UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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Paul A. Isaacson, M.D.; William Clewell, M.D.; Hugh Miller, M.D., Plaintiffs, vs. **Tom Horne, Attorney General of Arizona, in his official capacity; William (Bill) Montgomery, County Attorney for Maricopa County, in his official capacity; Barbara LaWall, County Attorney for Pima County, in her official capacity; Arizona Medical Board; and Lisa Wynn, Executive Director of the Arizona Medical Board, in her official capacity,** Defendants.	**CIV 12-01501-JAT-PHX** **Phoenix, Arizona** **July 25, 2012** **8:31 a.m.**

REPORTER'S TRANSCRIPT OF PROCEEDINGS

(**Hearing re: Motion for Preliminary Injunction/TRO**)

BEFORE: THE HONORABLE **JAMES A. TEILBORG,** JUDGE

Official Court Reporter:
David C. German, RMR, CRR
Sandra Day O'Connor U.S. Courthouse, Suite 312
401 West Washington Street, SPC-39
Phoenix, Arizona 85003-2151
(602) 322-7251

PROCEEDINGS TAKEN BY STENOGRAPHIC COURT REPORTER
TRANSCRIPT PREPARED BY COMPUTER-AIDED TRANSCRIPTION

APPEARANCES:

FOR PLAINTIFF ISAACSON:

Center for Reproductive Rights
120 Wall Street, 14th Floor
New York, New York 10005
By: Janet Crepps, Esq.
David Brown, Esq.

LaVoy & Chernoff, P.C.
201 North Central Avenue, Suite 3300
Phoenix, Arizona 85004
By: Christopher A. LaVoy, Esq.

FOR PLAINTIFFS CLEWELL and MILLER:

American Civil Liberties Union Foundation
125 Broad Street, 18th Floor
New York, New York 10004
By: Susan Talcott Camp, Esq.

American Civil Liberties Union Foundation of Arizona
3707 North 7th Street, Suite 235
Phoenix, Arizona 85014
By: Kelly Flood, Esq.

FOR DEFENDANT WILLIAM (BILL) MONTGOMERY:

William G. Montgomery
Maricopa County Attorney
222 North Central Avenue, Suite 1100
Phoenix, Arizona 85004
By: William (Bill) Montgomery, Esq.
Douglas L. Irish, Esq.

FOR DEFENDANTS HORNE, ARIZONA BOARD OF MEDICINE, and WYNN:

Dave Cole
Solicitor General
1275 West Washington Street
Phoenix, Arizona

APPEARANCES:

FOR DEFENDANTS HORNE, ARIZONA BOARD OF MEDICINE, and WYNN:

Evan Hiller
Assistant Attorney General
1275 West Washington Street
Phoenix, Arizona 85007

FOR DEFENDANT LaWALL:

Paula J. Perrera
Deputy County Attorney
32 North Stone Avenue, Suite 2100
Tucson, Arizona 85701-1412

Phoenix, Arizona
July 25, 2012

(Proceedings convened at 8:31 a.m.)

THE COURT: Thank you. Please be seated.

At this time I'll ask the clerk to call the next matter, please. 08:31:15

THE COURTROOM DEPUTY CLERK: Civil Case 12-1501, Isaacson, et al., versus Horne, et al. This is the time set for a motion hearing. Please step forward to the podium and announce your presence. 08:31:55

MS. CREPPS: Good morning, Your Honor. Janet Crepps for the plaintiff Isaacson.

THE COURT: All right. Good morning.

MS. CAMP: Good morning, Your Honor. Susan Talcott Camp for plaintiffs Clewell and Miller. 08:32:09

THE COURT: All right. Good morning.

MR. BROWN: Good morning, Your Honor. David Brown for plaintiff Isaacson.

THE COURT: Good morning.

MS. FLOOD: Good morning, Your Honor. Kelly Flood with the ACLU of Arizona on behalf of the plaintiffs Clewell and Miller. 08:32:22

THE COURT: All right. Good morning.

MR. LAVOY: Good morning, Your Honor. Chris LaVoy on behalf of plaintiff Isaacson. 08:32:34

THE COURT: All right. Good morning to all of you, and welcome to those of you from New York, as well as Phoenix, and welcome to the Sandra Day O'Connor Courthouse and Robert Broomfield Special Proceedings Courtroom.

Defendants? 08:32:59

MR. MONTGOMERY: Good morning, Your Honor. Bill Montgomery, Maricopa County Attorney.

THE COURT: All right. Good morning.

MR. COLE: Good morning, Your Honor. Dave Cole, Arizona Solicitor General, on behalf of Tom Horne. 08:33:13

THE COURT: Good morning.

MR. HILLER: Good morning, Your Honor. Evan Hiller on behalf of the State defendants Horne, Arizona Board of Medicine, and Wynn.

THE COURT: Good morning. 08:33:25

MS. PERRERA: Good morning, Your Honor. Paula Perrera on behalf of defendant Barbara LaWall.

THE COURT: All right. Good morning. Welcome to all of you.

This is -- 08:33:44

THE COURTROOM DEPUTY CLERK: Go ahead, sir.

THE COURT: I'm sorry. I --

MR. IRISH: Good morning, Your Honor. Doug Irish from --

THE COURT: I didn't look up soon enough. 08:33:50

MR. IRISH: -- the Maricopa County Attorney's Office. I don't expect to speak this morning.

THE COURT: All right. Good morning, and welcome to you, too.

This is the time set for the hearing on plaintiffs' motion for preliminary injunction and expedited consideration or in the alternative temporary retraining order; also the defendants' motion to dismiss the motion for preliminary injunction and the defendants' motion to dismiss defendant LaWall. 08:34:04 08:34:33

Incidentally, who would be considered lead counsel for the plaintiffs? Would that be Miss Crepps and Miss Camp?

MS. CREPPS: Yes, Your Honor. And for purposes of the argument today, I'll be handling that.

THE COURT: I'm sorry? 08:34:48

MS. CREPPS: Your Honor, yes, Miss Crepps and Miss Camp are considered lead counsel, and I will be doing the argument today.

THE COURT: All right.

Then while I have your attention, as I have read *Gonzales versus Carhart,* and I recognize it's a 2007 opinion, I am working on the assumption that we are talking about the D&E procedure described in *Gonzales* when we talk about abortions or pregnancy terminations in this case, and I just want to confirm that the -- I want the plaintiffs to confirm 08:34:56 08:35:33

that that is the procedure we're talking about. Is that correct?

MS. CREPPS: No, Your Honor. May I approach the podium?

THE COURT: You may. 08:35:42

MS. CREPPS: Your Honor, that is not, in fact, correct. There are different procedures used for abortions at this point in pregnancy, and so -- I don't know how much detail you want me to get into but the two categories of procedures would be surgical and induction, and both of those 08:36:01 procedures are performed by the plaintiffs before the Court.

So it would not be correct to assume that this is only about -- that the only procedures performed at this point in pregnancies are surgical.

THE COURT: The surgical procedure, though, is -- 08:36:16 was in 2007 and still is referred to as a D&E. Is that correct?

MS. CREPPS: Yes, Your Honor.

THE COURT: And the other one that you alluded to, just in simple description, would be what? 08:36:37

MS. CREPPS: An induction, Your Honor. It essentially mimics the birth process. It's not a surgical procedure and it's induced using medications that essentially bring on labor, although in this case it's labor prior to viability. 08:36:57

THE COURT: All right. So it induces a birth.

MS. CREPPS: Yes.

THE COURT: And how -- and I realize that the affidavits -- I raise this question because the affidavits are silent on this, but how do the percentages break out between those two procedures? 08:37:12

MS. CREPPS: Your Honor --

THE COURT: Let's just say at 20 weeks how would those procedures break out?

MS. CREPPS: Your Honor, I can't provide the Court with percentages because it is our position that it doesn't matter what procedure is used if the termination occurs prior to viability, and so we didn't think to include that information. 08:37:27

I think it might be more easily understood as to provider and the location where the provider is doing the services. Dr. Isaacson is more of a clinic-based practice. The other plaintiffs are more of a hospital-based practice, and so they would be using the induction procedure. 08:37:46

THE COURT: All right. 08:38:11

Well, given what you've said, I'm still going to default to the description, at least, of the D&E that is provided for us in *Gonzales*.

All right. Thank you.

Well, let me ask, since I still have you at the 08:38:28

podium, and I appreciate the fact that both counsel have worked hard to compact the presentation here and you have obviously worked professionally with one another on this and you've indicated that you need approximately two hours -- or we need two hours for the entire proceeding. Is that still roughly what you're estimating? 08:38:53

MS. CREPPS: Your Honor, speaking for my own presentation, I would say I'm probably more likely to need only 35 minutes at the most.

THE COURT: I'm not going to prohibit you from being even briefer so -- 08:39:10

MS. CREPPS: I may be. We just wanted to give the Court kind of an outside estimation.

THE COURT: Well, and I appreciate that.

And what I was about to say, while normally I do impose very strict time limits, I've set aside the morning so I'm prepared to be flexible, but I thought at least in terms of what we would aim for I would be prepared to tell each side that they ought to aim for something on the order of an hour, reserving whatever time might be left over for rebuttal in the case of the movants, and there are movants on both sides. 08:39:21 08:39:44

But given what you've said and given what the sides have said, why, it's obvious we'll have plenty of time this morning.

MS. CREPPS: Your Honor, may I inquire how you would 08:40:03

like to proceed in terms of hearing from the plaintiffs? Would you like to hear from us on the preliminary injunction motion stand alone or would you like to hear from us on all three motions at the same time?

THE COURT: Well, I think that -- I mean, you have just the one motion pending so it would seem like an orderly approach for you to present your motion, for the defendants to respond and at the same time present their motions, and then as part of your rebuttal respond to theirs, if that works for you to. 08:40:18 08:40:43

MS. CREPPS: That would be fine, Your Honor. Thank you.

THE COURT: All right. Thank you.

I'll hear briefly from the defendants.

Mr. Montgomery, you would be the lead counsel, I guess, is that correct. 08:40:50

MR. MONTGOMERY: Yes, Your Honor, if I may approach the podium?

THE COURT: You may. And I assume that -- you can tell me otherwise -- that your presentation would be an hour or less? 08:41:01

MR. MONTGOMERY: Much less, Your Honor.

THE COURT: All right. Then we'll proceed, basically, as I have just outlined, and I think -- will you be the sole spokesman or is Solicitor General Cole going to 08:41:17

speak?

MR. MONTGOMERY: I believe that Solicitor General Cole will also speak and will be available to either fill in gaps that I overlook, address particular questions that the Court may pose or particular issues that the Attorney General would prefer to be heard on. 08:41:34

THE COURT: Very well.

All right. Anything preliminarily from the Attorney General?

MR. COLE: No, Your Honor. 08:41:45

THE COURT: Very well. Thank you.

All right. Miss Crepps, then you may proceed.

MS. CREPPS: Thank you, Your Honor. May it please the Court.

THE COURT: And that -- you're going to have to get closer to that microphone, and I have to remind myself to do the same thing. They are very directional and require close proximity. 08:42:02

MS. CREPPS: Thank you. Let me know if you need me to speak up. 08:42:16

May it please the Court.

We are here seeking a preliminary injunction not to finally resolve this case but to preserve the status quo while the clearly serious constitutional issues raised by the ban are considered. Plaintiffs have made a strong showing as to 08:42:31

each of the requirements for preliminary injunctive relief.

First I'd like to address likelihood of success on the merits.

In order to obtain a preliminary injunction, we have to show that we are likely to succeed on the merits of our claim that the 20-week ban is unconstitutional because it bans abortions prior to viability. 08:42:48

We have met that burden. Controlling Supreme Court precedence, namely, *Roe* and *Casey*, make clear that the State cannot ban abortions prior to viability. This is so no matter what interests the State relies on to justify the ban and no matter what exceptions were made. The law on this point could not be more straightforward. 08:43:08

And going back to a question that Your Honor asked me just a moment ago about what procedures are at issue, I would again say that the constitutional prohibition on bans on abortion prior to viability is so regardless of what procedures are used. 08:43:25

In other words, while the Supreme Court has given the states some leeway as to what procedures, in terms of regulating procedures, it has not folded that into a reason to ban abortions. 08:43:49

THE COURT: Your position is that whether it's an induced birth, whether it's a D&E, or whether it's a so-called partial-birth abortion are all banned. 08:44:11

MS. CREPPS: Yes, Your Honor, although I would point out that the so-called partial-birth abortions would already be illegal under federal law, and so what we're really talking about would be inductions and D&Es, which are, as you know, the most common methods used after the first trimester of pregnancy. 08:44:28

Both sides agree that the Act bans abortions prior to viability. Both sides agree that the Supreme Court has spoken on this issue with absolute clarity.

THE COURT: Does it ban abortions previability or simply set in place a structure by which the patient must make the decision? In other words, push the decision point forward; not ban but just push it forward. 08:44:56

MS. CREPPS: Your Honor, it bans some abortions prior to viability, those that would occur after 20 weeks and before viability. 08:45:14

To say or to characterize the ban as simply pushing the decision forward is directly contrary to what the Supreme Court has said, in two ways.

One, the Supreme Court's been absolutely clear that the states can't ban abortions prior to viability, and then in the context of decisions in which the Supreme Court has said it is all right for the state to try and influence the decision, to try and make sure that the decision is informed, et cetera, the State has some leeway there. 08:45:35 08:45:55

But if you look at the two aspects of the *Casey* decision side by side, that is, what the Court has characterized as the essential holdings of *Roe* and the State's ability to influence a woman's decision whether or not to have abortions, it's clear that the Supreme Court has drawn a firm line that while the State can influence the decision it cannot prevent a woman from obtaining an abortion prior to viability. These are two distinct concepts that have to live side by side. 08:46:15

And that's what the court in *Gonzales* was saying, that these essential components have to live side by side, one component being that the State can't ban abortion prior to viability, another component being how the State can express its interests prior to viability, and it can do so so long as that is not an undue burden. 08:46:32 08:46:53

THE COURT: Well, I alluded to this a moment ago, but if you take your position that the State cannot and presumably Congress could not ban abortion prior to viability, if that was the major premise, and the minor premise is that a partial-birth abortion is a form of abortion, then you would have to conclude that any attempt to preclude a previability partial-birth abortion would be unconstitutional, and yet the Supreme Court said otherwise. 08:47:17

MS. CREPPS: Your Honor, I think that there are three distinct concepts that the Court has afforded different levels 08:47:36

of protection to, and those would be when a woman can get an abortion, why she can get an abortion, and how she can get an abortion.

Where the Supreme Court has drawn a firm line, a line that cannot be encroached by the states, is that prior to viability the reason why a woman wants an abortion is irrelevant, she is entitled to obtain an abortion prior to viability. After viability, states can prohibit abortions so long as there is still room for the woman to obtain the abortion based on life or health concerns. 08:48:00 08:48:24

Then there is the other concept of how she can get an abortion, and that is the concept that is considered when you're dealing with a procedure ban.

In other words, the State can say your abortion must be performed by a physician; your abortion must be performed in a licensed health care facility; you cannot have an abortion that is a partial-birth abortion. 08:48:47

But two things, I think, in *Gonzales* make this point clear.

One is the Supreme Court did not get to the question, which they did answer in *Stenberg versus Carhart*, that a ban on the most common methods of abortion in the second trimester, D&E abortions, would be an undue burden. 08:49:02

And also, in describing the state interests that were put forth in support of the partial-birth abortion ban, the 08:49:27

court clearly said regulations on abortion that are not designed to strike at the heart of the right can be permissible if they're not unduly burdensome to women.

So I think it's very important to keep in mind that prior to viability a woman can get an abortion regardless of her reasons for doing so, but the State retains some leeway to regulate how she gets that procedure. 08:49:48

And that's why Supreme Court opinions looking at procedure bans do not influence the decision as to whether or not a ban, an outright ban on abortion prior to viability is unconstitutional or not. 08:50:11

And I think the *Danforth* case that we cite in our brief is instructive here because there the State did attempt to ban what at that time was the most common method of second trimester abortions, and the Supreme Court said no, that's not permissible; it is intended to and will inhibit the vast majority of abortions after the first trimester. 08:50:30

So even within the context of a procedure ban, the Court has said on more than one occasion that a ban on methods of abortion that essentially takes away access to the most common method is unconstitutional. Although that's a distinct concept from the Court's clear rule prohibiting bans on abortion prior to viability, it shows how the Court has placed limits in this area. 08:50:49

Defendants rely primarily, I think, as the Court has 08:51:16

noted, on the *Gonzales* case to support their point that no preliminary injunction should issue in this case. They are, in effect, asking this Court to ignore clear Supreme Court precedent. And I hope I have made it clear in my explanation -- 08:51:37

THE COURT: You're not suggesting *Gonzales* is not itself Supreme Court precedent.

MS. CREPPS: No, Your Honor. It's binding Supreme Court precedent that is either irrelevant here or supports our position. 08:51:52

Two points about *Gonzales* that support our position.

One is, within the *Gonzales* opinion itself the Supreme Court assumed the principle that the states cannot ban abortions prior to viability, and it identified that rule as one of the essential components of *Casey*. 08:52:11

It then went on to consider a ban on a certain method of abortion.

And again, in finding that the partial-birth abortion ban was valid under the circumstances of that challenge, the Court said again that these kinds of regulations are 08:52:30 permissible so long as they do not strike at the heart of the right, the heart of the right being women's access to abortion prior to viability.

So nothing in the *Gonzales* opinion undermines our showing here. 08:52:54

What we have is clear Supreme Court precedent with the *Gonzales* opinion looking at a wholly different issue and yet affirming within its ruling the principle that we're standing on.

So I don't think that the *Gonzales* opinion is either 08:53:09
controlling in the way that the *Casey* decision is or that anything within the *Gonzales* opinion undermines our position or even contradicts our position.

THE COURT: Well, you have noted that in *Gonzales* there are several references, of course, to *Casey*, and the -- 08:53:31
but also not mentioned by you is the reference that in *Casey* -- reference by *Gonzales* that in *Casey* the principle that the 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, and that the State may 08:54:02
not impose a substantial burden to the right to a previability abortion if the purpose or effect is to place a substantial obstacle in the path of the woman.

On the other hand -- and this is quoting in part. "On the other hand, regulations may express profound respect 08:54:30
for the life of the unborn if they are not a substantial obstacle."

And they also say at page 157, "No doubt the government has an interest in protecting the integrity and ethics of the medical profession." 08:54:52

I give you those portions, and throughout the opinion, of course, are references -- throughout *Gonzales* are references to the State's interest in protecting the unborn.

But I read very carefully the affidavits from your clients, from the plaintiff physicians, who are, by the way, very well credentialed, who seem to have had very distinguished careers, and those affidavits reflect profound compassion and concern for their patients, the women, and presumably the fathers of the unborn child, but I didn't find anywhere in those affidavits any expression of concern by these plaintiff physicians for the unborn child, or even a hint of concern on their part. 08:55:13 08:55:42

And given that silence on their part and indeed the silence in your own presentation this morning, doesn't that underscore the legitimacy of the State's regulatory action such as that now being challenged out of a concern for the unborn child? 08:56:11

MS. CREPPS: Two responses to that, Your Honor.

Let me start with your reference to the declarations.

I believe that the declaration of Dr. Clewell in particular does express an interest in facilitating his patients' ability to have a baby if that's what they want to do, and he describes in there a number of situations in which he attempts to help women reach that viability point even though he understands that they are and are willing to accept 08:56:33 08:57:04

grave risks to their own health.

And so I believe that it is within our declarations that Dr. Clewell is helping women carry pregnancies to term in spite of long odds and serious risks, and that is what his practice is about, is facilitating women's ability to do that. 08:57:34

In some circumstances, the risks to the woman or the problem before the fetus are so significant that his patients decide to terminate their pregnancy.

But the overall point of his practice, if you will, is to assist women with complicated or risky pregnancies to 08:57:54 carry those pregnancies past viability and to term, if possible, and I think that is a deeply compassionate expression of interest in fetal life through the decisions that those women are making and he's facilitating.

But going back to your point about what we are saying 08:58:16 or not saying in our briefs about the *Gonzales* case, we are not trying to hide the fact that the Court in *Gonzales* discussed the State's interest in potential life and recognized that there are interests that the State can put forward. 08:58:36

It's our position that within the context of *Gonzales,* and especially looking at *Gonzales* and *Casey* together, that the Supreme Court has said clearly that regardless of what the State's interests are it cannot justify a ban on abortions prior to viability. And that explicitly 08:58:55

includes the State's interest in potential fetal life.

And so our failure to focus on that part of the *Gonzales* opinion is not because the Court didn't say it; it's because we feel in the context of that opinion, as compared to the issue before this Court, that that discussion is not relevant. 08:59:17

We're not contesting that the State of Arizona can assert a number of interests, and the way that they can assert those interests is by regulating abortion, not banning abortion but regulating abortion. 08:59:37

And the *Gonzales* court made that point very clearly when it talked about regulations, and this is in the context where it was discussing the State's interest -- the Government's asserted interest in that case -- cannot be intended or designed to strike at the heart of the right. And again, the heart of the right that we have here is a right to obtain abortions prior to viability. 08:59:53

There is no question that the effect of this ban is going to be to make illegal abortions prior to viability that are occurring beginning at 20 weeks. That is part of the heart of the right. Whether it's a ban on all abortions, whether it's a ban on abortions at 12 weeks, or whether it's a ban on abortions at 20 weeks, the Court has said you can't do it no matter what interests you assert. 09:00:12

There is another category of regulations that the 09:00:35

Court will look at and assess under the undue burden standard, but not this one. This one is per se unconstitutional.

If Your Honor has no other questions about likelihood of success, I would briefly address the other preliminary injunction standards. 09:00:56

THE COURT: You may.

MS. CREPPS: Thank you.

We have fully met our burden of satisfying the other three requirements for injunctive relief, and the defendants have not argued otherwise. 09:01:08

As to irreparable harm, we've met this requirement through our showing that women seeking previability abortions beginning at 20 weeks will be deprived of their constitutional rights guaranteed by the Fourteenth Amendment. Again, that right, as clearly stated by the Supreme Court, is that prior 09:01:23 to viability women have the constitutional right to abortion. Loss of constitutional rights cannot, of course, be remedied through damages, and the harm is irreparable.

We've also established other irreparable harms that will occur if the ban is allowed to take effect, and 09:01:45 specifically, for some women who find out that the fetus suffers from a serious or lethal anomaly the Act will prevent them from terminating their pregnancies or will interfere with their ability to make thoughtful decisions based on all of the relevant information with adequate time to reflect. 09:02:01

And some women who are seeking abortion because they're experiencing a medical problem may opt for an abortion rather than trying to carry the pregnancy to viability or will be delayed or outright denied medical care that their physicians deem to be in their best interests. 09:02:21

Our showing on this issue, in fact, wholly undermines the defendants' argument that this Act in any way furthers maternal health.

Your Honor, I didn't really address specifically the defendants' argument regarding maternal health, but let me say 09:02:41 that it is, again, foreclosed by Supreme Court precedent in *Roe* and *Casey*. The Court in those cases had before it the consideration that at some point, first trimester, maybe a little into the second trimester, the risks of abortion and pregnancy may become comparable. The Court, nonetheless, said 09:03:07 prior to viability the State cannot ban abortion.

It has also been clear that even after viability the State can only ban abortions if adequate exceptions are made for women's health.

Our evidence shows that this act Will endanger 09:03:27 women's health, and that is an irreparable harm.

Finally, as to the last two factors, balance of equities and the public interest, we have shown that the balance of hardships tips strongly in our favor. The plaintiffs will suffer -- plaintiffs' patients will suffer 09:03:45

deprivation of constitutional rights and some will have their health endangered, and the relief we are seeking again is simply to maintain the status quo.

On the other side of the balance, the defendants have not alleged that they will suffer any harm or that the balance of equities tips in their favor. 09:04:01

And as to the public interest, the last factor, the public interest will be served by a preliminary injunction in this case. Protection of constitutional rights is always in the public interest. 09:04:19

And as defendant LaWall has noted, the trust placed by the public in her office, based on that trust extreme care must be taken to ensure that individuals are not prosecuted for engaging in constitutionally-protected action. The public interest will be served by preventing any enforcement of this ban prior to viability. 09:04:37

For these reasons, we ask that the Court issue a preliminary injunction.

THE COURT: Let me ask you one more question --

MS. CREPPS: Certainly. 09:04:48

THE COURT: -- that does go back to some of your earlier comments, and actually your recent comments as well, and that's the subject of viability.

The declarant plaintiffs or plaintiff declarants have flatly stated that no child is viable at 20 weeks. I think 09:05:03

they make that flat statement. I assume if they had been declarants back in 1973 at the time of *Roe versus Wade* they would have declared with equal certainty that no child is viable at 28 weeks. I mean, I guess you and I can speculate over whether that was the case. But the point is, in 1973 09:05:28
viability was generally considered to be at 28 weeks, as I understand. Is that correct?

MS. CREPPS: Approximately, yes.

THE COURT: And then as we moved into -- I think by the time of *Casey* we're talking 24, 25 weeks. Is that right? 09:05:40

MS. CREPPS: Yes.

THE COURT: And the trend tends to be moving toward earlier rather than later viability. Correct?

MS. CREPPS: Well, I -- I'm not a doctor but I would say that many within the medical field feel that we may be 09:05:59
hitting the absolute limits at this point, that it's not going to be possible, but, of course, you never say never.

THE COURT: I guess my ultimate question would be given the challenges, I suppose, in determining viability, when we talk about the 20-week period of time we're still on 09:06:29
the border of viability with an unborn child, I suppose it's safe to say.

MS. CREPPS: Well, Your Honor, I'm not sure that I would say 20 weeks is on the border, but I do have two responses to your inquiry. 09:06:49

One is, what are the facts before this Court with this ban which takes effect at 20 weeks? The facts before this Court, including the declaration that the defendants have put in from Dr. Wright, who says that viability is not occurring until approximately 24 weeks, either, is that this ban takes effect approximately four weeks before any fetus can be viable, but, of course, not all fetuses are viable at 24 weeks. 09:07:09

The second point is that the Supreme Court has again been very, very clear on this issue. 09:07:29

First, it is not for the legislatures or the courts to set viability at a fixed point. That's the *Danforth* case. The states can't pick one determinant: Weeks of gestation or fetal weight or anything else. It has to be a decision left to physicians to make on a case-by-case basis. 09:07:55

That is clear law. The Court relied on it, has cited the *Danforth* case again in *Colautti* for a different proposition, but that again is binding Supreme Court precedent.

The Court has also said that the states can't fudge the line, you know, and try and move it to maybe viable instead of actual viability, and that's the *Colautti* case where the Court made that statement. 09:08:13

And it's important to know that in these cases and in the *Webster* case the Court was aware of the fact that there 09:08:34

can be differences. There could be errors in dating. The Court, nevertheless, said, taking that into account in making its decisions, that viability is the standard and viability must be left to physicians to determine on a case-by-case basis. 09:08:57

THE COURT: Don't you agree, though, that considering the State's interest in the well being of the unborn child that as almost a sliding scale as you approach viability that interest ought to heighten?

MS. CREPPS: Your Honor, I don't agree with that. I respectfully disagree, for two reasons. 09:09:18

One is that the Supreme Court has considered exactly that question, which is can the State's interest in fetal life overcome a woman's right to obtain an abortion prior to viability? They've looked at it in those terms. They've looked at it in terms of whether or not the State can adopt one theory of whether life begins in *Roe*, and the Court has said no, the State's interest in fetal life cannot overcome a woman's right to obtain an abortion prior to viability. 09:09:41

Now, maybe there is some leeway for the states in terms of regulatory authority to assert an increased interest as the fetus approaches viability. That is suggested in *Gonzales*. But here again, this is a different issue. This is not a regulation. It's a ban. But even under the *Gonzales* analysis, a ban on abortions is quintessentially an undue 09:10:00 09:10:25

burden on women seeking abortions.

And so a ban on previability abortions cannot survive the undue burden analysis.

So even if you applied the *Gonzales* analysis, which isn't applicable here because this is a ban on previability abortions, but even if you applied it you would have to come to the same result, which is this is an unconstitutional burden. 09:10:45

THE COURT: Thank you.

All right. Mr. Montgomery. 09:10:58

MR. MONTGOMERY: Thank you, Your Honor.

Your Honor, the State is asking the Court to deny plaintiffs' motion for preliminary injunction. The status quo would leave conditions that the Arizona Legislature, with the approval of the Supreme Court, has determined would create 09:11:19 significant interests on the part of the State in the maternal health and well being of the mother as well as the life of the fetus within her.

If the Court were to grant the preliminary injunction, then the very conditions that the State has been 09:11:35 concerned about would go on, presumably, to call into question the health and well being of a mother, as well as the life of a fetus.

So the status quo would be unacceptable to Arizona if it were allowed to continue. 09:11:50

Additionally, I would just note at the outset, too, that trying to distinguish a ban and regulation is really a distinction without a difference. A ban with exceptions is a regulation.

With respect to the ability for the plaintiffs to meet the standard necessary for a grant of preliminary injunction, the first and main point which the State raises in other pleadings is that, in essence, this is a facial challenge. Whether the plaintiffs want to characterize that as pre-enforcement as only directed at one aspect of the statute or not, it's a facial challenge. 09:12:05 09:12:23

Justice Kennedy spoke to that point directly in *Gonzales* and noted that the considerations that were discussed in that case, and this is at 550 U.S. 167, the considerations discussed support our further determination that these facial attacks should not have been entertained in the first instance. In these circumstances, the proper means to consider exceptions is by as-applied challenge. 09:12:45

The Government in that case and the Government in this case, the State of Arizona, would also acknowledge that a pre-enforcement as-applied challenge to the Act could be maintained. A court could ask a patient, whom the plaintiffs have not presented today, to appear in camera, maintain privacy, review the specifics of that patient's circumstances in conjunction with her physician's assessment of her 09:13:01 09:13:20

condition and the risks being faced in the factors that are being considered.

And in that instance, it would be the best circumstance for the Court because the Court would then be able to address questions of viability, relative risks, what it is that the plaintiff is facing, the particular patient would be facing in that instance. 09:13:36

But the plaintiffs have not done that here.

So this effort is no different than in *Stenberg* or *Gonzales* where doctors sought to have the Court substitute its judgment for that of the legislature. 09:13:53

And I would bring to the Court's attention an Eighth Circuit case that was just published yesterday, and the citation to that would be from the United States Court of Appeals for the Eighth Circuit, case number 09-3231, 3233 and 3362. For shorthand -- the respondent was -- the defendant was a governor Mike Rounds so for shorthand I'll refer to this as the *Rounds* case with the Court's permission. 09:14:11

There, the Eighth Circuit, referencing *Gonzales*, made it very clear, too, that in these areas, even where there may be a difference in medical or scientific opinion, the Supreme Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty, and medical uncertainty does not foreclose the exercise of legislative power in the abortion 09:14:37 09:14:51

context any more than it does in other contexts. And that's citing *Gonzales*, 550 at 163.

So in this particular instance with the Court not having the benefit of a real patient to look at real facts and real circumstances is left to guess with hypothetical presentations by the plaintiffs in a facial challenge that is disfavored in these circumstances. 09:15:12

Arizona's legislature had the benefit of considering the information that's been presented by plaintiffs in their declarations and made a choice. The legislature made a choice that its interests in maternal health and well being and that of the life growing within the mother were significant enough to establish at 20 weeks a ban absent a medical exception that is verbatim the medical exception language that was upheld in *Casey*. 09:15:28 09:15:50

It is a legitimate action by the legislature, it's permissible under Supreme Court precedent, and it is entitled to due deference from the Court absent an as-applied challenge that would permit the plaintiffs then to direct the Court to specific facts and circumstances and make a determination as to that patient in that circumstance. 09:16:06

Absent that, Your Honor, I would ask the Court to deny the motion brought by the plaintiff.

THE COURT: What you've just said, I assume, is also in support of your motion to dismiss. 09:16:22

MR. MONTGOMERY: Yes, Your Honor. That's correct.

Essentially, the same argument that defeats the plaintiffs' ability to succeed or to even potentially succeed on the merits, which then defeats their motion for preliminary injunction, equally applies to the motion to dismiss, again resting on the language from *Gonzales* by Justice Kennedy that facial challenges in these contexts are disfavored. It deprives the Court of specific facts and circumstances and asks the Court to deal with a hypothetical presented by the plaintiffs about some woman, sometime, somewhere and thereby substitute the decision of the legislature. 09:16:40 09:16:57

THE COURT: All right. Anything further?

MR. MONTGOMERY: Nothing further, Your Honor.

THE COURT: All right.

Solicitor General Cole. 09:17:16

MR. COLE: May it please the Court and counsel.

Just a couple of points, Your Honor, having heard both Miss Crepps and Mr. Montgomery this morning.

First of all, the standards for temporary restraining order or preliminary injunction are rigorous, and there's a very, very good reason for this. 09:17:34

With due respect to plaintiffs' counsel, I heard her say at least twice that they have to show a likelihood of success on the merits. That's not the law. The law is that they have to show a strong likelihood of success. And I 09:17:48

suggest to the Court that that adjective is not there to be ignored. It has place. They've not shown a strong likelihood of success on the merits.

Arizona has an abiding interest in the health and welfare of all of its citizens, and this includes an interest 09:18:05
in protecting the health of women from the outset of pregnancy.

The United States Supreme Court has recognized this on at least two occasions in *Akron* in 1983 and then in *Casey* nine years later. 09:18:22

Health in this context is not restricted to physical wellness. It includes emotional and mental well being. It's common knowledge that these elements of health are closely interrelated and that mutual causal relationships exist between these elements of health. 09:18:40

The statute in question is entitled to the same presumption of constitutionality that attends all legislative enactments. That is why the burden rests squarely on plaintiffs' shoulders and they must carry that burden if they are to be afforded any remedy. 09:18:59

Bear in mind, as Mr. Montgomery noted twice during his presentation, this is a facial challenge as opposed to an as-applied challenge.

I won't bore the Court with what has already been said by both the Court and Mr. Montgomery, but I think one 09:19:16

thing does bear repeating.

In *Gonzales*, the United States Supreme Court gave state legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty.

Furthermore, said the Court, medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts. 09:19:33

The Arizona Legislature's intent is clear from its detailed findings. Along with the Court's authority to declare a statute unconstitutional, and that, of course, is the ultimate purpose of the plaintiffs, comes the Court's responsibility to give due deference to legislative fact-finding and law-making. 09:19:54

Defendant Horne requests this Court to deny all forms of relief sought by plaintiffs. 09:20:09

THE COURT: All right.

MR. COLE: Thank you.

THE COURT: Thank you, sir.

Miss Crepps?

MR. MONTGOMERY: Your Honor, if I may address the Court, I do have a copy of that Eighth Circuit opinion, if I may approach. 09:20:24

THE COURT: You may approach and give it to Ms. Bengtson. I assume you've given Miss Crepps a copy or called it to her attention. 09:20:34

MS. CREPPS: Your Honor, I would forgive Mr. Montgomery given the recent issuance of the opinion. I will address that in my remarks, though.

THE COURT: Very well.

MS. CREPPS: If I could have just a moment. 09:20:54

Your Honor, would you like me as part of these remarks to address the motion to dismiss defendant LaWall?

THE COURT: You can -- yes, you can do so in whatever order is most comfortable and logical for you.

MS. CREPPS: Okay. Thank you. 09:21:21

THE COURT: I think you can feel free from any time constraints as well. We're moving ahead.

MS. CREPPS: Well. I generally have found that the longer I go the less progress I make, so I'll try and be brief, but I'd just like to address a couple of points in 09:21:35 response to the preliminary injunction specifically and then go on to the motions to dismiss.

THE COURT: Very well.

MS. CREPPS: Defendants assert that the status quo in Arizona is unacceptable and should not be allowed to continue, 09:21:51 but the fact is that the status quo in Arizona, which prohibits abortion after viability but not prior to viability, reflects the binding Supreme Court precedent that this Court must look to.

So when we're asking for the status quo to be 09:22:12

maintained what we're asking for is that the Court keep Arizona in compliance with the current constitutional framework. That's not a radical request. It's what preliminary injunctive relief is intended for to maintain the status quo. But in this case, that status quo is a constitutional framework that is set up by the Supreme Court and that the states are bound to respect. 09:22:35

I'd like to address the *Rounds* case that Mr. Montgomery just provided to the Court.

THE COURT: You may. 09:22:52

MS. CREPPS: Again, that case is wholly distinguishable.

In *Rounds*, the issue before the Court was not a ban on abortion. The issue before the Court was whether or not physicians were required to provide women with certain disclosures regarding the risks -- the potential risks of abortion and its association with suicide. 09:23:05

Now, the question as to whether or not abortion is associated with suicide was hotly contested. The District Court found that the required disclosures were false and misleading and that's why it enjoined that provision of the statute that. 09:23:28

That question aside, however, the *Rounds* case is an illustration of the kind of regulations that the Court in *Gonzales* has said the states may pursue, which is prior to 09:23:44

viability the states may express their interests in maternal health so long as those interests, those regulations, don't impose an undue burden.

So it wasn't a case about an outright ban on abortion. It was a case about mandatory disclosures. When 09:24:05
defendants refer to these areas, there are very distinct constitutional buckets, if you will, that apply here.

One is the states can't ban abortions before viability.

Two is the states can regulate abortion prior to 09:24:24
viability so long as that's not an a undue burden, and that second category is what the *Rounds* case is about.

I would also note that the *Stenberg* case, which is the state partial-birth abortion ban that preceded *Gonzales*, in that case one of the reasons why the Court found the state 09:24:50
statute unconstitutional was because the ban on the most common method of abortions in second trimester would be an undue burden on women's right to abortion.

It's inconsistent to say that *Gonzales*, which upheld the ban because it affected only a small number of abortions, 09:25:12
a narrowly defined procedure, somehow undermines the overall holding of *Stenberg*, which is the states can't ban the most common method of abortion in the second trimester. That is much more akin to what we have here, which is an outright ban on abortions. 09:25:34

So again, these are different kinds of restrictions that receive different constitutional analysis, but nothing in the *Gonzales* opinion undermines that states can't ban abortions prior to viability or that this ban is a substantial obstacle. 09:25:55

Finally, just as to the preliminary injunction -- well, actually, I want shouldn't say finally. I've got two more points.

The evidence before this Court, the only evidence before this Court, actually comes from the defendants in the 09:26:09 declaration Dr. Sawyer, and it's Dr. Sawyer's opinion that gestational dating is actually very accurate.

And so concerns that the State has raised about margin of error, again, that's already been taken into account in the Supreme Court opinions, but the evidence here is that 09:26:28 that margin of error is really not an issue because gestational dating is accurate.

I would also point out to the Court that the *Gonzales* opinion did, in fact, recognize induction as a method of abortion at this point in pregnancy, and that would be at 550 09:26:48 U.S. at 140.

And finally, on the issue of deference to the findings in this bill that this ban is justified by concerns about maternal health or the ability of a fetus to experience pain, this issue also came up in the Gonzales opinion, and the 09:27:12

Court recognized that deference may be appropriate but it rejected the assertion that absolute deference should be afforded to Congressional findings, and the Court says that it retains an independent constitutional duty to review factual findings where constitutional rights are at stake. 09:27:35

In this case, I don't even think that's applicable because under existing Supreme Court precedent there are no factual findings. There are no legislative findings or assertions that the State can make that can overcome the Supreme Court's statements that bans on abortion prior to 09:27:55 viability are unconstitutional regardless of what exceptions are made and regardless of what State interests are asserted.

Switching gears now, I'd like to address the motion to dismiss, the overall motion to dismiss.

In considering the motion to dismiss, it's important 09:28:15 to keep in mind that defendants concede that the Act bans abortions prior to viability and that binding Supreme Court precedent makes clear that a ban on abortion prior to viability is unconstitutional regardless of the exceptions.

THE COURT: Mr. Montgomery makes a point that a ban 09:28:35 with exceptions is really a regulation. It's a matter of semantics.

MS. CREPPS: I disagree with that statement, Your Honor.

THE COURT: I had a hunch you did but -- 09:28:46

MS. CREPPS: Thank you for giving me a chance to respond to it.

That is not what the Supreme Court has said. What the Supreme Court said in *Casey* is a ban on abortions prior to viability is unconstitutional regardless of what exceptions are made for particular circumstances. 09:29:01

That statement is clear. Mr. Montgomery has no basis for saying that what that really means is a ban is okay with exceptions. That's flatly contrary to what the Supreme Court has said. 09:29:24

And nothing in the *Gonzales* case suggests otherwise. Again, *Gonzales* recognized this essential component of *Casey* that states can't ban abortions prior to viability, and then went on to discuss appropriate regulations and what interests can support appropriate regulations. 09:29:43

The two are not the same thing, and I understand why defendants are trying to blur that line but the Supreme Court has not blurred the line, and that's what's important for this motion for preliminary injunction.

Defendants are trying to dismiss the case by incorrectly arguing that we're bringing a facial challenge and in arguing that we cannot meet the burden, meet the standards for a facial challenge. 09:30:05

First, we are bringing a pre-enforcement challenge seeking to have the ban enjoined not in all of its 09:30:22

applications but only as applied to abortions before viability.

The Ninth Circuit has provided a clear explanation of the difference between facial and as-applied challenges. This was last year in the *Hoye* case, which I'm not sure that we have cited, and I will give you the cite. It's *Hoye*, H-O-Y-E, *v. Oakland,* 653 F.3d at 857. 09:30:39

The Court there said, "As a general matter, a facial challenge is a challenge to an entire legislative enactment or provision. An as-applied attack, by contrast, challenges only one of the rules of the statute, a subset of the statute's applications, or the application of the statute to a specific factual circumstance." 09:30:57

As the face of our pleadings makes plain, this is an as-applied attack because we are only challenging a subset of the statute's applications, and that is the factual circumstances where a woman is seeking an abortion prior to viability. 09:31:17

Second, as the Supreme Court made clear in *Citizens United*, the designation of facial versus as applied really only goes to the remedy that plaintiffs are entitled to. The distinction goes to the breadth of the remedy employed by the Court, not to what must be pleaded in the complaint. 09:31:29

So even if our case could be fairly characterized as a facial challenge, which it cannot, once we have shown a 09:31:48

constitutional violation we are entitled to some relief. So even if defendants were correct that this is a facial challenge, their motion to dismiss should still be denied.

Third, the fact that this case has been brought before the effective date of the Act does not make it a facial challenge. *Gonzales* makes clear that pre-enforcement as-applied challenge is an appropriate mechanism through which to seek relief. 09:32:05

And fourth, the fact that this case is brought by physicians on behalf of themselves and their patients is a question of standing and does not determine if this is a facial or as-applied challenge. 09:32:19

So what remains of the defendants' claim is that a pre-enforcement challenge is not appropriate because relief should only be granted based on the specific circumstances of women seeking previability abortions at or after 20 weeks, but there are no specific circumstances to be weighed. Every woman seeking an abortion prior to viability is permitted under clear constitutional precedence to obtain one. 09:32:36

Defendants' reliance on *Gonzales* to support their opinion is misplaced. *Gonzales* involved two distinct challenges. 09:32:56

In the first instance, plaintiffs challenged the procedure ban on the grounds that it prohibited the most common method of abortions in the second trimester. The Court 09:33:09

rejected that claim, as I mentioned, holding that the Act only banned a narrowly-defined procedure.

The second facial attack in *Gonzales* was based on the law's lack of health exception, and it's this part of the opinion that the defendants are relying on. 09:33:27

The passage quoted by the defendants, though, actually makes clear that the distinction between a challenge to a ban on abortion, like the 20-week ban, which is per se unconstitutional, and a challenge based on the lack of health exception. 09:33:45

What the Court said at 167 is in these circumstances, these circumstances, the lack of a health exception, in these circumstances the proper means to consider exceptions is by an as-applied challenge. In an as-applied challenge, the nature of the medical risk can be better quantified and balanced than 09:34:03 in a facial attack.

As to a ban on abortion prior to viability, there are no exceptions to be considered. The Court has already said exceptions don't matter, the ban is unconstitutional.

And there's nothing to be quantified or balanced. 09:34:21 The Act is unconstitutional as applied to all women seeking previability abortions at or after 20 weeks. The harm to these women is not speculative but certain, and it doesn't differ from woman to woman. It is not for a court to weigh the relative risks that defendant just alluded to for each 09:34:42

woman. The balance of relative risks is the core part of the right to terminate a pregnancy or not that the Supreme Court has weighed.

Prior to viability, it is the woman's right to balance those risks and all the other important factors that might go into making a decision, but it is not for a court to make an individualized assessment. 09:35:03

For all of those reasons, the motion should be dismissed, or denied, but even if this were a facial challenge, the motion to dismiss should still be denied. 09:35:22

As I mentioned, the *Citizens United* case held that the distinction between facial and as applied really goes to remedy. It would be inappropriate to dismiss this case if we have otherwise established that we are entitled to some relief, but we could also succeed under the applicable legal standards. 09:35:42

Defendants incorrectly assert in their supplemental authority, citing, I think it was, the *Patel* case that if our case is a facial challenge we can only succeed under the *Salerno* no-set-of-circumstances test. They seem to be suggesting in making this argument that our case should be dismissed because we're not entitled to relief that we're not seeking. Clearly, that is not right. 09:36:01

But defendants' assertion that the no-set-of-circumstances test from *Salerno* would apply if this 09:36:17

were a facial challenge is incorrect for two reasons.

First and most importantly, the Ninth Circuit has explicitly rejected application of the *Salerno* test in challenges to abortion regulations, and that's in *Planned Parenthood of Southern Arizona versus Lawall*, 180 F.3d at 1027. 09:36:36

The Court said, I'm quoting, "*Casey* has overruled *Salerno* in the context of facial challenges to abortion statutes. We apply Casey's undue burden standard in determining facial unconstitutionality." 09:36:53

Under the *Casey* framework, the ban clearly fails even as a facial challenge because a ban on abortion is per se unconstitutional, or alternatively, it is without doubt an undue burden.

Even if the *Casey* framework were not applicable, which it is under binding Ninth Circuit precedent, the Ninth Circuit has also indicated that a facial challenge can succeed if plaintiffs can establish that the law does not have a plainly legitimate sweep. This again was from the *Hoye* case at 857, and in that case they're relying on the *Washington state Grange* case cited by defendants in supplemental authority. 09:37:11 09:37:28

Here, the substantial number of unconstitutional applications, which is all of those applications prior to viability, compared to the very limited number of potentially 09:37:45

constitutional applications of the statute after viability shows that the ban fails even under the plainly legitimate sweep test.

And, we can meet even the *Salerno* test as to the relief that we're seeking because the law is unconstitutional in all of its applications to previability abortions, and that is the only relief that we're seeking. 09:38:06

Moving now to -- unless Your Honor has questions on the motion to dismiss, I would move to the motion to dismiss defendant LaWall. 09:38:25

THE COURT: Go ahead.

MS. CREPPS: Thank you.

Plaintiffs oppose this motion. Our primary opposition comes from disagreement with defendants' assertion that dismissal is warranted because the Pima County Attorney, quote, does not oppose the relief sought by plaintiffs in this matter, close quote. 09:38:38

That assertion is without factual foundation, but even if it were established it would not entitle defendant Montgomery to have defendant LaWall dismissed. There's no basis for asserting that defendant LaWall does not oppose the relief we're seeking. Her position regarding the preliminary injunction falls far short of the relief that we're asking for in our complaint. 09:38:53

In order to fully protect our plaintiff in Tucson, 09:39:08

we're seeking permanent injunctive relief against the Pima County Attorney, her employees, agents and successors prohibiting enforcement of the ban.

That Pima County recognized the serious constitutional issues raised by our challenge and does not object to having a preliminary injunction issued while those issues are resolved does not come near to satisfying our overall request for relief. 09:39:24

Miss LaWall has not taken a position on the ultimate merits of the case, nor could any position that she takes in the course of this litigation bind her successors. In fact, unless the Pima County Attorney is bound by an function, she arguably is under an obligation to enforce the law. 09:39:40

So for the same reasons that Mr. LaWall was named as a defendant in the first place to seek full protection for the plaintiff physician who could be criminally prosecuted in Tucson, she must remain in the case until final resolution. 09:39:59

Our second grounds for opposing the motion is that the defendant incorrectly relies on Rule 12(b)(6) and Rule 21.

Defendants' citation to Rule 12(b)(6) is completely misplaced. That rule allows a defendant to seek dismissal when a plaintiff has failed to state a claim. It provides no basis for dismissing a defendant based on that defendant's position as to the merits of the claim asserted, nor does Rule 21 provide a basis for dismissal. 09:40:17 09:40:39

The purpose of Rule 21, which relates to misjoinder, is to allow the Court to drop parties who are not properly joined, and parties are not properly enjoined under Rule 20(a) if either the claims asserted do not arise out of the same transaction or occurrence or do not present some common question of law or fact. 09:41:01

If the test for permissive joinder is not satisfied, a court, in its discretion, may sever the misjoined parties so long as no substantial right will be prejudiced by the severance, and that comes from *Coughlin v. Rogers*, 130 F.3d at 1350, a Ninth Circuit case. 09:41:18

Here, both prongs for permissive joinder are met. Plaintiffs' claims against the defendants all arise out of the enforcement of the 20-week ban, and therefore defendant LaWall is not misjoined. 09:41:40

Moreover, it's clear that the Tucson plaintiffs' rights would be substantially prejudiced if defendant LaWall was dismissed. Without her presence, the Tucson plaintiff cannot obtain jury relief against potential criminal prosecution. 09:41:58

So we would ask the Court to deny the motion to dismiss Miss LaWall.

THE COURT: Let me go back to one of your earlier points, and that's concerning medical induction, and I thought, too, it had been referenced but you were quicker than 09:42:11

I was to locate it. It looks like that reference also answers a question, at least as of 2007, that I posed to you, but that portion says, and I'm quoting, "The doctor medicates the woman to induce labor and contractions occur to deliver the fetus, induction which unlike D&E should occur in a hospital can last as little as six hours but can take longer than 48. It accounts for about five percent of second trimester abortions before 20 weeks of gestation and 15 percent of those after 20 weeks." 09:42:40

At least as of '07, that kind of answers the question I asked you in terms of proportions. Agree? 09:43:05

MS. CREPPS: Yes, Your Honor. I don't know if -- I don't know if that statistic is still current because --

THE COURT: That's why I said it was as of '07.

MS. CREPPS: Yes. Thank you. 09:43:21

THE COURT: Thank you very much.

MS. CAMP: May we have just a moment?

MS. CREPPS: Your Honor, we're finished. Thank you.

THE COURT: Mr. Montgomery, at least as to your two motions, you're entitled to a reply. 09:43:50

MR. MONTGOMERY: Thank you, Your Honor, and I will be equally brief.

With respect to the motion to dismiss, again, focusing on the fact that functionally this is a facial challenge, you can call a duck a dog, it ain't going to bark. 09:44:06

So in this particular case, and even if we looked at the language that plaintiffs cited that as a general matter application to a specific set of facts would be an as-applied challenge, I wholeheartedly agree, and that's what we do not have here. 09:44:22

I would also point out that the reference to Dr. Wright's declaration or to the declaration within the State's exhibits regarding the accuracy of the ability to identify gestational age gives the Court all the more reason to reject plaintiffs' request for a preliminary injunction and 09:44:39 instead wait unless and until an as-applied challenge comes before the Court to then be able to see what is the specific gestational age, what are the specific risks, specific circumstances, and what is it that that particular patient wants to do. 09:44:58

The Court's been presented with half a sandwich this morning. We have the physician. We don't have the patient. And so we're left with hypotheticals with a big blank spot that the plaintiffs are hoping the Court will step into and assume the worst for the benefit of the plaintiff in meeting 09:45:11 their burden.

The reality is that they're all additional studies in the record for the legislative proceedings that the State did rely on in making its decision here, and I would note, too, that the State has not conceded that this regulation bans a 09:45:27

previability abortion. Viability is a moving target and it is dependent upon the specific circumstances.

The Court accurately noted earlier that when *Roe v. Wade* was first decided an infant at 27 weeks gestation would not have had the same consideration by the State as they would today, and the Court should not, by granting plaintiffs' preliminary injunction, condemn today the infant that might be saved tomorrow and instead should wait unless and until a specific as-applied challenge is brought before the Court. 09:45:49

Absent any questions from the Court, I'll move on to -- 09:46:08

THE COURT: You may.

MR. MONTGOMERY: Thank you, Your Honor.

With respect to the Pima County Attorney, whom I hold in high regard as a colleague in enforcing the criminal law here in Arizona, in this particular instance, as I've cited in the motion, there is a specific rule of civil procedure that would allow the Court, either on its own motion or on the motion of a party, to dismiss a party to the action. 09:46:16

Inasmuch as what is before the Court this morning, the Pima County Attorney does not oppose plaintiffs' motion or what the plaintiff seeks to do with respect to preliminary injunction and it would be appropriate for the Court to dismiss her. 09:46:33

THE COURT: I think Miss Crepps' point is that is a 09:46:47

concession that -- and at least it occurs to me that's also a concession that she is -- that the Pima County Attorney is not making with regard to a permanent function.

In other words, I guess what you're saying is she should be dismissed at this point but if there is a further hearing or trial on permanent injunction she might then have a place at the table. 09:47:08

MR. MONTGOMERY: Correct, Your Honor.

THE COURT: All right.

MR. MONTGOMERY: Thank you. 09:47:21

THE COURT: All right.

Solicitor General Cole.

MR. COLE: Nothing to add on behalf of defendant Horne.

THE COURT: All right. 09:47:30

Mr. Perrera, since your office is at least called into question here, do you have anything else to say?

I'm sorry. Miss Perrera. I apologize.

MS. PERRERA: Yes. Would you like me to approach the podium? 09:47:43

THE COURT: You may.

MS. PERRERA: Good morning. Thank you for the opportunity to respond.

THE COURT: Good morning.

MS. PERRERA: First, just for the record, I would 09:47:56

like to mention that Mr. Montgomery set this hearing, this motion for hearing, for today in contravention of the Rules of civil procedure. As I understand it, we should have been given more time.

THE COURT: I'm sorry. You said he set the hearing for -- 09:48:11

MS. PERRERA: I didn't see an order of the Court to sign setting it for today. I saw simply the notation on the motion itself setting it for today at this time. I didn't see a request to depart from the Rules of Civil Procedure. 09:48:28

THE COURT: I think you need to blame me. I think you --

MS. PERRERA: We're ready to proceed. I just wanted to make the record that that didn't happen.

The other thing that I would like to mention is that 09:48:41 clearly it's not -- it isn't clear who this motion -- Mr. Montgomery's motion is directed, whether it's directed to the plaintiff or whether it's directed for the response of defendant LaWall, and it certainly impacts defendant LaWall, but arguably it's -- it's the plaintiffs' burden to meet as to 09:48:58 whether she's properly joined defendant LaWall, which I think that she's competently defended.

As to defendant LaWall, defendant Montgomery's motion is a Rule 12(b)(6) motion, which is an affirmative defense, which is the plaintiff -- defendant LaWall's defense to raise, 09:49:18

not a defense that defendant Montgomery can raise on her behalf.

So defendant LaWall has specifically chosen not to raise the defense of failure to state a claim. Just because defendant LaWall agrees with the initial request for relief 09:49:36
does not mean that she does not deserve a seat at the table or that her positions and -- on the issues that are to be brought either by other defendants or the plaintiffs are not appropriate to be heard or not just.

So we would ask that you deny Mr. Montgomery's 09:49:55
motion, if not for those reasons for the reason that if you do not then you run the risk -- Arizona runs the risk of having disparate application of law across the state so that if the action is enjoined in Maricopa County but not in Pima we would have the obligation to proceed with enforcing the statute as 09:50:14
written today, whereas Maricopa may apply it differently, which would be inappropriate and unfair to the residents of Arizona.

Thank you.

THE COURT: Thank you very much. 09:50:29

Thank you, counsel. It's ordered taking these matters under advisement, and we're in recess.

(Proceedings recessed at 9:50 a.m.)

C E R T I F I C A T E

I, DAVID C. GERMAN, Official Court Reporter, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the proceedings and testimony reported by me on the date specified herein regarding the afore-captioned matter are contained fully and accurately in the notes taken by me upon said matter; that the same were transcribed by me with the aid of a computer; and that the foregoing is a true and correct transcript of the same, all done to the best of my skill and ability.

DATED at Phoenix, Arizona, this 26th day of July, 2012.

s/David C. German
DAVID C. GERMAN, RMR, CRR