No. 13-402

In The
Supreme Court of the United States

TOM HORNE, *et al.*,

Petitioners,

v.

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

Respondents.

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

BRIEF OF AMICUS CURIAE CENTER FOR ARIZONA POLICY IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE

The Center for Arizona Policy ("CAP") "is a nonprofit research and education organization committed to promoting and defending the foundational values of life, marriage and family, and religious liberty." *See* http://www.azpolicy.org/about/faq. CAP was "established in 1995 as a nonprofit organization dedicated to strengthening Arizona families through policy and education." *Id.* Its interest in this case is one of public policy. In 2012, CAP advocated for the passage of House Bill 2036 ("Act"), 2012 Ariz. Sess. Laws Ch. 250, before the Arizona Legislature, which is the subject of the petition, and CAP seeks to defend the Act before this Court.[1]

[1] Pursuant to Rule 37.6, CAP certifies that no party's counsel authored the brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person, other than *amicus curiae* or its members, contributed money that was intended to fund preparing or submitting the brief. Pursuant to Rule 37.2(a), *amicus* certifies that the parties granted blanket consent to the filing of *amicus* briefs, and CAP provided timely and adequate notice of its intention to file an *amicus* brief.

SUMMARY OF ARGUMENT

There can be no reasonable doubt but that, as a matter of fact, human life begins at conception. Thus, the root question presented in this case is when Arizona can extend the protection of its laws to human life. When it adopted the Act in 2012 by overwhelming majorities, the Arizona Legislature centered on development of the fetal brain sufficient to permit pain sensation, found that the unborn child (the Act's terminology, ARIZ. REV. STAT. § 36-2151(13)) can experience pain at 20 weeks, and accordingly extended the protection of law to the unborn child, with life and health exceptions. 2012 Ariz. Sess. Laws Ch. 250, §§ 9(A)(7) and 9(B)(1). In contrast, the Ninth Circuit held that viability, usually attained at 23 to 24 weeks of gestation, remains the bright line dividing when a State can proscribe an abortion from when it cannot. *Isaacson v. Horne*, 716 F.3d 1213, 1224-25 (9th Cir. 2013).

In reality, viability means lung development, and the worth of the life of an unborn child should not depend on what in essence is a mechanical function. Brain development is superior in determining development towards personhood. The time has come for this Court to set aside viability or lung development as having any constitutional importance, as it once abandoned the trimester framework in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 873 (1992). Making viability the bright line is out of step with science, history, practicality, and international norms, and it will collapse before the advancement of

science and medicine once the artificial womb has reached perfection. As a result, lung development should be replaced with brain development as the line that better balances a woman's right of privacy in controlling her own body with a State's right to protect human life. While CAP advocates overruling *Roe v. Wade*, 410 U.S. 113 (1973), and leaving the balancing of interests to the legislative branch, doing so is not now before the Court. It suffices in this case for the Court to abandon viability or lung development in favor of brain development to the point of pain sensation.

Finally, *stare decisis* is not invested so much in viability, which is a means, not an end, as it is in the core right to an abortion. The undisputed record below showed that 90% of abortions occur within the thirteenth week. *Isaacson v. Horne*, 884 F. Supp. 2d 961, 968 (D. Ariz. 2012). As a result, abandonment of viability in favor of brain development as the bright line still preserves *Roe*'s core right to an abortion and satisfies the *stare decisis* concerns at the forefront of *Casey*, 505 U.S. at 854-59. It also brings the law into line with the science of fetal brain development, and thus does no harm to *stare decisis*. When the facts have "so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification," *stare decisis* will not block a resulting change in the law. *Id.* at 855.

ARGUMENT

I. INTRODUCTION.

The controlling question in this case is whether Arizona can extend the protection of its laws in specified instances to the 20-week unborn child under the Fourteenth Amendment based on its recognition of the development of the fetal brain to the point of pain sensation. The District Court concluded that Arizona could do so, because the limitations that Arizona imposed on abortion between 20 weeks and viability created no significant obstacle to a woman's right to elect an abortion pre-viability. 884 F. Supp. 2d at 968. The Ninth Circuit reversed, holding viability to be the bright line dividing when a State can proscribe abortion from when it cannot. 716 F.3d at 1224-25.

On a facial challenge, the District Court's judgment was proper on the law and the facts, its findings of fact were based on a record it described as undisputed on the controlling points, and its judgment should have been affirmed under *Gonzalez v. Carhart*, 550 U.S. 124 (2007).

Yet CAP advocates an alternative. Science has made new discoveries about fetal brain development. Acting on such discoveries, the Court should set aside lung development to the point of viability as the bright line permitting abortion proscription in favor of brain development when pain is sensed, which the District Court and Arizona

found to be at 20 weeks. 2012 Ariz. Sess. Laws Ch. 250, §§ 9(A)(7); *Isaacson*, 884 F. Supp. 2d at 971.

II. LIFE WITHIN THE WOMB.

Courts have spoken to the question of life within the womb. Their factual findings or observations are that human life begins at conception. Experience would add that, unless interrupted prematurely, life then passes through an arc of development, from birth to infancy, childhood, adolescence, youth, middle age, the golden years, the dwindling years, and death. On this arc of life, a person's body, mind, talents, and abilities sprout, ripen, mature, decline, and wither. But wherever it is found on this arc, a person's life has the same worth and merits the law's same protection.

This Court itself has acknowledged that "by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb." *Gonzalez*, 550 U.S. at 147. Despite that acknowledgment, it has been observed that the Court is reticent to express any opinion on when, as a matter of fact and science, human life begins—at conception, at viability, or at some other point:

> The Supreme Court has been loath to address issues relating to the genesis of life. In *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), the Supreme Court expressed the belief that the question of when human life

> begins is moral, philosophical, and theological in origin. In its ruling, the Supreme Court stated, "When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." *Id.* at 159, 93 S.Ct. 705. "We need not resolve the difficult question of when life begins." *Id.* On several occasions post-*Roe,* the Supreme Court has reaffirmed its reticence to define when human life begins. *City of Akron v. Akron Center of Reproductive Health, Inc.,* 462 U.S. 416, 444, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983) (overruled on other grounds).

Planned Parenthood of Ind., Inc. v. Comm'r of Ind. State Dept. of Health, 794 F. Supp. 2d 892, 916 (S.D. Ind. 2011).

Other courts, however, have dealt with the question of fetal development as a matter of fact. For instance, in a health insurance coverage case, the District Court made a detailed description of fetal development:

> In discussing fetal development, the Merck Manual acknowledges that from the date of conception "[t]he heart begins to pump plasma through the

> vessels on day 20." The Merck Manual, 1709 (Robert Berkow, M.D., et al. eds., 14th ed. 1982). At eight weeks of gestation, brain activity has been observed. Flower, M.J., Neuromaturation of the Human Fetus, 10 J.Med.Philos. 237–351 (1988), and Goldenring, J.M., Development of the Fetal Brain, 307 N.Eng.J.Med. 564 (1982). Anesthesia is used during fetal surgery as early as 18 weeks because the fetus feels pain. Levine, A.H., Fetal Surgery 54 Aorn 17-19, 22-27, 27-30, 30-32 (1991); Strickland, R.A. *et als.,* Anesthesia, Cardiopulmonary Bypass and the Pregnant Patient, 66 Mayo Clin.Proc. 411-429 (1991); Rosen, M., Anesthesia and Monitoring for Fetal Intervention, *in* The Unborn Patient, 2nd. edited by, M.R. Harrison, 172-181. Spontaneous movement of the unborn child begins between six and seven and one-half weeks gestation. de Vries, J.I.P., Visser, G.H.A., and Prechtl, H.F.R., The Emergence of Fetal Behavior, 7 Early Hum.Dev. 301-322 (1982). Obviously, at all times during gestation, the fetus ingests food and metabolizes oxygen.

Foster v. State Farm Mut. Auto. Ins. Co., 843 F. Supp. 89, 98 (W.D.N.C. 1994).

Turning to the abortion-related cases, based on an affidavit given by bioethicist Paul Root Wolpe, Ph.D., an expert offered by Planned Parenthood of Minnesota, North Dakota, and South Dakota, the Eighth Circuit noted:

> Indeed, Dr. Wolpe's affidavit, submitted by Planned Parenthood, states that 'to describe an embryo or fetus scientifically and factually, one would say that a living embryo or fetus in utero is a developing organism of the species Homo Sapiens which may become a self-sustaining member of the species if no organic or environmental incident interrupts its gestation.' Wolpe Aff. ¶ 6. This statement appears to support the State's evidence on the biological underpinnings of § 7(1)(b) and the associated statutory definition.

Planned Parenthood Minn., N.D., and S.D. v. Rounds, 530 F.3d 724, 736 (8th Cir. 2008). *Rounds* involved the constitutionality of a law "amending the requirements for obtaining informed consent to an abortion as codified in S.D.C.L. § 34–23A–10.1." 530 F.3d at 726.

Similarly, the District Court had to weigh competing fact assertions regarding whether the fertilized egg constituted a human life in *Planned Parenthood of Indiana*, 794 F. Supp. 2d at 916. Indiana offered evidence in support of its position in the form of an expert affidavit:

> Maureen L. Condic, Ph.D., a Professor of Neurobiology and Anatomy at the University Of Utah School Of Medicine whose primary research focuses has (sic) been the development and regeneration of the nervous system, testified as follows:
>
> > The unique behavior and molecular composition of embryos, from their initiation at sperm-egg fusion onward, can be readily observed and manipulated in the laboratory using the scientific method. Thus, the conclusion that a human zygote is a human being (i.e. a human organism) is not a matter of religious belief, societal convention or emotional reaction. It is a matter of observable, objective, scientific fact.

Id. at 916-17. Planned Parenthood offered a competing declaration contesting Dr. Condic's affidavit in that case. *Id.* Nonetheless, the District Court concluded, "[h]aving weighed the testimony of all declarants, the [District] Court resolves this conflict in Defendants (sic) favor." *Id.* at 917, n.9.

In a pre-*Gonzalez* abortion case, the Second Circuit made the following observation:

> Abortion is the killing of a fetus prior to birth. For centuries abortion has been a

> matter of intense controversy. Some consider abortion the illegitimate killing of a person. Others consider abortion a legitimate medical procedure used by a pregnant woman, in consultation with her doctor, to terminate a pregnancy prior to birth. Those on both sides of the controversy acknowledge that the fetus is a living organism, starting as a collection of cells just after conception and developing into a recognizable human form as the time for birth approaches.

Nat'l Abortion Fed'n v. Gonzalez, 437 F.3d 278, 281 (2nd Cir. 2006). Having so framed the debate, the Second Circuit went on to strike down the partial-birth abortion law then before it. *Id.* at 290. After the Supreme Court made its decision in *Gonzalez*, 550 U.S. at 168, "upholding the Partial-Birth Abortion Ban Act of 2003 against a facial attack identical to the one in this case," the Second Circuit vacated this opinion. 224 Fed. Appx. 88 (2nd Cir. 2007). While a vacated opinion lacks precedential effect, the Second Circuit's identification of the stakes involved in abortion cases remains logically useful and helps set the stage for a discussion of viability.

III. VIABILITY SHOULD NOT BE A BARRIER TO PROSCRIBING ABORTIONS AFTER 20 WEEKS WITH EXCEPTIONS FOR LIFE AND HEALTH.

A. Viability Itself Is Not Rooted in the Fourteenth Amendment.

In *Roe*, the Supreme Court found that the word "person" as used in the Fourteenth Amendment did "not include the unborn." 410 U.S. at 158. What's more, as noted above, the Court shied away from answering the question of whether human life began at conception, recognizing differing religious and philosophical views of the matter. *Id.* at 160-62. Nonetheless, the Court found that a "pregnant woman cannot be isolated in her privacy." *Id.* at 159.

> She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. *See* Dorland's Illustrated Medical Dictionary 478-479, 547 (24th ed. 1965). The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which *Eisenstadt* and *Griswold*, *Stanley*, *Loving*, *Skinner* and *Pierce* and *Meyer* were respectively concerned. As we have intimated above, it is reasonable and appropriate for a State

> to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

Id. The Court then pinpointed a State's interest in protecting the fetus as follows:

> We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a non-resident who seeks medical consultation and treatment there, and that it has still another important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.'

Id. at 162-63. *Casey* reaffirmed this holding:

> Yet it must be remembered that *Roe v. Wade* speaks with clarity in establishing not only the woman's liberty but also the State's 'important and legitimate interest in potential life.'

> *Roe, supra,* at 163, 93 S.Ct., at 731. That portion of the decision in *Roe* has been given too little acknowledgment and implementation by the Court in its subsequent cases.

505 U.S. at 871. Having identified competing interests of constitutional import, the Court had to reconcile them. It did so in *Roe* with the concept of viability, for it was at viability that the Court found a State's interests sufficient to override a woman's privacy right:

> This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.

Id. at 163-64.

Despite the passage of 40 years, this reconciliation or balancing of interests has been dogged with controversy and has never been accepted by a wide swath of the American public—indeed far too large a swath to be dismissed as a minor eruption at the margins. While the Court is

called to make its decisions on reason and constitutional principle, and cannot and should not be swayed by the tides and currents of public opinion, two generations of unremitting opposition suggests a pause for reflection—if not on the core holding of a woman's right of privacy, then perhaps that the balance reached at viability comes too late in a pregnancy to claim the societal settlement and end of division that *Casey* sought 21 years ago but never achieved. 505 U.S. at 867.

Even at the beginning, *Roe*'s reasoning was criticized as circular: "But no, it is viability that is constitutionally critical: the Court's defense seems to mistake a definition for a syllogism." John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L.J. 920, 924 (1973). *See also*, Laurence H. Tribe, *The Supreme Court 1972 Term: Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 Harv. L. Rev. 1, 4 (1973) ("Clearly, this mistakes a 'definition for a syllogism,' and offers no reason at all for what the Court has held.").

In candor, *Roe* noted that the right to privacy, on which the right to an abortion turned, was not specified in the Constitution: "The Constitution does not explicitly mention any right of privacy." 410 U.S. at 152. As a result, the Court derived a woman's right of privacy in controlling her body from the "Fourteenth Amendment's concept of personal liberty." *Id.* The Court has never retreated from that core holding, and it is not called to do so in this case.

While substantive due process forms the foundation of a woman's privacy right, *Roe*, 410 U.S. at 153, and *Casey*, 505 U.S. at 868-69, it does not in itself erect the guideposts for balancing that right against a State's interest in fetal life. In this respect, *Casey* acknowledged, "[t]he weight to be given this state interest, not the strength of the woman's interest, was the difficult question faced in *Roe*." 505 U.S. at 871. It further allowed that *Roe*'s settling on viability as the bright line might be considered as "somewhat arbitrary." 505 U.S. at 870. It even went so far as to concede,

> We do not need to say whether each of us, had we been Members of the Court when the valuation of the state interest came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions.

Id. at 871.

While *Casey* described *Roe*'s viability rule as "a reasoned statement, elaborated with great care," 505 U.S. at 870, and thus reaffirmed it, *id.*, it remains true that *Roe* just as easily could have drawn the line elsewhere. Indeed, had science disclosed in 1973 what it now reveals about fetal brain development and pain sensation, the Court might have found the balance elsewhere.

Roe could have chosen quickening, the point described as "the first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy." 410 U.S. at 132. If *Roe* had done so, it would have had the force of history behind it, because quickening was the common law rule, 410 U.S. at 133-36, and was "the point that historically [has] been deemed crucial—to the extent *any* point between conception and birth has been focused on." Ely, *supra*, 82 Yale L.J. at 924 (emphasis in original). Thus, the wisdom of centuries was found in the ancient rule of quickening, for at that stage the body of an unborn child becomes animated, an unmistakable milestone of brain development on the march to personhood.

Roe also could have chosen the positions of the Conference of Commissioners on Uniform State Laws and of the American Bar Association, which in 1972 was 20 weeks. 410 U.S. at 146 n.40. Ironically, the 1972 position of the ABA and of the Uniform Law Commissioners on the dividing line is the same as the 2012 position of the Arizona Legislature as expressed in the Act. As well, *Roe* could have selected the position of the American Law Institute, which was to allow abortion up to the 26th week, *Doe v. Bolton*, 410 U.S. 179, 206-07 (1973) (App. B).

Despite these alternatives, the Court chose viability, which in 1973 was at 28 weeks, *Roe*, 410 U.S. at 160, now regressed on average to 23 to 24 weeks. *Isaacson*, 884 F. Supp.2d at 968. For the reasons that follow, CAP respectfully calls on the

Court to reconsider the balance and to abandon viability in favor of fetal brain development to the point of pain sensation attained at 20 weeks.

B. Viability's Inherent Deficiencies.

Viability is deeply dissatisfying for a variety of reasons. The question of when viability occurs depends on the doctor's judgment, and viability will vary from case to case:

> The determination of when the fetus is viable rests, as it should, with the physician, in the exercise of his medical judgment, on a case-by-case basis." Brief for Appellee Danforth 26. "Because viability may vary from patient to patient and with advancements in medical technology, it is essential that physicians make the determination in the exercise of their medical judgment." *Id.*, at 28. "Defendant agrees that 'viability' will vary, that it is a difficult state to assess . . . and that it must be left to the physician's judgment." *Id.*, at 29.

Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 65 n.4 (1976).

A bedrock notion of the rule of law is that all persons stand with equal rights before the law. *See, e.g.*, Sec. I, VIRGINIA DECLARATION OF RIGHTS (June

12, 1776) ("That all men are by nature equally free and independent . . . .").

This notion makes it troubling to see constitutional analysis tethered to a variable concept, for a variation of results suggests less than an equality of rights. Nonetheless, *Casey* dismissed such concerns:

> But these facts go only to the scheme of time limits on the realization of competing interests, and the divergences from the factual premises of 1973 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 legislative ban on nontherapeutic abortions.

505 U.S. at 860.

With medicine's advance since *Roe* was decided in 1973, viability has shrunk from 28 weeks to 24 or 23 weeks. Thus, the actual point at which a State can proscribe an abortion has shifted in result over the last 40 years, even if the viability formula to determine the result has remained the same. Women's rights accordingly have receded while the States' interests have proceeded, and such variability detracts from the timelessness of constitutional analysis, itself an important element to the Court's institutional legitimacy.

This is a critical fact, despite *Casey*'s dismissal, and it cannot be ignored when reliance is analyzed for *stare decisis*. Pragmatically, most people care little how the Court balanced the right of privacy against a State's interest in life. Their interest is in the result. They know that the Court recognized not just any right, but a constitutional right, and they have seen it retreat.

What's more, the key factor in determining viability appears to be the lung capacity of the unborn child. There is, however, nothing intrinsic in lung capacity to make it the determinant of whether the unborn child can be aborted. It is at most a mechanical process. Indeed, the perfection of an artificial womb, adverted to 40 years ago in *Roe*, 410 U.S. at 160, will cause the concept of viability to collapse on itself, just as medical progress made the trimester framework unworkable and led to its abandonment in *Casey*, 505 U.S. at 873.

Perhaps worst of all, viability is judged by the abortion doctor whose own financial interests may be served by providing abortion services. *See*, *e.g.*, Maryclaire Dale *et al.*, *Pa. Abortion Doctor Charged with Eight Counts of Murder*, WASHINGTON TIMES (Jan. 19, 2011), *available at* http://www.washingtontimes.com/news/2011/jan/19/pa-abortion-doctor-charged-8-counts-murder ("Dr. Kermit Gosnell, 69, made millions of dollars over 30 years, performing as many illegal, late-term abortions as he could, prosecutors said . . . Dr. Gosnell 'induced labor, forced the live birth of viable babies in the sixth, seventh, eighth month of

pregnancy and then killed those babies by cutting into the back of the neck with scissors and severing their spinal cord,' [District Attorney] Williams said.").

Relegating the safeguarding of a State's interest in protecting fetal life to someone with a financial stake in the outcome does little to advance the institutional respect for the Court, which *Casey* rightly shielded. 505 U.S. at 867-68.

C. Viability and Undue Burden.

While *Casey* was at pains to emphasize it was not abandoning viability as the bright line balance, 505 U.S. at 871, it did reject *Roe*'s trimester framework in favor of the undue burden concept, deeming the trimester framework not "to be part of the essential holding of *Roe*." *Id.* at 873. Logically, viability coexists uneasily, if at all, with undue burden as refined in *Gonzalez*. The undue burden test inevitably weakens viability as a bright line, because its practical point is to permit regulations that create exceptions in result.

Casey minimized the logical tension between viability and undue burden:

> The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where

> state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.

Id. at 874. Yet any burdening of the right to an abortion is going to prevent the right's exercise in some instances, which the Court in *Gonzalez* candidly acknowledged, "It is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions." 550 U.S. at 160.

Despite this acknowledgment, *Gonzalez* went on to hold that a burden will be upheld against a facial challenge if it does not limit the abortion right "in a large fraction of relevant cases." *Id.* at 167-68. The end result is that *Gonzalez* chips at viability, even if it does not bring it down, a result that did not go unnoticed by the dissent:

> But *Casey* makes clear that, in determining whether any restriction poses an undue burden on a 'large fraction' of women, the relevant class is *not* 'all women,' nor 'all pregnant women,' nor even all women 'seeking abortions.' *Ibid.* Rather, a provision restricting access to abortion 'must be judged by reference to those [women] for whom it is an actual rather than an

> irrelevant restriction.' *Ibid.* Thus the absence of a health exception burdens *all* women for whom it is relevant—women who, in the judgment of their doctors, require an intact D & E because other procedures would place their health at risk.

550 U.S. at 188.

D. Fetal Brain Development Achieves a Sounder Balance.

The secular powers that separate humankind from the other orders on earth—reason, cognition, consciousness, and personality—all reside in the brain. In contrast, lung functionality, on which viability currently depends, is merely the mechanical process of oxygenating the blood. The heart-lung machine can perform this function—a person can live for some time hooked up to the machine with both the heart and lungs stilled—but no artificial device can substitute for a person's brain. As a result, a State's interest in protecting life should focus on brain development rather than lung development. That was the unarticulated wisdom of the common law's placement of the bright line at quickening. Voluntary movement, like pain sensation, is an objective manifestation of brain development.

Indeed, focusing on lung development is a relic of analog reasoning that should be rejected in a digital age. If the Court of 40 years ago had the

benefit of today's science, it quite possibly might have reached a different result.

What's more, making brain development the bright line avoids the deficiencies associated with viability—the variability over time, the likely retreat to obsolescence in the face of advances in science and medicine, the dependency on the judgment of a doctor who has a financial stake in the decision, the absence of any link between personhood and the fetal lung development on which viability hangs, and the divergence from international norms summarized at Section IV.

E. *Stare Decisis.*

Casey makes clear that the driving forces behind its decision to reaffirm *Roe's* adoption of viability as the bright line were *stare decisis* and the Court's own institutional legitimacy. 505 U.S. at 860-70. But *stare decisis* does not stand in the way of updating the law to allow for new facts of science and medicine. It is not a rule of ossification. It is a rule of prudence, consistency, and continuity, which are the life blood of the rule of law. *Id.* at 854. Thus, when "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification," *id.* at 855, it is right for the law to change accordingly. Today's case places the Court at such a threshold.

Upon reflection, *Casey*'s *stare decisis* concerns centered more on *Roe*'s core holding of a woman's right to privacy in controlling her body than on the

specific balance struck by *Roe* between that right and a State's interest in protecting fetal life. Should this Court affirm the District Court, such concerns will still retain the respect of law.

At least 90% of abortions occur within thirteen weeks, and a mere fraction of that figure take place after 20 weeks. Viability now occurs between 23 and 24 weeks of gestation, while pain is felt at 20 weeks. As a result, making brain development to the stage of pain sensation the bright line does no real harm to a woman's core right of privacy, for it merely resets the balance between privacy and life by three or possibly four weeks, still long after most abortions have been performed.

Along these lines, *Casey* observed, in reaffirming *Roe*'s viability balance, "The viability line also has, as a practical matter, an element of fairness. In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child." 505 U.S. at 870. Realistically, it is not much less fair, if it is less fair at all, to require the decision to be made by the time the fetus feels pain, a difference from viability of only three to four weeks.

Neither can resetting the balance compromise *Casey*'s concern for reliance, which formed a major part of its *stare decisis* analysis. 505 U.S. at 855-56. Experience with human nature suggests little if any thought is given to an abortion right at the moments leading up to procreation activity, a practicality

Casey itself conceded. 505 U.S. at 855. With the mind otherwise preoccupied at that point, it is difficult to imagine it makes even a drop of difference to most men and women so engaged whether the right to abort is pegged at 24 weeks, 23 weeks, or only 20 weeks.

In the 40 years since *Roe* was decided, science and learning have not slept. To the contrary, they now have revealed that the fetus feels pain at 20 weeks. In light of such discoveries, resetting the balance to fetal pain sensation actually would enhance respect for *Roe*'s core holding. There is a whiff of barbarism to destroying an utterly helpless being that can feel the intense pain caused by the agencies of its destruction. It is true, as Judge Kleinfield suggested in concurrence below, that Arizona could require "anesthetization of the fetuses about to be killed, much as it requires anesthetization of prisoners prior to killing them when the death penalty is carried out." *Isaacson*, 716 F.3d at 1231. But that does not entirely mitigate the sense of barbarism attending such destruction. The sensation of pain implicates a worth beyond a mere collection of cells. It signals an advance towards personhood that warrants the respect of law, a respect that leaving viability as the marker would deny. In fact, this advance in science makes an appeal to human decency—with its empathy and mercy for the weak—to move the line back before the fetus can feel pain, particularly where doing so costs so little to the core abortion right. It also is of no small concern that doing so

would bring American abortion law more in line with international norms.

IV. VIABILITY AND INTERNATIONAL NORMS.

While Fourteenth Amendment liberties find their roots "in this Nation's history and tradition," *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997), international norms can still inform the Court's reasoning in substantive due process analysis. For example, in Eighth Amendment cases, weight is given to the opinions of "other nations that share our Anglo–American heritage," to views of "the leading members of the Western European community," and to "the international community in determining whether a punishment is cruel and unusual." *Roper v. Simmons*, 543 U.S. 551, 575-76 (2005) (internal quotation marks omitted.).

The concept of viability is out of step with the abortion laws of most of the leading countries of the West. Abortion prohibitions in Belgium, Denmark, France, Germany, Italy, the Netherlands, Norway, Portugal, and Spain fall between 12 and 14 weeks, with exceptions that vary among them dealing mainly with life, health, rape, incest, or fetal abnormality.[2] Sweden allows abortion with no limits

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[2] *See* http://www.ippfen.org/NR/rdonlyres/2EB28750-BA71-43F8-AE2A-8B55A275F86C/0/Abortion_legislation_Europe_Jan2007.pdf. For Spain, *see* Ley Orgánica 2/2010, de 3 de marzo, de salud sexual y reproductiva y de la interrupción voluntaria del

up to 18 weeks.[3] Like Arizona, New Zealand effectively puts the limit at 20 weeks, with life and health exceptions.[4] Great Britain permits abortion up to 24 weeks.[5] In Australia and Canada, the choice is left to the states or provinces and territories, where it varies from 12 weeks to 28 weeks.[6] Putting aside life and potential suicide exceptions, abortion is illegal in Ireland throughout the pregnancy.[7]

Viability thus separates this country from a roll-call of western nations—Belgium, Denmark, France, Germany, Ireland, Italy, the Netherlands, New Zealand, Norway, Portugal, Spain, and Sweden—and with some but not all Canadian and Australian jurisdictions. Resetting the balance to brain development at pain sensation shortens this separation, and puts this country closer in line with so many nations with which it shares fundamental principles. It should be done.

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embarazo, Title II, Ch. I, art. 14, *available at* http://www.boe.es/buscar/doc.php?id=BOE-A-2010-3514.

[3] *See* n.2, *supra*.

[4] *See* http://www.abortion.gen.nz/legal/index.html.

[5] *See* n.2, *supra*.

[6] For Australia, *see* http://www.childrenbychoice.org.au/info-a-resources/facts-and-figures/australian-abortion-law-and-practice. For Canada, *see* http://www.prochoice.org/canada/regional.html.

[7] *See* n.2, *supra*.

CONCLUSION

The Court should reverse the judgment of the Ninth Circuit and affirm the judgment of the District Court. In doing so, the Court should abrogate viability as the balance between a woman's liberty right to control her own body and a State's interest in protecting fetal life. It should replace viability with brain development to the point of pain sensation as a sounder balance between liberty and life.

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