No. 14-1891

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOSEPH M. BECK, et al APPELLANTS

v. No. 14-1891

LOUIS JERRY EDWARDS, et al APPELLEES

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

THE HONORABLE SUSAN WEBBER WRIGHT
UNITED STATES DISTRICT COURT JUDGE

APPELLANTS' PETITION FOR REHEARING EN BANC

Respectfully submitted,

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I. INTRODUCTION

Appellants hereby petition for rehearing en banc pursuant to Rule 35 of the Federal Rules of Appellate Procedure because the panel decision conflicts with the decisions and reasoning of the United States Supreme Court in *Gonzales v. Carhart*, 550 U.S. 124 (2007), and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), and because the panel decision conflicts with the decisions and reasoning of this Court in *Planned Parenthood of Minn., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (en banc) and *Planned Parenthood of Minn., N.D., S.D. v. Rounds*, 686 F.3d 889 (8th Cir. 2012) (en banc).

Appellants additionally petition for rehearing en banc because this case presents the following question of exceptional importance: Whether a State may constitutionally restrict pre-viability abortion after the first trimester when the State has statutorily eliminated the burden of unwanted parenthood upon a pregnant woman who does not choose to have an abortion. This question of exceptional importance has not been addressed by the United States Supreme Court or by this Court, and was not addressed by the panel.[1]

[1] Pursuant to Local Rule 40A, every petition for rehearing en banc is automatically deemed to include a petition for rehearing by the panel. Pursuant to Rule 40(a)(2) of the Federal Rules of Civil Procedure, Appellants contend that the panel misapprehended *Gonzalez*, *Casey*, and *Rounds I* & *II*, and overlooked this question of exceptional importance in the panel decision.

Arkansas Act 301 of the 2013 Regular Session of the 89th General Assembly of Arkansas ("Act 301") provides that prior to performing an abortion, a physician must perform an abdominal ultrasound test to determine if the fetus possesses a heartbeat. Ark. Code Ann. § 20-16-1303. A fetal heartbeat test is not required in the case of a medical emergency. Ark. Code Ann. §§ 20-16-1302(6) & 20-16-1303(c)(1)(A)(ii). If a fetal heartbeat is not detected, then Act 301 provides no further regulation of abortion. Ark. Code Ann. § 20-16-1305(a)(2). Abortions are not regulated by Act 301 at any stage of pregnancy if an abortion is necessary to save the life of the mother, if the pregnancy results from rape or incest, or if there is a medical emergency. Ark. Code Ann. § 20-16-1305(b). If a fetal heartbeat is detected by the ultrasound test and no exceptions apply, the physician must make certain informational disclosures to the pregnant woman. Ark. Code Ann. § 20-16-1303(d) & (e). Finally, Act 301 prohibits abortions after both twelve weeks' gestation and the detection of a heartbeat, except for abortions necessary to protect the life of the pregnant woman, abortions of pregnancies arising from rape or incest, and abortions in medical emergencies. Ark. Code Ann. §§ 20-16-1303(d)(3), 20-16-1304, and 20-16-1305.

The Appellees challenged Act 301 in its entirety. The district court permanently enjoined the provision of Act 301 that prohibits abortions where a fetal heartbeat is detected and the fetus has attained twelve weeks' gestation (with

enumerated exceptions), and the related provisions (Ark. Code Ann. § 20-16-1304(a) & (b) and Ark. Code Ann. § 20-16-1303(d)(3)). (Add. 22; App. 66) The district court determined that the informed consent provisions (Ark. Code Ann. § 20-16-1303) are constitutional. *Id*.

On appeal, the panel of this Court affirmed, holding that "[b]y banning abortions after 12 weeks' gestation, the Act prohibits women from making the ultimate decision to terminate a pregnancy at a point prior to viability." Entry ID 4278822, p. 5. The panel noted that "[a]s an intermediate court of appeals, this court is *bound* by the Supreme Court's decisions in *Casey* and the 'assum[ption]' of *Casey*'s 'principles' in *Gonzales*. *Id*. at 6 (emphasis in original). The panel rested its decision entirely upon the lack of proof that a fetus is "viable" at twelve weeks' gestation, while simultaneously admitting that "undeniably, medical and technological advances along with mankind's ever increasing knowledge of prenatal life since the Court decided *Roe v. Wade*, 410 U.S. 113 (1973) and *Casey* make application of *Casey*'s viability standard more difficult[.]" *Id*. Despite this admission by the panel, the panel ignored the argument, presented at length by Appellants and supporting *amici*, that the *Roe* viability standard is no longer a bright-line rule, and that restriction of abortion prior to viability is now permissible in light of *Gonzales*. Quoting other cases, the panel noted that the viability standard is "clearly on a collision course with itself" and that "the viability

standard is mov[ing] further back toward conception" (*id*.), but the panel ignored Appellants' argument that recent Supreme Court decisions suggest an express change in the *Roe* viability standard. The panel went to great length to outline deficiencies in the viability standard, such as the fact that case-by-case determinations change over time based upon medical advancements and the fact that the viability standard requires legislative speculation (*id*. at 8), but the panel completely ignored Appellants' arguments that the viability standard is arbitrary and has in fact been expressly abandoned in recent Supreme Court jurisprudence. The Court should rehear this case en banc for the reasons discussed in this petition.

II. THE PANEL DECISION CONFLICTS WITH THE DECISIONS AND REASONING IN *CASEY*, *GONZALES*, AND *ROUNDS*.

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

The Supreme Court has never referred to the viability standard set forth in *Roe* as a "bright-line" rule. To the contrary, the Court has repeatedly qualified the *Roe* viability standard to allow increasing regulation of abortions, including regulation of abortions prior to viability. The panel decision in this case misinterprets binding precedent from both the Supreme Court and this Court, and fails to properly analyze Act 301 in light of this precedent. The Court should rehear the case *en banc* and conduct a proper constitutional analysis of Act 301.

Ten years ago, this Court interpreted *Roe* as the panel interpreted *Roe* in this case, and struck down a ban on pre-viability abortion procedures. *See Carhart v.*

Gonzales, 413 F.3d 791 (8th Cir. 2005). The Supreme Court reversed, holding that the prohibition of the partial-birth abortion procedure was constitutional. The Court defined the types of restrictions the government can impose in light of *Casey*. *See Gonzales v. Carhart*, 550 U.S. 124 (2007). As the panel did in this case, the *Gonzales* Court assumed *Casey*'s premise that "a State 'may not prohibit any woman from making the ultimate decision to terminate her pregnancy[,]'" but unlike the panel in this case, the Supreme Court then analyzed the standards and policy considerations that must be taken into account in determining whether a statute regulating pre-viability abortions is constitutionally permissible. *Gonzales*, 550 U.S. at 146 (quoting *Casey*, 505 U.S. at 879). The Court held that a federal statute prohibiting *all* "intact dilation and evacuation" abortions, *both pre-viability and post-viability*, was constitutional. *Id*. at 124.

Act 301 allows for abortion up to the point of both twelve weeks' gestational age and the detection of a fetal heartbeat, which is when the vast majority of abortions occur. *See Gonzales*, 550 U.S. at 134. Act 301 neither prohibits nor regulates abortions in the first trimester. Act 301 regulates *some* abortions after twelve weeks' gestational age and the detection of a fetal heartbeat. In light of *Casey* and *Gonzales*, Act 301 does not violate *Roe*'s proclamation that a State may not prohibit a woman from making the ultimate decision to terminate her pregnancy prior to viability. The panel decision ignores this argument.

"[T]he fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." *Gonzales*, 550 U.S. at 157-58 (quoting *Casey*, 505 U.S. at 874). In upholding the abortion regulation that prohibited pre-viability partial birth abortions in *Gonzales*, the Supreme Court noted that despite the fact that the "necessary effect of the regulation" would "be to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions," the regulation was constitutional. *Id.*, 550 U.S. at 160. Likewise, while Act 301 may prompt some women who consider abortion to make the ultimate decision earlier than they might otherwise have made the decision, Act 301 is constitutional because it does not "prohibit any woman from making the ultimate decision to terminate her pregnancy." *Id*. at 146 (citing *Casey*, 505 U.S. at 879). Therefore, Act 301 does not impose a substantial obstacle to pre-viability abortions. The panel decision does not even acknowledge the fact that the Supreme Court *upheld a pre-viability abortion ban* in *Gonzales*, nor does the panel decision conduct the analysis set forth in *Gonzales* to determine if Act 301 is constitutional.

As medical advances have provided greater information about the developing child, the Supreme Court has recognized the need to balance the woman's right to abortion with the State's interests in protecting the life of the

child and the health of the mother. *Gonzales*, 550 U.S. at 146. The Supreme Court has now recognized that "a fetus is a living organism while within the womb, whether or not it is viable outside the womb." *Id*. at 147. The panel opinion fails to acknowledge this important development in *Gonzales*. Act 301 provides a reasonable balance of a pregnant woman's right to abortion, and the State's profound interest in protecting the life of the unborn child. Act 301 does not pose an undue burden upon a woman's right to abortion under *Casey* and *Gonzales*.

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

Rounds, 686 F.3d 889 (8th Cir. 2012) (en banc). If states can act on new scientific evidence to require physicians to make these sorts of disclosures to women who seek abortions, then the State of Arkansas should be allowed to act on the same scientific evidence to protect human life. The panel decision fails to discuss or even acknowledge this Court's decisions in the *Rounds* cases.

The panel decided this case based upon the viability rule of *Roe*, without proper consideration of *Casey*, *Gonzales* and *Rounds*. Appellants contend that the viability standard announced in *Roe* is not a bright-line rule in light of subsequent Supreme Court cases (as recognized by this Court in the *Rounds* cases). Appellants contend that the Court must consider the balance between the State's legitimate interests and the pregnant woman's constitutional right to terminate her pregnancy, and that a law that regulates abortions prior to viability can be constitutional, as in *Gonzales*. Under the analysis required by *Casey*, *Gonzales* and *Rounds*, Act 301 is constitutional. The Court should rehear this case en banc and hold that Act 301 is constitutional.

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

Appellants contend that Supreme Court decisions following *Roe* have altered the Supreme Court doctrine announced in *Roe*, and that Act 301 is constitutional due to this doctrinal development. Appellants and supporting *amici* have developed this argument in the briefing of this case. The panel decision does not

even acknowledge the argument. Although it is true that only the Supreme Court may overturn one of its precedents, Appellants contend that the Supreme Court has effectively overturned the *Roe* viability rule due to doctrinal development in *Casey* and *Gonzales*. If the rigid viability rule of *Roe* remained in place, then *Gonzales* could not have been decided as it was (as this Court concluded prior to being reversed by the Supreme Court in *Gonzales*). This Court has recognized in *Rounds* that courts can no longer reject abortion regulations simply because they regulate prior to viability, as the panel did in this case. A deeper analysis is required, and courts must now balance the State's profound interest in protecting the life of an unborn child with the woman's right to terminate her pregnancy. Appellants submit that this deeper analysis militates in favor of the constitutionality of Act 301 in this case, but the panel opinion does not even acknowledge that the analysis is required. This Court should rehear the case en banc and find Act 301 constitutional because Act 301 allows a pregnant woman a meaningful opportunity to exercise her choice to terminate her pregnancy.

III. THE PANEL DECISION FAILS TO PROPERLY WEIGH THE WOMAN'S RIGHT TO ABORTION AGAINST THE STATE'S INTEREST IN PROTECTING THE UNBORN CHILD.

"[T]he fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." *Gonzales*, 550

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

In *Casey*, the Court explained that the woman's right to make the ultimate choice regarding abortion is not insulated from the State's interests in protecting the life of the child and the health of the mother: "Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose." *Id*. at 877. As medical advances have provided greater information about the developing child, the Supreme Court has recognized the need to balance the woman's right to abortion with the State's interests in protecting the life of the child and the health of the mother. *Gonzales*, 550 U.S. at 146. The Supreme Court

has now recognized that "a fetus is a living organism while within the womb, whether or not it is viable outside the womb." *Id*. at 147. Act 301 provides a reasonable balance of a pregnant woman's right to abortion, and the State's interests in protecting the life of the unborn child and the health of the woman. Again, the panel decision completely fails to address this analysis.

The Supreme Court has noted that 85-90% of abortions in the United States occur in the first three months of pregnancy. *Gonzales*, 550 U.S. at 134. Act 301 does not place *any* obstacle in the path of a woman seeking an abortion in the first three months of pregnancy, and therefore Act 301 places *no burden* upon 85-90% of women seeking abortion. The Court can and should affirm the constitutionality of Act 301 based upon this fact alone, because Act 301 only burdens 10-15% of women seeking abortions *at most*, and thus Act 301 is constitutional under the large fraction test. *See, e.g., Whole Women's Health et al. v. Cole et al.*, No. 14-50928, at *39 (5th Cir. June 9, 2015) (finding that a burden on 16.7% of women of reproductive age did not meet the large fraction test and therefore did not constitute a substantial burden).

After twelve weeks' gestation, Act 301 does not regulate abortions unless and until a fetal heartbeat is detected, and even where a fetal heartbeat is detected, Act 301 does not regulate abortions where an abortion is necessary to protect the health or life of the mother, where the pregnancy results from rape or incest, where

there is a medical emergency, or where the fetus is diagnosed with a lethal fetal disorder. Act 301 allows any pregnant woman to obtain an abortion *for any reason and without any obstacle in her path* so long as she does so in the first trimester, which is when the vast majority of abortions occur. Act 301 contains reasonable regulations allowing women to obtain abortions without obstacle after the first trimester in cases where circumstances may cause women to decide that they want or need abortions after the first trimester. The panel decision fails to acknowledge the facts outlined in *Gonzales* and argued by Appellants and *amici* in this case, and the panel decision fails to balance the woman's right to abortion with the State's interests in protecting the life of the unborn child and the health of the mother.

Finally, the panel decision fails to address Appellants' argument that the burden on a pregnant woman under Act 301 must be understood in light of the Arkansas safe haven statute. Arkansas law provides a safe haven for women who choose to relinquish parental rights to a child within 30 days of birth. *See* Ark. Code Ann. § 9-34-202. Appellants cited the Arkansas safe haven statute in their briefing (and it was discussed at length by supporting *amici*), and the safe haven statute was discussed at length at oral argument, but there is no mention of the safe haven statute in the panel decision. It is undisputed that Act 301 does not prohibit or even regulate abortion during the first trimester of pregnancy. Arkansas law separately prohibits abortions after twenty weeks' gestation. *See* Ark. Code Ann. §

20-16-1405 (prohibiting abortion after twenty weeks' post-fertilization with certain enumerated exceptions). Thus, Act 301 only potentially burdens a woman's right to abortion (and then only when a fetal heartbeat is detected and no exceptions apply) for an eight-week period, between twelve and twenty weeks' gestation.

The panel decision erroneously adopts the bright-line rule that any restriction on a woman's right to obtain an abortion prior to viability is *per se* unconstitutional without consideration of the nature of that burden and the corresponding furtherance of the State's profound interest in protecting the life of the unborn child. But Appellants have argued, and ask the full Court to consider, that the essence of the pregnant woman's burden is not the pregnancy, but rather, the lifelong burden of *parenthood*. In *Roe*, the Supreme Court was clearly concerned with the burden of unwanted *parenthood* when the Court concluded that a woman cannot be forced to carry an unwanted child to term:

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. *Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.* In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her

> responsible physician necessarily will consider in consultation.

410 U.S. at 153 (emphasis added). The discussion of the pregnant woman's burden in *Roe* makes clear that the source of the pregnant woman's protected right to abortion is not so that she may avoid unwanted *pregnancy*, but rather, so that she may avoid unwanted *parenthood*.

The State of Arkansas allows any pregnant woman to relinquish parental rights within 30 days of birth, and the State thereby assumes the pregnant woman's burden of parenthood completely. Accordingly, no pregnant woman in Arkansas is faced with burdens of "additional offspring" and "a distressful life and future," or mental and physical health "taxed by child care," or general distress associated with an "unwanted child," or "the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it." *Roe*, 410 U.S. at 153. The safe have statute completely eliminates the pregnant woman's burden of parenthood, as a matter of law. The panel decision fails to analyze the balance between the woman's right and the State's interest, and fails to acknowledge or analyze the safe haven statute and its effect upon the pregnant woman's right under *Roe*. The Court should rehear this case *en banc*, conduct the proper analysis including analysis of the woman's right in light of the safe haven statute, and hold that Act 301 is constitutional.

IV. CONCLUSION

In 1973, the Supreme Court stated that "prior to the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician." *Roe*, 410 U.S. at 164. However, the Court later jettisoned the trimester framework (*Casey*, 505 U.S. at 871-73), clarified that the State's legitimate interests permit regulation pre-viability (*id*. at 869), and concluded that a regulation that prohibited pre-viability abortions survived a facial constitutional challenge, *Gonzales*, 550 U.S. at 156. Act 301 regulates abortions without placing a substantial obstacle in the path of a woman seeking a pre-viability abortion, and in furtherance of the State's profound interest in protecting the life of the unborn child. In accord with doctrinal developments in *Casey*, *Gonzales*, and *Rounds*, Act 301 is constitutional. The Court should rehear this case en banc, and reverse the panel decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the page-limitations of Fed. R. App. P. 32(b)(2) and Fed. R. App. P. 40(b) because this brief does not exceed 15 pages, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

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

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CERTIFICATE OF SERVICE

I, Colin R. Jorgensen, Assistant Attorney General, do hereby certify that on June 10, 2015, I electronically submitted for filing the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit via the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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