No. 19-1685

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

AMY BRYANT, M.D., M.S.C.R., et al.,
Plaintiffs-Appellees,

v.

JIM WOODALL, et al.
Defendants-Appellants.

On Appeal From The United States District Court
For The Middle District Of North Carolina

BRIEF OF *AMICI CURIAE* STATES OF WEST VIRGINIA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, INDIANA, KANSAS, KENTUCKY BY AND THROUGH GOVERNOR MATTHEW G. BEVIN, LOUISIANA, MISSOURI, MONTANA, NEBRASKA, NORTH DAKOTA, OHIO, OKLAHOMA, SOUTH CAROLINA, TEXAS, AND UTAH, AND GOVERNOR PHIL BRYANT OF THE STATE OF MISSISSIPPI IN SUPPORT OF DEFENDANTS-APPELLANTS

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IDENTITY AND INTERESTS OF *AMICI CURIAE*

Amici curiae the States of West Virginia, Alabama, Alaska, Arizona[1], Arkansas, Indiana, Kansas, Kentucky by and through governor Matthew G. Bevin, Louisiana, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Texas, and Utah, and Governor Phil Bryant of the State of Mississippi have a significant interest in the outcome of this case. Like the State of North Carolina, *amici* States are interested in ensuring that the jurisdictional limits Article III of the U.S. Constitution places on federal courts remain strong. The Plaintiffs-Appellees in this case argued below that the abortion industry—and only that set of potential plaintiffs—benefits from a relaxed threshold to establish standing. App. 930 (citing App. 830-31). Although the district court correctly rejected this claim, the court erred nonetheless by finding that Plaintiffs-Appellees had shown a credible threat of enforcement. This permissive standard is at odds with governing case law, and would subject *amici* States to increased, unwarranted litigation if not reversed.

Moreover, like the State of North Carolina, *amici* States have a sovereign interest in protecting potential life, protecting unborn children capable of feeling pain, and protecting maternal health through the laws regulating abortions in their States. *Amici* are invested in the continued development of precedent in this critical

[1] Arizona has a similar statute to the law at issue, codified at Ariz. Rev. Stat. § 36-2159, which was enjoined in *Isaacson v. Horne*, 716 F.3d 1213 (9th Cir. 2013).

part of constitutional law because *amici* States—like North Carolina—also regulate in this area pursuant to important state legislative interests that the Supreme Court has repeatedly affirmed.

ARGUMENT

I. Plaintiffs-Appellees Lack Standing To Bring This Suit.

Inherent in the "difference between an abstract question and a 'case or controversy'" justiciable under Article III is the requirement that "[a] plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 297-98 (1979) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)). Plaintiffs-Appellees have not shown a realistic danger of prosecution under the challenged provisions, and the district court was wrong to conclude otherwise.

North Carolina prohibited abortion in 1881. *See* 1881 N.C. Sess. Laws 351. In 1973, the State modified this prohibition by passing a series of statutes regulating the circumstances in which abortions may be provided. These decades-old regulations provide that an abortion is permissible after a fetus's twentieth week of gestation only in certain, medically warranted circumstances. After forty-two years, the North Carolina General Assembly modified these regulations by amending the type of "medical emergencies" for which abortions may be performed after the

twentieth week of pregnancy. *See* N.C. Gen. Stat. §§ 14-44, 14-45, 14-45.1. Critically for this case, the twenty-week provision of the 1973 statute was never enforced before the 2015 amendment, and there is no credible threat of enforcement under the modified law, either.

A. Abortion Providers Do Not Have Special Solicitude To Challenge Statutes Without Demonstrating A Credible Threat Of Prosecution.

Perhaps anticipating the difficulty they would face under these facts in proving a threat of enforcement sufficient to establish Article III standing, Plaintiffs-Appellees argued in the district court that "the standing of abortion providers" to challenge abortion statutes is a *fait accompli* and "not open to question." App. 930 (quoting App. 840 (Pl. Mot. Summ. J.)). This initial argument—which would afford the abortion industry special solicitude to challenge unenforced statutes in federal court, despite Article III's demands in all other cases—is wholly without support. The district court correctly dispensed with this argument. App. 930. To the extent Plaintiffs-Appellees attempt to revive it here, this Court should do the same.

In the district court, Plaintiffs-Appellees cited a litany of cases in which courts determined that abortion providers had standing to challenge laws imposing criminal penalties in the abortion context. As the district court correctly explained, there is no "automatic right of standing to challenge an abortion regulation and 'imaginary or speculative' fears of prosecution are insufficient to confer standing." App. 930 (quoting *Younger v. Harris*, 401 U.S. 37, 42 (1971)). Indeed, none of the cases relied

on by the Plaintiffs-Appellees below support the proposition that abortion clinics are exempt from the requirement to show a "realistic danger" of enforcement. *Babbitt*, 442 U.S. at 298.

First, when properly read, two of the cases Plaintiffs-Appellees relied on below contradict their assertion. Plaintiffs-Appellees relied on *Doe v. Bolton*, 410 U.S. 179 (1973), particularly its statement that because "'[t]he physician is the one against whom these criminal statutes directly operate in the event he procures an abortion that does not meet the statutory exceptions and conditions,'" that physician "therefore 'assert[s] a sufficiently direct threat of personal detriment,' and 'should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.'" App. 839 (citation omitted). Yet far from establishing a blanket rule that abortion providers can *always* establish standing, the Court in *Doe* emphasized that—unlike here—the challenged statute had an established history of enforcement. *Doe*, 410 U.S. at 188-89. Indeed, the Court contrasted the statute at issue, which was "successor to another Georgia abortion statute under which, we are told, physicians were prosecuted," with a statute that "had been enacted in 1879, and, apparently with a single exception, no one had ever been prosecuted under." *Id.* (footnote omitted). The long pattern of non-enforcement here is akin to that latter statute, not the former.

Plaintiffs-Appellees' reliance below on *Diamond v. Charles*, 476 U.S. 54 (1986) (cited at App. 839), fails for similar reasons. *Diamond* expressly cabins *Doe*'s holding: "[a] physician has standing to challenge an abortion law that poses for him *a threat of criminal prosecution*." *Id.* at 65 (citing *Doe*, 410 U.S. at 188 (emphasis added)). Nothing in *Diamond* supports Plaintiffs-Appellees' theory of near-automatic standing.

Second, although Plaintiffs-Appellees' remaining authorities do not confirm the ordinary standing requirements as clearly as *Doe* and *Diamond*, they are similarly hostile to a special standing carve-out for the abortion industry. In one case, for example, the Supreme Court did not analyze the threat of enforcement question, but that was because standing was not disputed at the Supreme Court stage. *See Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983), *overruled on other grounds by Planned Parenthood of Se. Pa. v. Casey,* 505 U.S. 833 (1992) (cited at App. 839). Moreover, the district court record in that case makes clear that the plaintiffs had properly established standing because the "defendants st[ood] ready to enforce" the challenged law—not because of any abortion-specific rule. *Akron Ctr. for Reprod. Health, Inc. v. City of Akron*, 479 F. Supp. 1172, 1183 (N.D. Ohio 1979), *aff'd in part, rev'd in part,* 651 F.2d 1198 (6th Cir. 1981), *aff'd in part, rev'd in part sub. nom.*, 462 U.S. 416.

Similarly, Plaintiffs-Appellees cited two cases holding that abortion providers "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." App. 839 (quoting *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 62 (1976), *Colautti v. Franklin*, 439 U.S. 379, 383 n.3 (1979) (emphasis removed)). But to say that abortion providers have standing to challenge abortion regulations before they "undergo a criminal prosecution" is not to say that they have standing before the possibility of prosecution so much as crosses the horizon. Indeed, no party is required to "first expose himself to actual arrest or prosecution to be entitled to challenge [a] statute that he claims deters the exercise of his constitutional rights." *Babbitt*, 442 U.S. at 298 (citing *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)). But *every* plaintiff—abortion providers and otherwise—must demonstrate at least a credible threat of prosecution.

B. Plaintiffs-Appellees Have Not Demonstrated A Credible Threat Of Enforcement.

After being directed to brief a different theory than the special-solicitude approach discussed above, Plaintiffs-Appellees argued that they face a credible threat of prosecution under the forty-two-year-old regulation. Yet the district court was wrong to find standing under this late-offered approach because Plaintiffs-Appellees cannot establish standing under their alternate theory, either. A plaintiff can establish standing by showing "a credible threat of prosecution," that is, an objectively reasonable belief that the statute will be enforced against them. *Babbit*,

442 U.S. at 298. This fact-specific inquiry turns on three factors: the history of enforcement; whether plaintiffs' conduct is "ubiquitous, open, [and] public" so as to "quickly invite the attention of enforcement officials"; and statements from the enforcers either threatening or disavowing future enforcement. *Poe v. Ullman*, 367 U.S. 497, 502 (1961); *see also Babbit*, 442 U.S. at 298. The court misapplied this traditional standing analysis to find a credible threat of enforcement.

On the second element, the district court correctly found that Plaintiffs-Appellees could not show "open and notorious" violations of the regulation here. App. 953. Plaintiffs-Appellees did not identify any past or planned violations. And as all of their actions related to the challenged regulation are confidential medical procedures, it is unlikely they would make such a showing in the future. *Id*. The court, however, misconstrued the first and third elements about history of enforcement and the statements of those charged with enforcing the challenged regulation.

To begin, although noting that the historical record of prosecution showed "no prosecutions for over forty years," App. 950, the court all-but disregard this history of non-enforcement on the basis that the General Assembly's decision to amend the exemption showed new intent to start enforcing. This approach misses the mark, as the General Assembly is not an enforcement authority. In other words, the court looked to indications of *legislative* intent, both within North Carolina and without,

rather than the intent of the relevant *enforcers*. The court cited to cases supporting the general proposition that legislative amendments are presumed to have effect, App. 945-46 (citation omitted), and that changing "one aspect of a statutory scheme" "creates a reasonable presumption that other changes may follow," App. 949. And the Court noted that "numerous other" state legislatures had enacted "similarly-worded statutes" as evidence of the legislature's intent to increase enforcement. App. 959. But under our separation-of-powers system a State's legislature has no power to enforce its enactments. This power lies with the State's executive officers—including prosecuting attorneys and regulatory agencies. Enforcement power does not lie with the General Assembly, and certainly not with the legislatures of other States. The purported wishes of North Carolina's and other States' legislative branches does not help Plaintiffs-Appellees show a credible threat of enforcement here.

Similarly, the court gave short shrift to the unanimous statements of those who *do* have enforcement authority. The court acknowledged that all of the statements in the record regarding enforcement showed no present or future plans to enforce the regulation. App. 956. Nevertheless, without any overt evidence of enforcement in the past, present, or future, the court relied instead on extraneous factors to find a realistic threat of enforcement. Specifically, rather than crediting the express statements and sworn declarations of the relevant North Carolina enforcing officers,

the district court relied on the Defendants-Appellants' "vigorous defense" of the statute as an indicator of potential intent toward future enforcement. App. 961. This approach was doubly flawed. For one thing, the Defendants-Appellants' defense turned extensively (and in this Court exclusively) on Plaintiffs-Appellees' standing, rather than the constitutional merit of the challenged law. *See*, *e.g.*, App. 795 n.4, 796 (summarizing Defendants-Appellants' briefing on standing). For another, the district court's approach would place States in the untenable position of either not defending a validly enacted law, or effectively conceding standing if they do respond to a challenge in court. This catch-22 would eliminate the "credible threat of enforcement" doctrine—after all, if defending an unenforced statute against constitutional challenges were enough to constitute credible threat of enforcement, then the very act of raising the history of non-enforcement as a defense would defeat a State's reliance on that defense. [2]

Here, the district court was faced with a long-standing history of non-enforcement, a unified chorus of intent to continue that non-enforcement, and an acknowledged absence of "open and notorious" conduct; there was no need to look

[2] Treating the invocation of a defense as evidence that the defense does not apply is a quintessential "catch-22." *See* Joseph Heller, *Catch-22* 52 (1994 ed.) ("Anyone who wants to get out of combat duty isn't really crazy . . . [because] concern for one's own safety in the face of dangers that were real and immediate was the process of a rational mind. Orr was crazy and could be grounded. All he had to do was ask; and as soon as he did, he would no longer be crazy and would have to fly more missions." (quotation marks omitted)).

to the State's litigation position to shore up the gaps in Plaintiffs-Appellees' standing theory. This Court should reverse for failure to satisfy the standing requirements Article III demands.

II. The District Court Should Not Have Granted Summary Judgment On The Merits.

If this Court ultimately finds that Plaintiffs-Appellees had standing, it could—and should—still reverse the district court's ruling on the merits. Appellate courts often confine themselves to the error briefed by a petitioner; nevertheless, *amici* may raise significant constitutional issues that warrant *sua sponte* consideration. *See Mapp v. Ohio*, 367 U.S. 643, 646, n.3 (1961) (applying exclusionary rule to the States although such a course of action was urged only by *amicus curiae*). And although it is true this approach is disfavored where parties "have never had an opportunity to respond to [a] novel claim," *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 721 (2014), this prudential limitation does not apply here, where both parties briefed the constitutional merits of the challenged regulations extensively before the district court, App. 967-971, and the district court's opinion discussed these important issues of public policy in considerable depth, App. 963-973.

A. The Constitution Does Not Prohibit All Abortion Regulations Before The Point Of Viability.

The foundation of the district court's holding—that "a state is never allowed to prohibit any swath of pre-viability abortions outright," App. 965—is crumbling.

The Supreme Court does not treat the point at which an unborn child becomes viable as absolute, with all regulations of abortion prohibited before that point. Instead, the Court has long recognized that States have valid interests in regulating, and even restricting or banning, some abortions before viability. And in recent years, the Supreme Court has distanced itself further still from a categorical approach to viability like that the district court adopted here. Thus, even under existing Supreme Court precedent, strong and sweeping regulations at or after twenty weeks—when concerns about the mother's health reach their most severe level and unborn infants have the capacity to experience pain—are appropriate and fully constitutional exercises of state power, whether applied to abortions before or after viability.

1. The Supreme Court has consistently recognized and respected the principle that States have important interests that can justify certain restrictions on abortion before and after viability. Part of the "essential holding" of *Roe v. Wade*, 410 U.S. 113 (1973), is 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." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 846 (1992) (emphasis added). Consistent with this holding, in *Casey* a plurality of the Supreme Court rejected the "strict scrutiny" approach that courts had applied to abortion restrictions after *Roe*, and adopted instead a sliding-scale approach that considered whether a restriction posed an "undue burden." *Id.* at 875-78 (plurality op.). Indeed, *Casey* itself held

that Pennsylvania could prohibit a minor from receiving an abortion before the point of viability where the abortion was not in the minor's best interests and she was not mature enough to give informed consent. *Id.* at 899.

In *Gonzales v. Carhart*, 550 U.S. 124 (2007), the Court continued to retreat from viability as a constitutional talisman. Given an opportunity to reaffirm *Casey*, the *Gonzales* majority instead only "assume[d]" the principles from its plurality opinion. *Id.* at 146. It also emphasized that, "[w]hatever one's view concerning the *Casey* joint opinion," a "premise central to its conclusion" is that "the government has a legitimate and substantial interest in preserving and promoting fetal life"—and that this interest applies "from the outset of the pregnancy." *Id.* at 145 (quoting *Casey*, 505 U.S. at 846 (plurality op.)).

More striking still, *Gonzales* upheld a complete federal ban on partial-birth abortions at *every stage* of pregnancy—pre- and post-viability—except where necessary to save the mother's life. *Id.* at 141-42. The Court's reasoning in *Gonzales* can thus "be read to eliminate the significance of viability as a marker" by which to judge the constitutionality of state abortion laws. Khiara M. Bridges, *Capturing the Judiciary:* Carhart *and the Undue Burden Standard*, 67 WASH. & LEE L. REV. 915, 941 (2010); *see also MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 774 (8th Cir. 2015) ("the Court's viability standard has proven unsatisfactory

because it gives too little consideration to the 'substantial state interest in potential life throughout pregnancy'" (quoting *Casey*, 505 U.S. at 876 (plurality op.))).

Similarly, the Supreme Court's recent decision in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), reiterated that the appropriate standard by which to weigh state abortion laws is not a bright-line viability rule, but (at least in some contexts) a sliding scale that considers "the burdens a law imposes on abortion access" "together with the benefits those laws confer." *Id.* at 2309. The *Hellerstedt* balancing test strikes down a law only if the burdens of the law substantially outweigh its benefits. *See Planned Parenthood v. Jegley*, 864 F.3d 953, 960 n.9 (8th Cir. 2017). Thus, viability is not dispositive in challenges to abortion restrictions; it is simply one data point when weighing the strong interests supporting a state abortion law.

2. Consistent with these principles, the fact that some or even many pregnancies have not reached the point of viability by twenty weeks is not—as the district court held, App. 969—fatal to North Carolina's law. The State's prohibition on abortions after this gestational stage is justified by at least three important interests.

First, North Carolina's twenty-week abortion law embodies the State's strong interest in protecting maternal health. States have "a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances

that insure maximum safety for the patient." *Hellerstedt*, 136 S. Ct. at 2309 (quoting *Roe*, 410 U.S. at 150). Available scientific studies show that abortions are considerably more dangerous for the mother after twenty weeks.

Specifically, the risk of maternal death from an abortion is nearly ninety times greater after the twenty-week mark than for early-term abortions. L. Bartlett, et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103:4 OBS. & GYN. 733 (2004). Twenty weeks is also the point where the risk of major complications from an abortion reaches its highest. J. Pregler & A. DeCherney, *Women's Health: Principles and Clinical Practice* 232 (2002). And late-term abortions are frequently accompanied by higher risks to women's mental health. *See* P. K. Coleman, *Abortion and Mental Health: Quantitative Syntheses and Analysis of Research Published 1995–2009*, 199 Brit. J. Psychiatry 180–86 (2011). North Carolina's law reflects a valid and considered judgment that its interest in protecting women's health warrants restricting abortions during the period in which they pose significantly heightened risk.

Second, States have a substantial interest in protecting unborn children capable of feeling pain. Since *Roe* was decided, scientific advances have made it clear that "a baby develops sensitivity to external stimuli and to pain much earlier than was then believed." *McCorvey v. Hill*, 385 F.3d 846, 852 (5th Cir. 2004) (Jones, J., concurring). In *Gonzales*, the Supreme Court affirmed the federal government's

interest in promoting "respect for the dignity of human life" by prohibiting a method of abortion that could "further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life." 550 U.S. at 157 (citation omitted). As our understanding of the early stages at which a fetus is capable of feeling pain deepens, it also becomes increasingly apparent that the interest in respect for human dignity must extend not only to particularly troubling abortion methods, but also to abortions after the point an unborn child experiences pain.

Indeed, compelling evidence now exists that fetuses feel pain as early as twelve weeks. *See*, *e.g.*, Teresa Stanton Collett, *Fetal Pain Legislation: Is It Viable?*, 30 PEPP. L. REV. 161, 166-67 (2003) (citing Parliamentary Office of Science & Tech., *Advice to the Department of Health*, in Fetal Awareness 2 (Feb. 1997), http://www.parliament.uk/post/pn094.pdf); *see also* K.J. Anand & P.R. Hickey, *Pain and Its Effects in the Human Neonate and Fetus*, 317 New Eng. J. Med. 1321 (1987). At the very least, by twenty weeks a fetus has developed the neural functions necessary to recognize and feel pain. *See* Ritu Gupta et al., *Fetal Surgery and Anaesthetic Implications*, 8 Critical Care & Pain No. 2, at 71 (2008), *available at* https://academic.oup.com/bjaed/article/8/2/71/338464.

Any uncertainty in the scientific community about the precise point at which the unborn experience pain does not undermine the importance of North Carolina's interest in preventing fetal pain. Courts must give "state and federal legislatures

wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales*, 550 U.S. at 163. In particular, "the existence of medical or scientific uncertainty regarding . . . fetal capacity to feel pain does not preclude the [state] legislature from" determining how and when to allow abortions. *Isaacson v. Horne*, 716 F.3d 1213, 1229 (9th Cir. 2013) (citing *Gonzales*, 550 U.S. at 163-64).

Third, North Carolina's statute is buttressed by the government's "legitimate and substantial interest in preserving and promoting fetal life." *Gonzales*, 550 U.S. at 145. Even *Casey* "reaffirmed" that "[t]he government may use its voice and its regulatory authority to show its profound respect for the life within the woman." *Id* at 157. And although the *Casey* plurality did not find a general interest in unborn life sufficient to uphold laws prohibiting abortion before viability, 505 U.S. at 845, this interest becomes more compelling when combined with the independent state interests discussed above, and especially where the law at issue restricts abortions at or at least within a few weeks of viability. *See MKB Mgmt. Corp.*, 795 F.3d at 771 (explaining that "evolution in the Supreme Court's jurisprudence reflects its increasing recognition of states' profound interest in protecting unborn children").

Further, the lengthy history of state wrongful death statutes, common-law tort doctrines protecting fetal life, and fetal homicide laws underscores that States have long considered the protection of human life—at all stages—to be an important interest. Courts' repeated refusal to impose an arbitrary line at viability when

assessing the legitimacy of a State's interest in these contexts highlights the importance of the interest here as well.

At least since 1946, American courts have recognized that a fetus has a separate existence from its mother and that a child born alive could recover in tort for injuries occurring before birth. And in many instances recovery was not limited by the gestational point when the injury occurred. In *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946), for example, the U.S. District Court for the District of Columbia held that a child born alive could maintain a tort action for injuries suffered before birth. *Id.* at 139–41. Although the fetus in *Bonbrest* was viable at the time of injury, the court placed no weight on this fact because "a non-viable foetus is not a part of its mother" any more than a viable unborn child. *Id.* at 140.

By 1960, at least eighteen states had similarly recognized that a child subsequently born alive could recover in tort for injuries that occurred prior to the child's birth. *Sinkler v. Kneale*, 164 A.2d 93, 95 (Pa. 1960); *see also Sylvia v. Gobeille*, 220 A.2d 222, 223 (R.I. 1966) (explaining that "there is no sound reason for drawing a line at the precise moment of the fetal development when the child attains the capability of an independent existence"). As another example, the Supreme Court of New Jersey recognized that an unborn child has a separate legal existence and found "no reason for denying recovery for a prenatal injury because it occurred before the infant was" able to survive on his or her own. *Smith v. Brennan*,

157 A.2d 497, 504 (N.J. 1960). The court noted that in other areas of the law, such as in criminal law and inheritance law, an unborn child was already recognized as a separate entity, *id.* at 502 (citation omitted), and rejected the notion that recovery turns on viability because such a "distinction has no relevance to the injustice of denying recovery for harm which can be proved to have resulted from the wrongful act of another," *id.* at 504.

These doctrines persist in state tort law today. The Pennsylvania Supreme Court, for instance, concluded in 1960 that viability has "little to do with the basic right to recover, when the foetus is regarded as having existence as a separate creature from the moment of conception," *Sinkler*, 164 A.2d at 96, and expressly reaffirmed this principle at least as recently as 1985, *Amadio v. Levin*, 501 A.2d 1085, 1087 (W. Va. 1985).

Similarly, state courts have repeatedly held that state wrongful death statutes do not depend on viability. *See*, *e.g.*, *Farley v. Sartin*, 466 S.E.2d 522, 533 (W. Va. 1995) (holding that West Virginia's wrongful death statute applies pre-viability, because justice would be denied were "a tortfeasor . . . permitted to walk away with impunity because of the happenstance that the unborn child had not yet reached viability"); *66 Fed. Credit Union v. Tucker*, 853 So.2d 104, 114 (Miss. 2003) (holding that "[v]iabiltiy is not the appropriate criterion to determine whether the unborn is a 'person' within the context of the wrongful death statute"). At least

twenty-three States have adopted fetal homicide laws, applying before and after viability.[3] For example, Alabama law defines a person for purposes of "criminal homicide or assault" as "a human being, including an unborn child in utero at any stage of development, regardless of viability." Ala. Code § 13A-6-1(a)(3). Similarly, Utah's criminal homicide statute protects "an unborn child at any stage of its development." Utah Code Ann. § 76-5-201(1)(a). And "individual" for purposes of the Texas Penal Code is defined as "a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth." Tex. Penal Code § 1.07(a)(26).

B. North Carolina's Restriction On Abortions After Twenty Weeks Is Fully Consistent With Even A Broader View Of Supreme Court Precedent.

North Carolina's law withstands constitutional scrutiny on the basis of the strong state interests animating the law, regardless whether applied before or after viability. *Supra* Part II.A. Further, even accepting the district court's view that a prohibition on pre-viability abortions could never be consistent with current Supreme Court precedent, App. 969, that would still not be a reason to invalidate North Carolina's law. Even under that incorrect understanding of the role viability plays in the analysis, North Carolina's law does not "place a substantial obstacle in

[3] *See* Nat'l Conf. State Legislatures, *Fetal Homicide Laws* (May 1, 2018), http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx.

the path of a woman seeking an abortion before the fetus attains viability." *Gonzales*, 550 U.S. at 146 (quoting *Casey*, 505 U.S. at 879). The "benefits" of the law discussed above well outweigh the "burdens" it "imposes on abortion access." *Hellerstedt*, 136 S. Ct. at 2309.

Like the statute at issue in *Gonzales*, the North Carolina statute does not prohibit all pre-viability abortions. North Carolina generally permits abortions prior to twenty weeks, which is when the vast majority of abortions occur. Indeed, over 89% of abortions occur during the first twelve weeks, and over 98% of abortions occur by week twenty. Guttmacher Institute, *Induced Abortion in the United States* at Fig. 2 (Jan. 2018), https://www.guttmacher.org/fact-sheet/induced-abortion-united-states. This means the North Carolina law would apply to the 1.3% of abortions performed later than twenty weeks. *Id.*

Further, as the Supreme Court has acknowledged, rapid advancements in medical science are pushing the point of viability ever earlier. *MKB Mgmt. Corp.*, 795 F.3d at 774 (citing *Casey*, 505 U.S. at 860). Some studies have shown that the proportion of live births at the twenty-week mark has increased to as much as 12%.[4] Accordingly, the already small number of post-twenty week abortions will continue

[4] *E.g.*, P.I. Macfarlane et al., *Non-Viable Delivery at 20–23 Weeks Gestation*, 88 Archives of Disease in Childhood—Fetal and Neonatal Edition issue 3, at F199 (2003), *available at* http://fn.bmj.com/content/88/3/F199.

to shrink, because States indisputably retain the "power to restrict abortions" after viability. *Gonzales*, 550 U.S. at 145 (quoting *Casey*, 505 U.S. at 846).

Thus, even under the district court's incorrect view, the consequences of the North Carolina law cannot be said to place a "substantial obstacle" for a woman seeking a pre-viability abortion. In contrast, for example, to a state ban on the "then-dominant second-trimester abortion method," *Gonzales*, 550 U.S. at 165, that the Supreme Court found unconstitutional because it inhibited "the *vast majority of abortions* after the first 12 weeks," *Danforth*, 428 U.S. 79 (emphasis added), the law here affects under two percent of abortions. *See also*, *e.g.*, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 598 (5th Cir. 2014) (upholding law that would cause abortion clinics to close where "more than ninety percent" of women seeking abortions would be unaffected because they would still "be able to obtain the procedure within 100 miles of their respective residences"); *Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 464 (5th Cir. 2014) (Garza, J., dissenting) ("[N]early sixty percent of Mississippi women who obtained abortions already traveled to other states for those services[,] [t]hus, the Act would likely not impose any undue burden on their access to those very same out-of-state providers." (footnote omitted)).

Finally, North Carolina's exception to the twenty-week prohibition where an abortion is necessary to avoid death or serious health risks to the mother is more

permissive than other statutes the Supreme Court has affirmed. Under the North Carolina law, post-twenty week abortions are permitted in "medical emergencies," where abortion is necessary "to avert [the mother's] death or for which a delay will create serious risk of substantial and irreversible physical impairment of a major bodily function." N.C. Gen. Stat. § 90-21.81(5). By contrast, the law upheld in *Gonzales* permitted partial-birth abortions only where "necessary to save the life of the mother," 550 U.S. at 141 (quoting 18 U.S.C. § 1531(a)), and even where there was "medical uncertainty" whether the prohibited procedure was often "the safest method of abortion," *id.* at 161. When weighed against the grave importance of the State's interests at and beyond twenty weeks in protecting the health of the mother, safeguarding unborn children from pain, and promoting potential life close to viability, North Carolina's restriction is well within the Constitution's bounds.

CONCLUSION

The court should reverse the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations for an *amicus* brief on the merits because, excluding the parts of the document exempted by Fed. R. App. R. 32(f), this brief contains less than 6,500 words. This brief complies with the typeface and type style requirements because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

/s/ Lindsay S. See
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I certify that on September 3, 2019, the foregoing document was served on counsel of record for all parties through the CM/ECF system.

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