ARIZONA SUPREME COURT

PLANNED PARENTHOOD ARIZONA, INC., et al., Plaintiffs/Appellants, v. KRISTIN MAYES, Attorney General of the State of Arizona, et al., Defendants/Appellees, and ERIC HAZELRIGG, M.D., as guardian ad litem of all Arizona unborn infants; DENNIS McGRANE, Yavapai County Attorney, Intervenors/Appellees.	Supreme Court No. CV-23-0005-PR Court of Appeals Division Two No. 2 CA-CV 2022-0116 Pima County Superior Court No. C127867

BRIEF OF MARIO VILLEGAS AND THE ESTATE OF BABY VILLEGAS AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR REVIEW

Pursuant to Ariz. R. Civ. App. P. 16, Amici Certify that no counsel for a party wrote any portion of this brief, and that no party provided any compensation for this brief. Amici received written consent to file this brief from all parties.

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INTEREST OF AMICI CURIAE

Mario Villegas ("Mario") and the Estate of Baby Villegas ("Estate") are tort claimants in Gila County Cause # CV2019-094945, now pending in Globe, Arizona. Theirs is a lawsuit seeking statutory and common law relief against Jackrabbit Family Medicine, et al, ("Jackrabbit") for wrongfully aborting Mario's unborn child, Baby Villegas, in violation of A.R.S. § 36-2153. Jackrabbit is an abortion provider operating a clinic in Phoenix. The abortion happened in mid-2018.

Mario and the Estate sued because Jackrabbit failed to satisfy the informed consent requirements of A.R.S. § 36-2153, which invalidated the consent of the child's mother, M.S.V. Without M.S.V.S's valid consent, Defendants' had no legal right to perform the abortion. Mario and the Estate ("Plaintiffs") claim statutory and common law remedies, including money damages, statutory penalties, punitive damages, attorneys fees, and costs. Plaintiffs claim in their lawsuit that Defendants' unlawful abortion eliminated any constitutional protection they may have had under *Roe v. Wade*, 410 U.S. 113 (1973), rendering *Roe* moot in their case.

Plaintiffs believe that Arizona tort law presents a unique perspective that will aid the Court in determining whether the "harmonization" by the Court of Appeals was proper.

INTRODUCTION

Plaintiffs will focus on one theory only in support of the Petition for

Review, although they support the other arguments made by Dr. Hazelrigg, Yavapai County, and the other Amici.

Plaintiffs believe that the unborn are "persons" within the meaning of Ariz. Const. art. II, § 4. Therefore, any statute left standing by the lower court's "harmonization" that allows the unborn to be aborted, except to preserve the life of the mother, is unconstitutional because it violates the right of the unborn to continue living, guaranteed by the Arizona Constitution. Likewise, any statute that prohibits an abortion when the pregnancy threatens the mother's life would violate her right to live. Only A.R.S. § 13-3603, Arizona's criminal code ban of elective abortions, affords both the unborn and her mother due process.

For that reason alone, the "harmonization" of statutes by the Court of Appeals was reversible error because it left intact unconstitutional statutes in Title 36 that allow elective abortions, when the mother's life is not in jeopardy.

During the *Roe* era, federal constitutional law trumped state constitutional law, and held that maternal rights must trump fetal rights, even when the mother's life is not threatened. The law in Arizona before *Roe*, however, was that the rights of the unborn and her mother were in parity, neither one above the other, as long as there was no threat to the life of either. In that situation, the law "*balanced the interest of the mother against the interest of the fetus" . . . and "opted in favor of the fetus.*" Nelson v. Planned Parenthood Ctr. of Tucson, Inc., 19 Ariz. App. 142, 149, 505 P.2d 580 (1973). But when the rights to live of the two were in conflict, i.e., when the pregnancy threatened the mother's life, and she wanted an abortion, maternal rights trumped fetal rights.

This affords due process to both, given the complex relationship involved. It

is analogous to the criminal law's rule of "self-defense", or "justifiable homicide". A mother should not be forced to sacrifice her life for her unborn child.

When Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 213 L. Ed. 2d 545 (2022) sent abortion law back to the States, the Arizona Constitution became the controlling authority, and *Roe's* interpretation of the US Constitution was moot, on this issue. If the unborn are persons within the meaning of the Arizona Constitution, along with all other members of the human family, then no statute may elevate a mother's right to an elective abortion above her unborn's right to live.

Plaintiffs are not aware of any Arizona case that has construed Arizona's due process clause to include the unborn, one way or the other. Plaintiffs invite the Court to consider and rule on this issue now.

ARGUMENT

I. Unborn children are "persons" within the meaning of Ariz. Const. art. II, § 4.

Plaintiffs will draw upon a few of the principles discussed by Justice Clint Bolick in his excellent article, "*Principles of State Constitutional Interpretation*", including the "Gunwall factors" he mentions that are outlined by the Washington Supreme Court in State v. Gunwall, 106 Wash. 2d 54, 720 P.2d 808, 811 (1986).

A. The "Primacy" and "Serious Examination" principles require interpretation of the Arizona Constitution on its own merits.

Roe's interpretation of the 14th Amendment, holding that the unborn are not persons entitled to due process, no longer controls in Arizona. This Court should not

interpret the Arizona Constitution in lockstep with *Roe's* holding, absent compelling reasons to do so. A few of the Gunwall factors, the text, preexisting state law, and constitutional history of our state Constitution, require a different interpretation.

Roe considered the word "person" as used in the US Constitution, at page 157:

> *But in nearly all these instances, the use of the word is such that it has application only postnatally. None indicates, with any assurance, that it has any possible pre-natal application.*

In reality, many of these constitutional uses of the word person that considered by *Roe* do not apply to newborns either, yet no one would contest that newborns are persons entitled to due process of law. These include among other uses, the use of person in connection with the qualifications for legislators, President, and electors.

Similarly, the Declaration of Rights in Arizona Constitution uses the word "person" to define many rights that apply to different classes of Arizona residents, including "victims" of crimes (§ 2.1), the right to life (§ 4), the right of petition and of assembly (§ 5), freedom of speech and press (§ 6), oaths and affirmations (§ 7), right to privacy (§ 8), the privilege against self-incrimination (§ 10), and the right not to have laws passed that limit the amount of damages recoverable for death or injury (§ 31).

Both newborns and the unborn in their present state can be victims of crimes, and can be injured or killed, but neither have the legal or physical capacity to "qualify" for the other rights that older persons can. However, if allowed to continue living, both will assume all the other rights guaranteed by the Declaration of Rights.

The Court of Appeals in Nelson, 19 Ariz. App. 142, stated, at page 149:

"One cannot gainsay a legislative determination that an embryonic or fetal organism is 'life.' Once begun, the inevitable result is a human being, barring prior termination of the pregnancy."

A favorite phrase in the abortion debate is "potential life," which distorts the discussion rather than clarifying it. Even *Roe's* concession that a viable fetus has a right to protection is an arbitrary line that cannot be justified by science. In Plaintiffs' case, Mario's wrongfully aborted unborn child, now represented by her Estate, even though she was "pre-viable" when aborted, had a 90% likelihood of successfully delivering at term. She was not "potential life", but probable life, a genetically unique and distinct human being, entitled to due process before being born, as much as after being born.

The real issue is where along the unborn's "inevitable" path to adulthood, should the offspring of human beings be entitled to due process? After all, declared in the Declaration of Independence, Mario's unborn child was endowed by those who created her, the living parents who conceived her, with the same right to life they enjoyed, an "inalienable" right to continue living once life started. Why should a newborn be entitled to due process, but the unborn not?

B. The "Independent Meaning" and "Originalist" Principles, and the text, require construction of the word "person" to include the unborn.

Justice Bolick counsels:

Where the text's meaning is clear—which it often is not, given the general wording typically used in constitutional text—we should enforce it as written. If not, we should examine the original public meaning of the words as understood by the drafters and people at the time of adoption.

Besides the text, the *Gunwall* Court suggests considering preexisting state law.

By the time the Arizona Constitution was ratified in 1912, the State's abortion ban had been on the books for almost 50 years. The first version is found in what was called the "Howell code" adopted in 1864, and its text is much the same as the current version, A.R.S. § 13-3603. The Howell code can be found at https://azmemory.azlibrary.gov.

Surely, the framers of the Arizona Constitution, and the citizens of the State who ratified it, were aware that Arizona had banned abortion since 1864 except when necessary to preserve the life of the mother. Surely it is reasonable to conclude that this long-standing abortion ban was meant to protect the unborn, just like the rest of the human family. Surely this law informed the Framers' use of the word "person" in the due process clause, and also informed the Arizona citizens who ratified it.

As Justice Bolick states, at page 787 of his article:

> *"The converse of the maxim for the preceding principle is also true: where our constitution's framers adopted language from the federal constitution, we may presume that they did so deliberately, and intended to adopt its meaning as they understood it. However, this emphatically does not mean that they intended to hitch interpretation of the state constitution to evolving Supreme Court jurisprudence. Rather, the meaning was established at the time the provision was adopted. "The meaning of a writing or saying is in part a function of the context in which the communication occurs; the relevant context is the context at the time of writing or saying."*

The only way to change the meaning of a constitutional phrase is to amend it. *Roe's* interpretation of the US Constitution can't do it, nor can well-meaning experts, the media, or abortion providers, who are financially invested in preserving the right to abortion after *Roe*. Likewise, This Court should not be persuaded by the cultural debate about abortion today, because the intent of the citizens of Arizona who ratified the Constitution in 1912 controls.

There have been no amendments to change the original meaning of the due process clause as understood by the framers and citizens of Arizona in 1912.

II. Affording the unborn due process of law is the best way to balance the rights and duties of everyone involved in the abortion controversy.

A. Determining that the unborn are entitled to due process helps ensure the integrity of the medical profession by clarifying the duties of physicians and the rights of their patients.

It is typical in the abortion debate to talk about one's rights, but not one's duties. It is in the area of duties that Arizona tort law has something relevant to contribute, because tort law always starts an analysis of duty.

Rights and duties are inter-related and reciprocal. Every right that one person claims imposes a duty on another person to protect that right. Similarly, every duty a person owes to another invests the other person with a right to enforce that duty.

In the field of medicine, doctors owe patients a duty to inform them before performing any medical procedure. Patients have a corresponding right to be fully informed, and to consent or not consent based on the disclosed risks and benefits. Each person gets to choose for herself whether or not to undergo life-threatening medical care, a choice sometimes called a "patient's right of self-determination." Duncan v. Scottsdale Med. Imaging, Ltd., 205 Ariz. 306, 314, 70 P.3d 435 (2003).

Parents own the legal right to choose medical care for their minor children, including the unborn, who have no legal capacity to choose. That right imposes on parents a duty to choose what is best for the child. The physician owes both child and parents a duty of care which parents may enforce.

Of all the actors in the abortion drama, only the unborn owe no duties to anyone, but are owed duties of care by everyone. However, an unborn child has no voice, except that of her parents, and in the case of her death, her probate estate.

When *Roe* dictated to Arizona that a mother's right to choose trumps her unborn child's right to live, when her life is not at stake, it effectively nullified the mother's duty to her unborn child, and her doctors' duties to the unborn. But it also created an irreconcilable conflict of interest in the practice of medicine.

It is well-settled law in Arizona that a doctor who treats a pregnant woman has two patients, the mother and her unborn child, and owes a duty of care to both. As stated in Summerfield v. Superior Ct. In & For Maricopa Cnty.,144 Ariz. 467, 470, 698 P.2d 712 (1985):

> *"By contrast, in the case at bench, the defendants had undertaken a direct duty of care to the fetus as well as to the mother and, plaintiffs contend, should be held liable to each for breach of the duty. We agree that the foreseeable risk of harm imposed such a dual duty upon the defendants."* Summerfield, 144 Ariz. at 470.

The *Summerfield* Court construed the word "person" in the wrongful death statute to include "a stillborn, viable fetus." *Summerfield* considered the cultural debate of "when life begins", but recognized that the legislature should determine the scope of the wrongful death statute, stating, at page 479:

> *"We hold, therefore, that absent a clear and definitive demonstration of legislative intent to the contrary, the word "person" in the wrongful death statutes (A.R.S. § 12–611 et seq.) encompasses a stillborn, viable fetus."*

This language implies that the wrongful death statute's definition of a "person" would be expanded to include "pre-viable" children if the legislature demonstrated a *"clear and definitive demonstration of legislative intent"* to do so. A.R.S. § 36-2153 demonstrates that intent. Its statutory remedies for wrongful abortion are the same for all unborn children, viable or pre-viable, and are

essentially the same as those A.R.S. § 12-611 provided for viable, unborn children, as construed by *Summerfield*.

It begs reason to argue that the Legislature intended to provide the remedies of A.R.S. § 36-2153 to pre-viable children, and yet deny pre-viable children other statutory and common law remedies available to viable children, especially given this language of A.R.S. § 36-2153(K): "*In addition to other remedies available under the common or statutory law of this state . . .*"

Therefore, when *Roe* mandated abortion rights , it upended the balance between medical providers' duties and patients' rights that existed before. The Court of Appeals perpetuated this irreconcilable conflict by allowing Title 36 statutes that allow elective abortions, to stand. How can a physician honor her duties to both mother and child if the mother asks for an abortion?

Abortion providers want to resolve this conflict by simply eliminating their duty to the unborn, but that only creates more conflict. It nullifies the duty a mother owes to her unborn child to choose what is best for the child, and a father's duty to parent his child. It also nullifies the parents' right to sue the doctor for malpractice under A.R.S. § 12-611, if the child is unlawfully killed, and the right of the child's Estate to sue, under A.R.S. § 14-3110. These are a few of the real-world consequences of the lower court's harmonization of Arizona statutes, some of which should be declared unconstitutional toward the unborn.

A.R.S. § 13-3603 is the only statute "harmonized" by the Court of Appeals that does not wreak havoc on Arizona's long-standing medical provider duties of care and corresponding tort law rules. If the lower Court's decision is left standing, the resulting havoc will have to be sorted out and rectified, sooner or later.

The best solution to this dilemma is to afford all unborn due process of law under the Arizona Constitution.

B. Determining that the unborn are entitled to due process resolves the reversable error of the Court of Appeals below.

Construing the unborn to be constitutional "persons" harmonizes State law and policy with the Arizona Constitution. Plaintiffs agree with the arguments of other Amici about the State's policies toward the unborn and the effect *Roe* has had on the State's ability to enforce its policies.

But Plaintiffs believe the best way to correct the reversable error of the Court of Appeals is to interpret the Arizona's due process clause to extend its right to life guarantee to the unborn at all stages of gestation.

Plaintiffs respectfully urge the Court to so rule.

Dated October 4, 2023.

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