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

BRIEF OF THE HONORABLE MARY FALLIN, GOVERNOR OF OKLAHOMA, BY AND THROUGH THE HONORABLE E. SCOTT PRUITT, ATTORNEY GENERAL OF OKLAHOMA; A COALITION OF FEMALE STATE LEGISLATORS; CONCERNED WOMEN FOR AMERICA; AND SUSAN B. ANTHONY LIST, *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Did the Ninth Circuit correctly hold that the "viability" line from *Roe v. Wade* and *Planned Parenthood v. Casey* remains the only critical factor in determining constitutionality, to the exclusion of other significant governmental interests, or is Arizona's post-twenty-week limitation facially valid because it does not pose a substantial obstacle to a safe abortion?

2. Did the Ninth Circuit err in declining to recognize that the State's interests in preventing documented fetal pain, protecting against a significantly increased health risk to the mother, and upholding the integrity of the medical profession are sufficient to support limitations on abortion after twenty weeks gestational age when terminating the pregnancy is not necessary to avert death or serious health risk to the mother?

3. If the Ninth Circuit correctly held that its decision is compelled by this Court's precedent in *Roe v. Wade* and its progeny, should those precedents be revisited in light of the recent, compelling evidence of fetal pain and significantly increased health risk to the mother for abortions performed after twenty weeks gestational age?

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INTEREST OF *AMICI*[1]

Amici are united by their concern for women's public policy issues.

Oklahoma Governor Mary Fallin and the coalition of State legislators (individually named in an Appendix to this brief) are women who are tasked with creating the public policies that will shape and impact women's reproductive health. It is their duty and desire to enact wise public policy that protects the health and safety of pregnant women, preserves the integrity and prestige of the medical profession, and fosters a compassionate, humane society. Of course, this governor and state legislators are also united by their female gender. They are well aware that every pregnancy is a life-altering event for the mother. They insist that their executive and legislative duty must carry with it the prerogative to make the difficult decisions about which policies best fulfill that duty, provided they do not unduly interfere with the individual liberty interests this Court has expounded.

Concerned Women for America is the nation's largest women's public policy organization. It is committed to promoting laws that reflect Biblical

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[1] Attorneys for *amici* authored this brief. No counsel for any party authored this brief in whole or part and no party or their counsel made a monetary contribution to fund the preparation or submission of this Brief. Law and Liberty Institute provided a monetary contribution to partially fund the submission of this Brief. Counsel of record for the parties to this action have filed blanket consents to the filing of *amici curiae* briefs, and counsel of record for all parties were provided notice of *amici*'s intention of filing the brief at least 10 days prior to its due date.

principles in public policy, and among these are the principles that each human life—at every stage of development—is imbued with unique dignity and value, and that members of a civil society are called to care for the welfare of others, including women seeking abortions.

In the spirit of the original suffragettes, Susan B. Anthony List works for the election of candidates who champion life and oppose abortion. Its members share the conviction of Alice Paul, author of the 1923 Equal Rights Amendment, that "Abortion is the ultimate exploitation of women."

Amici are convinced that the political activism of those who champion abortion rights often works to the detriment of the very women who assert those rights. The recent tragedies of the Kermit Gosnell clinic serve as a poignant reminder of how easily individual women—and the sensibilities of a humane society—can become the casualty of an ideological battle. *Amici* seek this Court's intervention to unshackle State government and affirm their authority to execute sound judgment in the fulfillment of their duties without the constraints of rigid, outdated rules that cannot keep pace with the steady progress of science.

SUMMARY OF THE ARGUMENT

The analytical framework of *Roe v. Wade*, 410 U.S. 113 (1973) and its progeny rests upon the identification and balancing of various interests. While this Court has conclusively announced the results of that balancing test as of 1973 and 1992, those outcomes cannot be deemed immutable because the nature of the interests on the scales is such that they are impacted

by advances in scientific knowledge and understanding in ways that were unforeseeable at the time of those decisions.

For this reason, enforcement of a rigid rule precluding all pre-viability abortion prohibitions would improperly interfere with the ability of State legislatures to protect the interests the Court has sought to balance. These include protecting the mother's health and safety (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846 (1992)), protecting the unborn child (*Id.*), upholding the integrity of the medical profession (*Gonzales v. Carhart*, 550 U.S. 124, 157 (2007)), and promoting respect for the dignity of human life (*Id*). The protection of these interests falls decidedly within the bailiwick of State legislatures.

Of course, in keeping with this Court's abortion jurisprudence, States must perform their duties with proper regard for a pregnant woman's right to choose abortion instead of childbirth. But the Court should affirm the integrity and competence of State legislatures to do so as they refine public policy to reflect the relentless advances in science and medicine that continue to reveal significant insights regarding the development of human life and the ways in which unnecessary health risks for pregnant women can be minimized.

The Ninth Circuit's decision below improperly ties the hands of State legislatures, and *Amici* urge the Court to untie them.

ARGUMENT

I. The Court's analytical framework cannot logically insulate abortion law from the inevitable advances in scientific and medical knowledge.

This Court's decision in *Roe v. Wade* was premised on its assessment of a deficiency in "the development of man's knowledge" with regard to "the difficult question of when life begins." 410 U.S. at 159. Finding no definitive answer to "the difficult question," the Court imbued the time of fetal "viability" with constitutional significance, determining it to be the point at which the State's interests in protecting "potential life" become strong enough to justify a general prohibition of abortions. *Id.* at 163-65.

While some have questioned the legitimacy of the Court's agnosticism with regard to the "difficult question," no one can question the relevance of science and technology to the Court's ruling. Medical and scientific knowledge and technological capabilities are relevant not only in determining the time of "viability," but also in evaluating the respective strengths of the various interests, most of which are informed by our understanding of human development or medical risk assessments.

The Court has wisely recognized that the balance of rights and interests it perceived when *Roe* was decided was neither static nor always conclusive. *See Casey*, 505 U.S. at 860 (describing how "time has overtaken some of *Roe*'s factual assumptions…"). The Court has made allowances for at least two identified circumstances to shift the chronological point at which

the balance tips in favor of the State's interest in prohibiting abortion.

First, the Court has explicitly acknowledged that, since *Roe*, developments in neonatal care have advanced the stage in the pregnancy at which the unborn child is viable, thereby justifying legal restrictions at this earlier time. *Casey*, 505 U.S. at 860. So the amount of weight assigned to the respective interests at any given point in pregnancy must be viewed as *dynamic* over time rather than *static*. Or, in the Court's words, changes in fact may shift "the scheme of time limits on the realization of competing interests." *Id.* While the respective weights of the interests in 1973 were such that the scales tipped in favor of regulation at roughly 28-weeks gestation, the State's interests, in fact, came to carry more weight in earlier weeks as science and technology evolved to advance the point of viability. *Id.*

Second, the Court has indirectly acknowledged that various scientific, medical factors that were extraneous to the Court's general balancing test in *Roe* and *Casey* are, in fact, relevant to the analysis. This is why the Court has required that States retain exceptions to otherwise permissible abortion prohibitions, allowing even post-viability abortions whenever a particular pregnant woman's life or health is believed to be endangered by continuance of the pregnancy. *Roe*, 410 U.S. at 163-64. In this sense, the valuation of interests announced in this Court's precedents must be considered *presumptive* rather than *conclusive*. In other words, while the general information known in 1973 caused the balance to tip at the 28-week point (thus permitting an abortion prohibition after that

point), the Court has implicitly acknowledged that informational realities of particular situations might cause it to tip at a different point—or not at all.

So while the Court in *Casey* expressed continued commitment to its prior conclusion that viability was the earliest point at which a State's interests would justify prohibiting non-therapeutic abortions (505 U.S. at 860), its approach does actually permit new general evidence or case-specific evidence to affect the result of the balancing as it impacts the respective weights of the interests. Indeed, even as it avowed its commitment to the constitutional significance of viability, the Court was careful to note that "no changes of fact have rendered viability more or less appropriate as the point at which the balance of interests tips." *Id.*, at 861. This conclusion is clearly based on the presupposition that it is *possible* for changes of fact to tip the scale at a point other than viability.

Nevertheless, the Ninth Circuit has erroneously interpreted this Court's precedents to create a rigid rule perpetually forbidding all pre-viability abortion prohibitions—even those based upon new scientific evidence that is relevant, credible, and compelling. Such an interpretation should be disavowed by this Court. For if the balance of interests is *dynamic* rather than *static* (the outcome at a given point in pregnancy may vary with time) and *presumptive* rather than *conclusive (*factors not included in the Court's original analyses may, in fact, be relevant), then surely State legislatures must retain the ability to apply informational gains to the appropriate sides of the scales.

II. The judiciary must not prevent lawmakers from acting in response to emerging scientific knowledge for the purpose of protecting health and welfare.

Petitioners and *Amici* are before the Court because they believe that the balance of interests has, in fact, changed in such a way as to erode the legitimacy of the conclusion that viability is the obvious tipping point for general abortion prohibitions. The legislatures of the 13 States that have acted to ban abortions after the 20-week point have applied compelling new scientific data to the competing interests this Court has framed and have concluded that a properly informed balancing of these interests now produces a different tipping point.[2]

The findings of the Arizona legislature indicate that the more appropriate tipping point is now 20 weeks, because the risks of abortion to the mother are markedly higher after this point, and many experts have concluded that the unborn child experiences

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[2] These thirteen States include (roughly in order of adoption): Nebraska (NEB. REV. STAT. §§ 28-3,102 to 28-3,111 (2011)); Alabama, (CODE OF ALA.§§ 26-23B-1 to 26-23B-9 (2013)); Idaho (IDAHO CODE ANN. §§18-501 to 18-510 (2011)); Kansas (KAN. STAT. ANN. §§ 65-6722 to 65-6725 (2012)); Oklahoma (OKLA. STAT. tit. 63 § 1-745.1 to 1-745.11 (2013)); Arizona (AZ. REV. STAT. § 36–2159) (2012)); Georgia (GA. CODE ANN. §§ 16-12-140 to 16-12-141(2013) and GA. CODE ANN. tit. 31 Ch. 9B; 31-9B-1 to 31-9B-3 (2012)); Louisiana (LA. REV. STAT. ANN. 40:1299.30.1 (2013)); Arkansas (ARK. CODE ANN. §§ 20-16-1301 to 20-16-1310 (2013)); Indiana (IND. CODE § 16-34-2-1 (2013)); North Carolina (N.C. GEN. STAT. § 14-45.1 (2013)); North Dakota (N.D. CENT. CODE, § 14-02.1-11 (2013)); and Texas (TEX. HEALTH & SAFETY CODE §§ 171.041 to 171.048 (2013)).

excruciating physical pain when abortion is performed at or after this point. Arizona Chapter 250, Laws of 2012 § 9(A)(3), (4), and (7).

Among the many science-based findings that prompted the elected representatives of Arizona to pass the law in question were the conclusions that:

- The relative risks of abortion increase exponentially at later gestational periods (citing L. Bartlett *et al.*, "Risk factors for legal induced abortion-related mortality in the United States," *Obstetrics & Gynecology* 103(4):729–737 (2004));
- The incidence of major complications is highest after twenty weeks of gestation (citing J. Pregler & A. DeCherney, *Women's Health: Principles and Clinical Practice* 232 (2002));
- The risk of death associated with abortion increases with the length of pregnancy, from one per 29,000 abortions at 16-20 weeks to one per 11,000 abortions at 21 or more weeks. (citing L. Bartlett *et al.*, at 729-737); and
- By at least 20 weeks of gestation, an unborn child has the capacity to feel pain during an abortion (citing K. Anand, "Pain and its effects in the human neonate and fetus," *New England Journal of Medicine*, 317:1321-29 (1987)).

Arizona Chapter 250, Laws of 2012 §9(A)(1)-(7).

These studies are bolstered by many others,[3] and they implicate *all* of the State's interests in regulating abortion, revealing each of them to be greater at the 20-week point than originally supposed. They also *align* the interests of pregnant women with those of the State.

This is one reason why the new scientific insight is so compelling. At times, informational gains will undoubtedly exacerbate the tension between the various interests that factor into the Court's balancing analysis in the abortion context. For instance, the State's interest in protecting unborn human life—which is present throughout the pregnancy (*Casey*, 505 U.S. at 846)—may often be in conflict with the woman's interest in having access to a safe abortion procedure.

But in this case, the emerging scientific insights at issue *unite* these sometimes-divergent interests into an overwhelming confluence, harmoniously demanding that policymakers channel the woman's decision-

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[3] *See*, *e.g.*, S. V. Gaufberg, "Abortion Complications," (2008), http://emedicine.medscape.com/article/795001-overview (last visited October 24, 2013) (concluding that rate of medical complications from abortion increases from 3-6% at 12-13 weeks up to an astounding 50% during the second trimester); Myers LB, *et al.*, "Fetal endoscopic surgery: indications and anaesthetic management," *Best Practice & Research Clinical Anaesthesiology* 18:2 (2004) 231-258 (citation omitted) (pain receptors are present throughout the body by 7 weeks gestation); C. Bocchi *et al.*, "Ultrasound and Fetal Stress: Study of the Fetal Blink-Startle Reflex Evoked by Acoustic Stimuli," *Neonatal Pain*, ed. Giuseppe Buonocore & Carlo V. Bellieni (Milan: Springer, 2007), 31–32 (fetal movements may be evoked by week 14 due to "fetal sensitivity to its environment.").

making into the pre-20-week period when it can be exercised most safely, most humanely, and no less effectively.[4]

It is both the duty and the prerogative of State legislatures to safeguard the health of their citizens. In fact, this function is a core component of State power. *See*, *e.g.*, *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (The "structure and limitations of federalism . . . allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.") (quotation marks and citation omitted); *Hill v. Colorado*, 530 U.S. 703, 715 (2000) ("It is a traditional exercise of the States' police powers to protect the health and safety of their citizens." (quotation marks and citation omitted)); *Head v. N.M. Bd. of Exam'rs in Optometry*, 374 U.S. 424, 428 (1963) ("[T]he statute here involved is a measure directly addressed to protection of the public health, and the statute thus falls within the most traditional concept of what is compendiously known as the police power.").

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[4] It should be noted that the overwhelming majority of women (Respondents have estimated 90%, *Isaacson v. Horne*, 884 F.Supp.2d 961, 968 (D. Ariz. 2012)) who choose abortion do so within the first 13 weeks of pregnancy. Arizona's legislative channeling of the decision into the pre-20-week period would only potentially influence the timing of the estimated 1.04% of abortions which are currently performed in Arizona after 20 weeks. See http://www.azdhs.gov/diro/reports/pdf/2011-arizona-abortion-report.pdf. The law would not, however, affect the portion of that 1.04% of abortions that are obtained in response to dangers to the mother's life or health (in such cases, abortion would continue to be available after 20 weeks under the Arizona law).

The Court has also recognized that a State may act "to ensure the medical profession and its members are viewed as healers, sustained by a compassionate and rigorous ethic and cognizant of the dignity and value of human life, even life which cannot survive without the assistance of others." *Stenberg v Carhart*, 530 U.S. 914, 962 (2000) (Kennedy, J., *dissenting*) (*citing Washington v. Glucksberg*, 521 U.S. 702, 730-734 (1997)). *See also Gonzales*, 550 U.S. at 157. And most recently, the Court has recognized that it is appropriate for legislatures to act in the interest of curbing brutality and preventing the further coarsening of our society. *Id.* (ruling on federal legislation).

In the context of these legislative prerogatives and duties, the Court must consider the position of State legislators who are faced with the kind of evidence that prompted the law at issue here. See Arizona Chapter 250, Laws of 2012 § 9(A)(1)-(7).

When confronted with credible scientific data demonstrating that abortions performed beyond the 20-week point are significantly less safe for women than those performed prior to that point, it is surely appropriate for legislators to protect women's health by requiring physicians to perform the procedure at the earlier, far safer stage. Under these circumstances, for the judiciary to wave a bright-line rule as a talisman against sound legislative policymaking is to ignore the best interests of the very women whose rights it seeks to protect.

But the compelling evidence which prompted Arizona's legislature to act confronted them with a second terrible reality: the unborn children over the age of 20 weeks who are the victims of abortion

experience excruciating pain during the process of being killed.[5] Surely this information triggered the duty of lawmakers to relieve human suffering and mitigate cruelty in our society.

This Court has acknowledged that "a fetus is a living organism while within the womb, whether or not it is viable outside the womb." *Gonzales*, 550 U.S. at 147. Science now reveals that, far from being an impersonal blob of tissue for whom the descriptor of "living" is little more than a technical, biological fact, the post-20-week human being within the womb is so fully developed as to be wholly capable of feeling pain as his or her body is literally ripped apart and removed from the womb, piece by piece. *See Isaacson*, 884 F.Supp.2d at 970 (describing the dilation and evacuation procedure, which is most commonly used for second-trimester abortions).

This information implicates not only the State's interest in protecting the unborn child and preventing societal desensitization to cruelty, but also its interest in protecting mothers from the mental anguish that would likely result should they learn, after having a post-20-week abortion, that their unborn children had suffered intense physical pain from the procedure. *See Gonzales*, 550 U.S. at 159 (describing as "self-evident" that a woman would endure greater post-abortion anguish if she later learned that the procedure used was a particularly gruesome one).

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[5] The District Court below described Arizona's evidence as "uncontradicted and credible." *Isaacson*, 884 F.Supp.2d at 971.

A humane, civilized society cannot retain its identity as such if its courts preclude lawmakers from imposing reasonable limitations on such brutality. Even animals—which most people would agree are not possessed of the same degree of individual value and dignity as humans—are entitled to and receive legal protections against cruelty and barbarism.

A survey of European abortion laws reveals that the United States lags sadly behind in applying reasonable humanitarian limitations to abortion rights. A recent article noted that sixteen out of eighteen European countries generally require abortions to be performed during the first trimester. Jon A. Shields, "When is a Ban on Abortions 'Extreme'?" *The Weekly Standard*, July 10, 2013; available at http://www.weeklystandard.com/blogs/when-ban-abortions-extreme_739202.html (last visited on October 24, 2013) (citing Phillip B. Levine, *Sex and Consequences: Abortion, Public Policy, and the Economics of Fertility* (Princeton University Press, 2007), 135-139).

As the courts must be the champions of liberty for a just society, so must they allow legislatures to be the vanguards of a humane society. While the judiciary is ill-equipped to make specific policy decisions in response to constantly-advancing scientific and medical data, State legislatures are particularly well-suited to do just that. Even where there exists genuine scientific debate surrounding particular policy issues, it is the province of the legislature to evaluate and act upon what it deems to be the best available information.

In the context of abortion law, State legislatures must be unfettered in their ability to enact wise restrictions in the interests of maternal health, the

integrity of the medical profession, and the compassionate sensibilities of society at large, even as they manifest due regard for this Court's ruling that pregnant women must retain the liberty to ultimately decide between abortion and childbirth.

III. If the Ninth Circuit's interpretation of this Court's precedents is correct, then departure from the principle of *stare decisis* is now appropriate and necessary to overrule the time-bound aspects of the implicated holdings.

As this Court acknowledged in *Casey*, one of the relevant factors in determining when departure from the rule of *stare decisis* is appropriate is whether "facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification." 505 U.S. at 855 (citation omitted).

As explained above, this is precisely the situation now before the Court. Scientific and medical data which have emerged since this Court's decisions in *Roe* and *Casey* reveal that the balance of relevant interests tips at an earlier point than originally supposed.

The logical footing of this Court's abortion jurisprudence will surely be lost if the balancing of the interests as they were conceived in 1973 is deemed to have created an immutable rule which cannot account for the impact of continuing scientific advances on the interests which the Court sought to balance. Applying the result of the balancing of interests in 1973 to today's scientific and medical environment is akin to using 1973 financial statements for computing this year's taxes.

As an example of the sort of factual change that necessitates a departure from precedent, this Court has pointed to the new insights about the "facts of life" gained during the 58-year interim between *Plessy v. Ferguson*, 163 U.S. 537 (1896) and *Brown v. Board of Education*, 347 U.S. 483 (1954). *Casey*, 505 U.S. at 862-63. This example provides a nice parallel to the informational gains and refinement of understanding that have occurred in the abortion context over the past 40 years since the Court announced its decision in *Roe*.

Just as many believed in 1896 that imposing segregation did not necessarily deprive African Americans of human dignity, so many believed in 1973 that abortion could be performed up until 28 weeks without causing actual human suffering or increasing health risks to a woman seeking abortion. Both of these assumptions have now been disproven.

In reality, legally-enforced racial segregation always resulted in stigmatizing African Americans—even in 1896 when the Court decided *Plessy*. Thus, it was not only proper for the Court to overrule *Plessy* in deciding *Brown*, but the Court's failure to do so once the truth became apparent would have compounded a great injustice.

In the same way, the factual underpinnings of *Roe* and *Casey* have changed in such a way as to expose the threat of humanitarian injustice borne by the Ninth Circuit's interpretation of those precedents. This threat will be realized unless this Court acts to overturn the decision below.

Whatever the logical legitimacy of using viability as a bright-line rule to demarcate the point at which the

State's interests justified prohibiting non-therapeutic abortions in 1973, the science of 2013 has eviscerated it. The Court must therefore take whatever steps are necessary to recognize and effectuate society's relentless informational progress.

The informational gains which society has realized since *Roe* and *Casey* must trigger this Court's acknowledgment that some types of pre-viability abortion prohibitions may constitute permissible burdens on the pregnant woman's right to choose abortion over childbirth. Such burdens do not strike at the heart of the liberty interest this Court has framed, but rather channel its exercise to the timeframe in which it can be exercised most safely and with lesser collateral damage to the sensibilities of a humane, compassionate, and civilized society.

CONCLUSION

Because this Court's rulings in *Roe* and *Casey* are staked upon the balancing of interests which evolve over time, attempts to shoehorn the 1973 balance into a rigid rule cannot result in perpetually appropriate outcomes. Therefore, the Court should review the decision below and revisit precedent, as necessary, to ensure that State legislatures enjoy the policymaking flexibility required to properly serve all of the relevant interests as they continue to evolve through scientific and medical advances.

Respectfully submitted,

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APPENDIX

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APPENDIX A

The Legislators who have joined this brief as *amici curiae* are the Honorable:

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Sen. Cecile Bledsoe (R-AR)
Rep. Ellie Espling (R-ME)
Rep. Bette Grande (R-ND)
Rep. Patricia Strachota (R-WI)
Rep. Donna Oberlander (R-PA)
Rep. Lenette Peterson (R-NH)
Rep. Kathy Rapp (R-PA)
Rep. Lori Saine (R-CO)
Sen. Katrina Shealy (R-SC)
Rep. Jane Cormier (R-NH)
Rep. Jeanine Notter (R-NH)
Sen. Kimberly Yee (R-AZ)
Rep. Mary Sue McClurkin (R-AL)
Sen. Vicki Marble (R-CO)
Sen. Sharon Weston Broome (D-LA)
Sen. Kelli Ward, M.D. (R-AZ)
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Rep. Lynn Hutchings (R-WY)
Sen. Margaret Sitte (R-ND)
Rep. Wendy Nanney (R-SC)
Sen. Mary Lazich (R-WI)
Del. Kathy Byron (R-VA)
Rep. Margaret O'Brien (R-MI)
Sen. Judy Burges (R-AZ)
Rep. Debbie Lesko (R-AZ)
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