that the prohibition of *any* abortion prior to fetal viability is, "without more, invalid." *Isaacson v. Horne*, 716 F.3d 1213, 1225 (9th Cir. 2013). The extremity of that decision, elaborated below, warrants this Court's review and correction.

I. THE NINTH CIRCUIT HELD THAT THERE IS A RIGHT TO OBTAIN ABORTIONS THAT ARE TOTALLY UNNECESSARY FOR HEALTH REASONS.

In *Doe v. Bolton*, 410 U.S. 179 (1973), this Court upheld a statute that prohibited any abortion – throughout all nine months of gestation – unless, "based upon [the physician's] best clinical judgment . . . an abortion is necessary," *id.* at 191-92. As the *Doe* Court emphasized, "necessary" meant for "health" reasons, in the "best medical judgment" of the physician. *Id*. at 192. This Court has never overruled that holding. Indeed, *Roe* itself expressly rejected the "argu[ment] that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and *for whatever reason she alone chooses*," 410 U.S. at 153 (emphasis added). *See also Casey*, 505 U.S. at 887 (joint opinion) ("Even the broadest reading of *Roe*, however, has not suggested that there is a constitutional right to abortion on demand").[2]

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[2]The *Casey* joint opinion described the *Roe* right as proscribing "undue" state interference with her decision, *id*., not a right to abort for reasons completely unrelated to health, e.g., to

The Ninth Circuit nevertheless adopted the position that a pregnant woman has a right to an abortion prior to viability, no matter how unnecessary. "The twenty-week law is unconstitutional because it bans abortion at a pre-viability stage of pregnancy; *no health exception, no matter how broad, could save it*." *Isaacson*, 716 F.3d at 1227-28 (emphasis added; footnote omitted). Thus, even an entirely lax health exception – one broad enough to drive most trucks through – would not be enough to satisfy the lower court's insistence on abortion on demand as late as five-and-a-half months of gestation.[3]

II. THE NINTH CIRCUIT HELD THAT THERE IS A RIGHT TO OBTAIN EVEN UNSAFE ABORTIONS.

One of the premises of this Court's abortion jurisprudence from the start has been the assumption that abortions protected under *Roe* and subsequent cases are medically safe procedures. *E.g.*, *Roe*, 410 U.S. at 148-49 (noting that when abortion laws were adopted, "the procedure was a hazardous one for the woman" but that "abortion . . . prior to the end of the

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placate an irresponsible boyfriend, *see, e.g.,* Lisa McGarry, "Big Brother winner Josie Gibson regrets having an abortion," Unreality TV (Mar. 15, 2011), or to have a boy instead of a girl, *see* Mara Hvistendahl, *Unnatural Selection*: *Choosing Boys Over Girls and the Consequences of a World Full of Men* (2011).

[3]I.e., at 22 weeks, a point after Arizona's cut-off of 20 weeks but before the onset of viability at 24 weeks. A video and text description of the baby at 22 weeks is available at www.whattoexpect.com/pregnancy/video/pregnancy-week-22?source=dlp-pdr# (last visited Oct. 25, 2013).

first trimester, although not without its risk, is now relatively safe"); *Connecticut v. Menillo*, 423 U.S. 9, 10 (1975) (per curiam) (*Roe* only recognized right to abortion "under safe, clinical conditions") (internal quotation marks and citation to *Roe* omitted). Indeed, the state has a "compelling interest" in protecting the "health and safety" of the pregnant woman contemplating abortion. *Simopoulos v. Virginia*, 462 U.S. 506, 519 (1983). This Court has never announced a right to obtain abortions that are hazardous or incompetently conducted.[4]

Yet the Ninth Circuit held that the safety of the abortions being restricted is legally irrelevant. In response to the state's argument that "there is no right to *unsafe* abortion," *Isaacson*, 716 F.3d at 1228 (emphasis added by Ninth Circuit), the court below claimed that "this suggestion runs squarely up against *Roe* and its progeny, including *Casey*," *id*. The unsafety of the post-twenty-week abortions, the court below declared, is simply one factor for women contemplating abortion to consider, namely, "whether they wish to undertake known risks," *id*. at 1229. (This assumes a lay woman will know of the medical risks, a dubious proposition at best.) In short, the Ninth

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[4]Recent events illustrate how "ridiculously unsafe" even legal abortions can be. *E.g.*, Wendy Saltzman, "Delaware abortion clinic facing charges of unsafe and unsanitary conditions," ABC News, July 24, 2013, http://abclocal.go.com/wpvi/story?id=9059172; Mary Curtis, "Nurses describe 'unsafe' conditions at Delaware abortion clinic," Washington Post (May 30, 2013); Kristen Powers, "Gosnell's abortion atrocities no 'aberration,'" USA Today (Apr. 29, 2013).

Circuit held that it does not matter how unsafe abortion after twenty weeks might be. Protecting maternal health is simply off the table as a justification for prohibiting such abortions.

III. THE NINTH CIRCUIT HELD THAT IT IS IRRELEVANT WHETHER ABORTIONS AFTER 20 WEEKS CAUSE SEVERE PAIN TO THE CHILD IN THE WOMB.

"[T]he prohibition of animal cruelty itself has a long history in American law," *United States v. Stevens*, 559 U.S. 460, 469 (2010), and states have "legitimate interests" in "preventing cruelty to animals," *Church of Lukumi Babalu Aye v. City of Hialeah,* 508 U.S. 520, 538 (1993). *A fortiori*, forbidding cruelty to living members of the human species is a permissible legislative end. Moreover, in this case the district court noted "the substantial and well-documented evidence that an unborn child has the capacity to feel pain during an abortion by at least twenty weeks gestational age" and the "uncontradicted and credible evidence to the Court that supports this determination." *Isaacson v. Horne*, 884 F. Supp. 2d 961, 971 (D. Ariz. 2012).

Even a creature as primitive as a caterpillar or worm will presumably squirm violently if a pin is stuck in it. To claim that such a creature does not feel pain is callous and absurd. Unborn human children are much more biologically complex, *see*, *e.g.*, *supra* note 3, and, unsurprisingly, also demonstrate typical responses to pain, as the district court noted:

> When provoked by painful stimuli, such as a needle, the child reacts, as measured by increases in the child's stress hormones, heart rate, and blood pressure. Doc. 25-1, Exhibit 1 at 5. When the child is given anesthesia, these responses decrease, which is why doctors often give both the mother and the fetus anesthesia separately in the case of fetal surgery. *Id.*; Doc. 25-1, Exhibit 2 at 27, 29-30.

884 F. Supp. 2d at 971.

Neither in *Roe* nor in any subsequent abortion case has this Court decided whether restrictions on abortion might rest on the prospect of an abortion causing pain, perhaps horrific pain, to the child being aborted.[5] Yet the court below categorically ruled such considerations out of bounds. The Ninth Circuit ruled that, when it comes to abortions before the 24th week of pregnancy, it is legally irrelevant whether the unborn child feels pain, even excruciating pain, from the abortion. According to that court, "fetal capacity to feel pain" is beside the point: "because Arizona's twenty-week law acts as a prohibition of, and not merely a limitation on the manner and means of, pre-viability abortions, under long-established Supreme Court law *no state interest is strong enough* to support it." *Isaacson,* 716 F.2d at 1229 (emphasis added).

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[5] *Cf. Thornburgh*, 476 U.S. at 778 (Stevens, J., concurring) (finding it "obvious" that the state's interest in protecting the unborn increases with the "embryo['s]" "capacity to feel pain"); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 552 (1989) (Blackmun, J., joined by Brennan & Marshall, JJ., concurring in part and dissenting in part) (same).

CONCLUSION

The decision of the Ninth Circuit places an extreme and rigid construction on this Court's precedents regarding abortion laws. This Court should grant review and repudiate the harsh inflexibility of the Ninth Circuit's interpretation of the constitutional law of abortion.

Respectfully submitted,

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