No. 13-402

In The Supreme Court of the United States

TOM HORNE, ATTORNEY GENERAL OF ARIZONA, *et al.*,

Petitioners,

v.

PAUL A. ISAACSON, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL HISPANIC CHRISTIAN LEADERSHIP CONFERENCE, NATIONAL ASSOCIATION OF EVANGELICALS, ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, LUTHERAN CHURCH – MISSOURI SYNOD, AND CHRISTIAN LEGAL SOCIETY IN SUPPORT OF PETITIONERS

KIMBERLEE WOOD COLBY
Counsel of Record
CHRISTIAN LEGAL SOCIETY
8001 Braddock Road
Suite 302
Springfield, Virginia 22151
(703) 894-1087
kcolby@clsnet.org

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES:

OTHER AUTHORITIES:

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICI CURIAE*[1]

The **National Hispanic Christian Leadership Conference** ("NHCLC"), The Hispanic National Association of Evangelicals, is America's largest Hispanic Christian organization serving millions of constituents via our 40,118 member churches and member organizations. The NHCLC exists to unify, serve and represent the Hispanic Born Again Faith community by reconciling the vertical and horizontal elements of the Christian message via the 7 directives of Life, Family, Great Commission, Stewardship, Education, Justice and Youth.

The **National Association of Evangelicals** ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 41 member denominations, as well as numerous evangelical associations, missions, nonprofits, colleges, seminaries and independent churches. NAE serves as the collective voice of evangelical churches and other religious ministries. It believes that human life is sacred, that civil government has no higher duty than to protect

[1] As required by Rule 37.2(a), counsel for *amici curiae* provided timely notice of the intent to file this brief in support of petitioners to all parties' counsel of record. The parties' letters granting blanket consent to the filing of briefs *amicus curiae* have been filed with the Clerk. Pursuant to Rule 37.6, neither a party nor its counsel authored this brief in whole or in part nor made a monetary contribution intended to fund its preparation or submission. Only *amici curiae*, their members, and their counsel made such a monetary contribution.

human life, and the duty is particularly applicable to the life of unborn children because they are helpless to protect themselves.

The **Ethics & Religious Liberty Commission** ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with over 46,000 autonomous churches and nearly 16 million members. The ERLC is charged by the SBC with addressing public policy affecting such issues as the sanctity of human life, freedom of speech, religious freedom, marriage and family, and ethics. Southern Baptists have a long-standing concern about the treatment of the unborn. It is our belief that human life begins at conception, and therefore deserves protection under the law.

The **Lutheran Church – Missouri Synod** is a mission-oriented, Bible-based, confessional Christian denomination headquartered in St. Louis, Missouri. Founded in 1847, the LCMS has more than 2.3 million baptized members in some 6,200 congregations and more than 9,000 pastors. The Synod believes in the sanctity of human life, including "unborn children, whom God has woven together in their mother's wombs." (*Psalm* 139:13-16)

The **Christian Legal Society** ("CLS"), founded in 1961, is an interdenominational association of Christian attorneys, law students, and law professors with chapters in nearly every state and most law schools. Since 1975, CLS's legal advocacy division, the

Center for Law and Religious Freedom, has litigated and educated on matters involving the sanctity of human life.

SUMMARY OF ARGUMENT

The Ninth Circuit panel below believed that this Court's decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), prohibits states from restricting abortion of the human fetus *twenty weeks* into pregnancy – that any such laws are "*per se* unconstitutional." *Isaacson v. Horne*, 716 F.3d 1213, 1217 (9th Cir. 2013). *Amici* support petitioners' request that a writ of certiorari be granted to review this judgment on two grounds.

ARGUMENT

I. *Amici* Believe that Laws Regulating Late-Pre-Viability Abortion Can Be Seen as Consistent with *Casey*'s General Framework of Evolving, Court-Made Constitutional Law of Abortion.

The Ninth Circuit in our view over-read *Casey* as banning all regulation of abortion prior to the point of viability. Particularly in light of this Court's subsequent decision in *Gonzales v. Carhart*, 550 U.S. 124 (2007), this position is difficult to sustain. *Gonzales* upheld a pre-viability prohibition of a specific abortion-infanticide method against a facial challenge to its

constitutionality. Similarly, *amici* submit that a restriction on abortion at twenty weeks might be sustained without impairing the core of the abortion right created by this Court in *Roe v. Wade*, 410 U.S. 113 (1973), and retained, with modifications, in *Casey*.

Specifically, the statute at issue could be upheld on a number of different grounds, not squarely foreclosed by *Casey* and which would require, at most, fairly minor adjustments in the framework employed in *Casey* – an approach consistent with that of *Casey* itself, which modified *Roe* and overruled two other abortion precedents. At twenty weeks, the pregnancy is well along – more than halfway completed. Absent extraordinary circumstances, the pregnant woman has had ample opportunity to have an abortion. Twenty-week restrictions do not so much burden the ability to choose to have an abortion as to have a *late* abortion. It might well be thought that, under such circumstances, a law restricting abortion of twenty-week-old living human fetuses does not impose a "substantial burden" on the *Roe*-*Casey* right to choose whether to bear a child.

Further, such restrictions can readily be seen as reasonable prophylactic measures designed to protect the life of very nearly viable human children. As this Court acknowledged in *Casey*, the point of "viability" is a somewhat fluid and contingent one – and also something of a moving target, given advances in life-saving medical technological capabilities. Given the uncertainty and indefiniteness of "viability" as a

standard, it is reasonable for states to draw a bright line at twenty weeks, as a prophylactic measure for preserving the lives of viable human babies – an interest the Court has long conceded (in both *Roe* and *Casey*) to be a permissible one.

Further yet, there is strong medical reason to believe that at twenty weeks the unborn but living human fetus can feel or experience human pain in the process of being killed. Given the reality that the fetus can experience pain, it is again reasonable and appropriate for states to be able to restrict abortion at this point. For much the same reason that restrictions on partial-birth abortion are appropriate – and constitutional – in part because of the governmental interest in respect for preborn human life and because of the particular brutality of the late-term abortion methods, it is similarly appropriate to uphold restricting abortion at the point where it is reliably known or reasonably believed that the child feels pain in the process of being brutally killed.[2]

---

[2] *Compare Gonzales v. Carhart*, 550 U.S. 124, 182 (2007) (Ginsburg, J., dissenting) (noting that "[n]onintact D & E [abortion] could equally be characterized as 'brutal,' . . . involving as it does 'tear[ing] [a fetus] apart' and 'ripp[ing] off' its limbs,. . . . [citations to majority opinion omitted]. '[T]he notion that either of these two equally gruesome procedures . . . is more akin to infanticide than the other, or that the State furthers any legitimate interest by banning one but not the other, is simply irrational.'" (*quoting Stenberg v. Carhart*, 530 U.S. 914, 946-947 (2000) (Stevens, J., concurring)).

For these reasons, this Court may well wish to grant certiorari to repudiate the Ninth Circuit's view that twenty-three weeks (or twenty-four weeks) constitutes, under *Casey*, a magic, talismanic line before which *no* state-law prohibitions of abortion can be sustained, for *any* reason whatever. Such a wooden, absolutely-pro-abortion reading of *Casey* should be rejected.

II. *Amici* Submit that the More Fundamental Problem – the Source of the Ninth Circuit's Error in this Case – Is *Casey* Itself.

To the extent it might be thought that *Casey* in fact does embrace such a categorical ban on any and all pre-viability restrictions on abortion (as the panel below thought and as even some determined opponents of *Roe* and *Casey* conclude[3]), *Amici* believe that this merely highlights the wrongfulness of *Casey*.

Amici submit that *Casey*, like *Roe* before it, is wrongly decided and should be overruled. *Amici* thus support review also of the third question presented in the Petition – whether, on the assumption that *Roe* and *Casey* indeed support the Ninth Circuit's conclusion, this Court should revisit those precedents "in

---

[3] *See*, *e.g.*, Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 Notre Dame L. Rev. 995, 995 n.4 (2003) (pre-*Gonzales* article arguing that, under *Casey*, "the woman is permitted to have an abortion, prior to the child's ability to live outside the womb, for any reason").

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?" Petition for Certiorari at ii (Question Three).

Amici believe that this question warrants review even if it might be possible to construe *Casey* narrowly, or to read *Gonzales* as modifying *Casey*, so as to squeeze a legislative restriction on late pre-viability abortions, at twenty weeks, within the window of constitutionality recognized in the Court's present abortion-law doctrine. For as evidenced by the opinion below, the core problem is that *Casey*'s framework and language – and the creation of an a-textual, and shifting, constitutional policy right to abortion in the first place – seemingly invite and at least make plausible decisions such as that of the court below. Bluntly stated: given the creation of a right to abortion; given the continuity of fetal human life gestating in the womb; given the essential arbitrariness (and indefiniteness) of the "viability" line in the sand; and given the malleable verbal formulations of *Roe* and *Casey* in attempting to explain, defend, and revise its abortion jurisprudence, it is unsurprising that lower courts would generally tend to reach extreme, pro-abortion decisions.

The argument for overruling *Roe* and *Casey* is straightforward and has been well made by many advocates and scholars. This Court is familiar with these points, and *Amici* will not belabor them here, but merely summarize the key points.

A. As an Original Matter, it is Clear That Nothing in the Text of the Constitution Plausibly Supports the Existence of a Constitutional Right to Abortion.

No rule or principle supplied by a fair reading of the words of any constitutional provision; no rule or principle fairly derived from the Constitution's structure or logic or from other propositions contained in its specific provisions or general architecture; and no rule or principle attributable as a matter of history to evidence of any intention of the document's drafters and adopters or an authoritative decision of the people, even remotely supports the creation of a constitutional right to abortion. As a matter of text, structure, history, and intention, the right to abortion simply finds no basis in our written Constitution.

B. There is a Powerful Textual, Historical Case to Be Made that Unborn, Living Human Beings in Utero were Regarded by The Framing Generations as, Legally, *Persons*, Entitled to the Legal Rights of Persons.

Furthermore, by the same criteria outlined above – text, structure, history, intentions or expectations – the opposite conclusion is indeed far more plausible. There is a powerful textual, historical case to be made that unborn, living human beings in utero were regarded by the framing generations as, legally, *persons*, entitled to the legal rights of persons, including the right to the protection of the laws against the

private violence of others. *See* Michael Stokes Paulsen, *The Plausibility of Personhood*, 74 Ohio State L.J. 13 (2013). This was Blackstone's view, and there is much evidence that this view was the one accepted by the generations that adopted both the original Constitution (and Bill of Rights) and the Reconstruction amendments. *See id.* at 21-32, 45-52. *See also,* Joseph Dellapenna, *Dispelling the Myths of Abortion History* 315-25 (2006); Robert Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Fordham L.Rev. 807, 815-27 (1973); James S. Witherspoon, *Reexamining* Roe*: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 St. Mary's L.J. 29 (1985). *Roe*'s initial premise – that living unborn human beings gestating in the womb possess *no* constitutional status as "persons" and consequently no legal rights that others must respect – was thus a most dubious one. The Court in *Roe* conceded that, if it was mistaken on this point, everything else in its analysis was wrong and that it would need to reach almost the exact *opposite* conclusion: "If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment." 410 U.S. at 156-57.

Roe's subsequent textual analysis of the question of the legal personhood of the unborn is most flimsy indeed. This Court may well wish to revisit that analysis: particularly in the context of consideration of a law restricting abortion *at twenty weeks* – at a point where the clear visual evidence of human

characteristics is unavoidable, where the scientific evidence of fetal human pain is convincing, and where the Blackstonian standard of legal personhood is undeniable – the case for reconsidering and overruling *Roe* on this fundamental point is a serious and weighty one indeed.

C. The Interest of Society in Protecting Innocent Human Fetal Life is a Compelling One.

Third, even if one were to concede the legitimacy of judicial creation of a "privacy" right to abortion (a formulation that of course itself begs the question of fetal human personhood); and even if one were not prepared to recognize the human fetus as possessing the constitutional rights of "persons," the interest of society in protecting innocent human fetal life, in utero, is certainly a compelling one, if anything is, and outweighs the asserted privacy right to kill the fetus – and certainly so at twenty weeks. This Court's abortion jurisprudence has recognized such a compelling interest when the human fetus could live outside the womb. With respect, however, that line is an arbitrary one. In light of the undeniable medical, scientific fact of the *continuity of the same human life throughout pregnancy*, the "viability" line makes no principled sense. The Court should recognize that, at all events, government has a compelling interest in protecting human life throughout pregnancy.

D. The Judicial Doctrine of *Stare Decisis* Will Not Bear the Weight of a Decision Limiting the Power of the State to Protect Human Life.

Fourth, the judicial doctrine of *stare decisis* – the ground on which this Court in *Casey* reaffirmed (as slightly modified) *Roe* – simply will not bear the weight of a decision limiting the power of the State to protect human life. Simply stated, if *Roe* was inconsistent with the Constitution's text, structure, history, and intention, to reaffirm that decision even on the assumption of its fundamental incorrectness is a violation of the judicial responsibility. The Court's obligation is to the Constitution, not to prior judicial decisions the Court concludes were not (or no longer can be regarded as) faithful, sound interpretations of the Constitution. Judicial integrity, and the public's resulting respect for the Court, is a function of principled decision in accordance with the Constitution's true commands. For the Court to adhere to precedents – selectively and inconsistently – contrary to the Constitution does not advance, but instead detracts, from judicial integrity.[4]

---

[4] *See* Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. Rev. 1165 (2008). *See also*, Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 Yale L.J. 1535 (2000).

The Court should acknowledge the incorrectness of *Roe* and the subsequent incorrectness of *Casey* in failing to redress the incorrectness of *Roe*. The decision below highlights the flaws of the *Roe-Casey* regime, and may well provide an appropriate opportunity to revisit the prior decisions of this Court that were the point of departure for the judgment below.

CONCLUSION

For these reasons, *amici* submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

KIMBERLEE WOOD COLBY
Counsel of Record
CHRISTIAN LEGAL SOCIETY
8001 Braddock Road
Suite 302
Springfield, Virginia 22151
(703) 894-1087
kcolby@clsnet.org

October 30, 2013