No. 14-1891

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOSEPH M. BECK, et al APPELLANTS

v. No. 14-1891

LOUIS JERRY EDWARDS, et al APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

THE HONORABLE SUSAN WEBBER WRIGHT
UNITED STATES DISTRICT COURT JUDGE

APPELLANTS' REPLY BRIEF

Respectfully submitted,

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I. THE DISTRICT COURT ERRED BY RULING THAT CERTAIN PROVISIONS OF ARKANSAS ACT 301 OF 2013 ARE UNCONSTITUTIONAL.

A. Act 301 of 2013 is Constitutional under Existing Precedent.

The Plaintiff-Appellees generally contend that Arkansas Act 301 of 2013 unconstitutionally bans "abortion care" at a pre-viability point in pregnancy under *Roe v. Wade*, 410 U.S. 113 (1973), and subsequent cases. The Appellees repeatedly refer to "this oft-reaffirmed, bright-line rule" that, according to the Appellees, was established in *Roe* and has persisted unchanged for over 40 years since *Roe*. *See* Appellees' Brief at 7. The Supreme Court has never referred to the standard set forth in *Roe* as a "bright-line" rule. To the contrary, as explained in the State's opening brief, the Court has repeatedly qualified the *Roe* viability standard to allow increasing regulation of abortions, including regulation of abortions prior to viability.

Less than ten years ago, this Court interpreted *Roe* as the Appellees advocate here, and struck down a ban on pre-viability abortion procedures. *See Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005). The United States Supreme Court reversed, concluding that the prohibition of the partial-birth abortion procedure was constitutional. The Court defined the types of restrictions the government can impose in light of *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

See Gonzales v. Carhart, 550 U.S. 124 (2007). The *Gonzales* Court assumed *Casey*'s premise that "a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy'" and then set forth the standards and policy considerations that must be taken into account in determining whether a statute regulating pre-viability abortions is constitutionally permissible. *Gonzales*, 550 U.S. at 146 (quoting *Casey*, 505 U.S. at 879). The Court held that a federal statute prohibiting all "intact dilation and evacuation" abortions, both pre-viability and post-viability, was constitutional. *Id*. at 124.

The Appellees assert that the Supreme Court's decisions in *Casey* and *Gonzales* "cannot save Act 301's unconstitutional ban on pre-viability abortion[,]" and that "these two cases support the District Court's conclusion that the ban is invalid and must be enjoined." Appellees' Brief at 9. The Appellees contend that "although the regulation considered in *Gonzales* applied both before and after viability . . . it determined only how, not whether, a woman could obtain an abortion." *Id*. at 10. Of course, as explained in the State's opening brief, Act 301 likewise determines only how, not whether, a woman can obtain an abortion. Act 301 does not prohibit all pre-viability abortions. Act 301 allows for abortions in pre-viability cases up to the point of both twelve weeks' gestational age and the detection of a fetal heartbeat, which is when the vast majority of abortions occur. *See Gonzales*, 550 U.S. at 134. Act 301 neither prohibits nor regulates abortions in

the first trimester. Act 301 regulates *some* abortions that take place after twelve weeks' gestational age and the detection of a fetal heartbeat. In light of the Supreme Court's decisions in *Casey* and *Gonzales*, Act 301 does not violate *Roe*'s proclamation that a State may not prohibit a woman from making the ultimate decision to terminate her pregnancy prior to viability.

"[T]he 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." *Gonzales*, 550 U.S. at 157-58 (quoting *Casey*, 505 U.S. at 874). In upholding the abortion regulation that prohibited pre-viability partial birth abortions in *Gonzales*, the Supreme Court noted that despite the fact that the "necessary effect of the regulation" would "be to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions," the regulation was constitutional. *Id.*, 550 U.S. at 160. Likewise, while Act 301 may prompt some women who consider abortion to make the ultimate decision earlier than they might otherwise have made the decision, Act 301 is constitutional because it does not "prohibit any woman from making the ultimate decision to terminate her pregnancy." *Id.* at 146 (citing *Casey*, 505 U.S. at 879). Therefore, Act 301 does not impose a substantial obstacle to pre-viability abortions.

As medical advances have provided greater information about the developing child, the Supreme Court has recognized the need to balance the woman's right to abortion with the State's interests in protecting the life of the child and the health of the mother. *Gonzales*, 550 U.S. at 146. The Supreme Court has now recognized that "a fetus is a living organism while within the womb, whether or not it is viable outside the womb." *Id*. at 147. Act 301 provides a reasonable balance of a pregnant woman's right to abortion, and the State's interests in protecting the life of the unborn child and the health of the woman. Act 301 does not pose an undue burden upon a woman's right to abortion under *Casey* and *Gonzales*.

The Appellees concede that the State has legitimate interests in protecting the lives of unborn children, protecting the health and lives of pregnant women, and regulating the medical profession. *See Gonzales*, 550 U.S. at 126 ("A central premise of *Casey*'s joint opinion [is] that the government has a legitimate, substantial interest in preserving and promoting fetal life[.]"); *Casey*, 505 U.S. at 846 ("[T]he State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."); *Roe*, 410 U.S. at 162 (acknowledging that the State has an "important and legitimate interest in protecting the potentiality of human life."). The Appellees concede that these legitimate interests are advanced by Act 301. The State should

be allowed to encourage women to exercise their right to an abortion in the first trimester of pregnancy, in furtherance of these legitimate interests.

This Court recently determined that scientific evidence uncovered since 1973 demonstrates that an unborn child is a living human being, and therefore states can require physicians who perform abortions to inform women that "abortion will terminate the life of a whole, separate, unique, living human being." *Planned Parenthood of Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 726 (8th Cir. 2008) (en banc). This is a significant development since 1973, when the Supreme Court only acknowledged the State's interest in protecting the "potentiality of human life." *Roe*, 410 U.S. at 162. This Court has also recently determined that sufficient scientific evidence exists that abortion increases the risks of depression, suicide, and suicide ideation, that states may require physician disclosures to women regarding the increased risks of depression and related psychological distress, suicide, and suicide ideation, to which pregnant women are subjected when they seek abortions. *See Planned Parenthood of Minn., N.D., S.D. v. Rounds*, 686 F.3d 889 (8th Cir. 2012) (en banc). If states can act on new scientific evidence to require physicians to make these sorts of disclosures to women who seek abortions, then the State of Arkansas should be allowed to act on the same scientific evidence to protect human life.

The Appellees contend that the constitutional question presented by this case is resolved by the "bright-line" viability rule of *Roe*, without consideration of *Casey*, *Gonzales*, and *Rounds*. The State contends that the viability standard announced in *Roe* is not a bright-line rule in light of subsequent Supreme Court cases (as recognized by this Court in the *Rounds* cases). The State contends that the Court must consider the balance between the State's legitimate interests and the pregnant woman's constitutional right to terminate her pregnancy, and that a law that regulates abortions prior to viability can be constitutional, as in *Gonzales*. Under the analysis required by *Casey* and *Gonzales*, Act 301 is constitutional.

B. Recent Supreme Court Decisions Suggest an Express Change in Supreme Court Doctrine.

The State contends that Supreme Court decisions following *Roe* have altered the Supreme Court doctrine announced in *Roe*, and that Act 301 is constitutional due to this doctrinal development. *See* Appellants' Brief at 21-25. In response, the Appellees simply assert that this Court is bound by the Supreme Court's decision in *Roe* unless and until the Supreme Court itself expressly overturns *Roe*. *See* Appellees' Brief at 12-15. Although it is true that only the Supreme Court may overturn one of its precedents, the State contends that the Supreme Court has effectively overturned the *Roe* viability rule due to doctrinal development in *Casey* and *Gonzales*. If the rigid viability rule of *Roe* remained in place, then *Gonzales* could not have been decided as it was (as this Court concluded prior to being

reversed by the Supreme Court in *Gonzales*). This Court has recognized that in light of *Casey* and *Gonzales*, courts can no longer reject abortion regulations simply because they regulate prior to viability. A deeper analysis is required, and courts must now balance the State's profound interest in fetal life with the woman's Fourteenth Amendment right to terminate her pregnancy. The State submits that this deeper analysis militates in favor of the constitutionality of Act 301. The Appellees implicitly concede the State's argument by relying exclusively on *Roe*, which no longer controls in a vacuum. This Court should find Act 301 constitutional because Act 301 allows a pregnant woman a meaningful opportunity to exercise her choice to terminate her pregnancy.

II. CONCLUSION

In 1973, the Supreme Court stated that "prior to the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." *Roe*, 410 U.S. at 164. However, the Court later jettisoned the trimester framework set forth in *Roe* (*Casey*, 505 U.S. at 871-73), clarified that the State's legitimate interests permit regulation pre-viability (*id*. at 869), and concluded that a regulation that prohibited certain pre-viability abortions survived a facial constitutional challenge, *Gonzales*, 550 U.S. at 156. Act 301 regulates certain pre-viability abortions without placing a substantial obstacle in the path of a woman seeking a pre-viability abortion, and in furtherance

of the State's legitimate interests in protecting the human life of the fetus, protecting the life and health of the pregnant woman, and protecting the integrity and ethics of the medical profession. In accord with *Roe*, *Casey*, and *Gonzales*, Act 301 is based upon important state interests about the consequences of late-term abortion for both the pregnant woman and the unborn human child. In accordance post-*Roe* doctrinal developments in *Casey*, *Gonzales*, and *Rounds*, Act 301 is constitutional. For the foregoing reasons, the State of Arkansas respectfully requests that the district court's constitutional ruling and permanent injunction be reversed, and that this Court declare Arkansas Act 301 of 2013 constitutional.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 1,779 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point Times New Roman font.

The electronic files comprising this brief and filed with the Court have been scanned and are virus-free, as set forth in Eighth Circuit Rule 28A(h)(2).

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CERTIFICATE OF SERVICE

I, Colin R. Jorgensen, Assistant Attorney General, do hereby certify that on July 23rd, 2014, I electronically submitted for filing the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit via the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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