IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

AMY BRYANT, M.D., M.S.C.R.; BEVERLY GRAY, M.D., ELIZABETH DEANS, M.D., on behalf of themselves and their patients seeking abortions; and PLANNED PARENTHOOD SOUTH ATLANTIC, on behalf of itself, its staff and its patients seeking abortions,

Plaintiffs,

v.

Jim Woodall, in his official capacity as District Attorney ("DA") for Prosecutorial District ("PD") 15B; Roger Echols, in his official capacity as DA for PD 14; Eleanor E. Greene, M.D., M.P.H., in her official capacity as Secretary of the North Carolina Medical Board; Rich Brajer, in his official capacity as Secretary of the North Carolina Department of Health and Human Services; and their employees, agents, and successors,

Defendants.

Case No. 1:16-cv-01368-UA-LPA

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 11 OTHER STATES IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

PATRICK MORRISEY
ATTORNEY GENERAL

Erica N. Peterson, WV Bar No. 12679
*Assistant Attorney General**
OFFICE OF THE ATTORNEY GENERAL OF WEST VIRGINIA
State Capitol Building 1, Room 26-E
Charleston, WV 25305
Telephone: (304) 558-2021
Email: Erica.n.peterson@wvago.gov
* Appearing pursuant to Local Rule 83.1(d); appearance to be filed

Anthony Biller, NC Bar No. 24117
Special Assistant Attorney General
Coats and Bennett PLLC
1400 Crescent Green Suite 300
Cary, North Carolina 27518
Telephone: (919) 719-4855
Email: abiller@coatsandbennett.com

Attorneys for Amici Curiae

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INTEREST AND IDENTITY OF *AMICI CURIAE*

Amici curiae the States of West Virginia, Alabama, Arkansas, Indiana, Louisiana, Michigan, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, and Texas have a significant interest in the outcome of this case. 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. The States are strongly invested in the development of federal law governing challenges to state laws like North Carolina's—which serve important interests the Supreme Court has repeatedly affirmed—to ensure that such laws are not invalidated as unconstitutionally placing "a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007).

SUMMARY OF ARGUMENT

In 2015, North Carolina amended its abortion restrictions to prohibit all abortions after the twentieth week of pregnancy, except in cases of medical emergency. *See* N.C. Gen. Stat. §§ 14-44, 14-45, 14-45.1. Plaintiffs' motion for summary judgment argues that because in many cases—but not all—an unborn child is not yet viable at twenty weeks, North Carolina's statute fails as a matter of

law. Viability, however, is not a trump card to invalidate restrictions on abortion that serve important and legitimate state interests.

The Supreme Court has long recognized that States have valid interests in regulating abortion that apply throughout all stages of pregnancy. Here, North Carolina has at least three strong interests that fully support its decision to prohibit late-term abortions after twenty weeks. *First*, the law protects women's health, as available medical evidence indicates that the risk from abortions increases significantly later in pregnancy—particularly after week twenty. *Second*, North Carolina's law reflects the State's important interest in protecting unborn children that can feel pain. *Third*, the law embodies a substantial interest in protecting human life at all stages of development, consistent with Supreme Court precedent and States' well-established protections for fetal life. These interests make clear that North Carolina's law is constitutional as applied to abortions before and after the point of viability.

In any event, even if Plaintiffs' view of Supreme Court precedent were correct—and it is not—the North Carolina law is justified under that standard as well. The vast majority of abortions occur before week twenty, and the overwhelming majority of abortions occur at least two months earlier than that. Particularly when weighed against the State's compelling interests in restricting

abortion after twenty weeks, North Carolina's law is fully consistent with the Constitution and Supreme Court precedent.

ARGUMENT

I. The Constitution Does Not Prohibit All Restrictions On Abortion Before The Point Of Viability.

The foundation of Plaintiff's key argument—that "the United States Supreme Court has repeatedly held that, prior to viability, States lack the power to ban abortion," Pl. Memo. 2—is crumbling. The Supreme Court has never treated the point at which an unborn child becomes viable as absolute, with all restrictions on abortion prohibited before that point. Instead, the Court has long recognized that States have valid interests in restricting some abortions even before viability. And in recent years, the Supreme Court has distanced itself further still from a categorical approach to viability like that Plaintiffs urge this Court to adopt. Thus, drawing the line at twenty weeks—when concerns about the mother's health become increasingly weighty and unborn infants experience pain during an abortion—is an appropriate and fully constitutional exercise of state power, whether applied to abortions before or after viability.

a. The principle that States have important interests that can justify certain restrictions on abortion before and after viability is baked into Supreme Court

precedent. 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 Se. 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 opinion). Indeed, *Casey* itself held that the State 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 "assumed" the principles from its plurality opinion. 550 U.S. 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 opinion)).

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 opinion))).

Similarly, last year's decision in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016), reiterated that the appropriate standard by which to weigh state abortion laws is not a bright-line viability rule, but a sliding scale that considers "the burdens a law imposes on abortion access" "together with the benefits those laws confer." *Id.* at 2309.[1] Viability is not dispositive in challenges to abortion restrictions; it is one data point when weighing the strong interests supporting a state abortion law.

[1] The *Hellerstedt* balancing test only strikes down a law 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).

b. 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 Plaintiffs' argue—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." *Whole Woman's Health*, 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). Also after twenty weeks, the risk of major complications from an abortion is at 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 which 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, p. 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 affirm 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.

Around 1946 American courts began to recognize 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 ruled that a child subsequently born alive could recover in tort for injuries that occurred prior to the child's birth. *Sinkler v. Kneale*, 401 Pa. 267, 271, 164 A.2d 93, 95 (1960); *see also Sylvia v. Gobeille*, 101 R.I. 76, 79, 220 A.2d 222, 223 (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*, 31 N.J. 353, 364–65, 157 A.2d 497, 503 (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 363, 157 A.2d 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 367, 157 A.2d 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 v. Kneale*, 401 Pa. 267, 273, 164 A.2d 93, 96 (1960), and expressly reaffirmed this principle at least as recently as 1985, *Amadio v. Levin*, 509 Pa. 199, 204-05, 501 A.2d 1085, 1087 (1985).

Similarly, state courts have also repeatedly held that state wrongful death statutes do not depend on viability. *See, e.g.*, *Farley v. Sartin*, 195 W. Va. 671, 682 466 S.E.2d 522, 533 (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.[2] 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.

[2] *See* Nat'l Conf. State Legislatures, *Fetal Homicide Laws* (Nov. 8, 2017), http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx; *see also* Va. Code Ann. § 18.2-32.2.

§ 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 Ann. § 1.07(a)(26).

II. North Carolina's Restriction On Abortions After Twenty Weeks Is Fully Consistent With 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 I. Further, even assuming that Plaintiffs' view is correct that a prohibition on pre-viability abortions could never be consistent with current Supreme Court precedent—and it is not—that would still not be a reason to invalidate North Carolina's law. Even under Plaintiffs' incorrect understanding of the role viability plays in the analysis, North Carolina's law does not "place a substantial obstacle in 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." *Whole Women's Health*, 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 (Oct. 2017), 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. v. Stenehjem*, 795 F.3d 768, 774 (8th Cir. 2015), *cert. denied*, 136 S. Ct. 981 (2016) (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%.[3] Accordingly, the already small number of post-twenty week abortions will continue 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).

Even under Plaintiffs' incorrect view, the consequences of the North Carolina law thus 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," *Planned Parenthood v. Danforth*,

[3] *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.

428 U.S. 52, 79 (1976) (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) (holding that abortion restriction that might require women to obtain abortions out of state did not pose undue burden where "nearly sixty percent of Mississippi women who obtained abortions already traveled to other states for those services").

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 procedures was often "the safest

method of abortion," *id.* at 161. When weighed against the grave importance of the State's interest 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 deny Plaintiffs' motion for summary judgment.

Respectfully submitted,

PATRICK MORRISEY
ATTORNEY GENERAL

Erica N. Peterson, WV Bar No. 12679
*Assistant Attorney General**
Lead Counsel
OFFICE OF THE ATTORNEY GENERAL OF WEST VIRGINIA
State Capitol Building 1, Room 26-E
Charleston, WV 25305
Telephone: (304) 558-2021
Email: Erica.n.peterson@wvago.gov

/s/ Anthony Biller
Anthony Biller, NC Bar No. 24117
Special Assistant Attorney General
Coats and Bennett PLLC
1400 Crescent Green Suite 300
Cary, North Carolina 27518
Telephone: (919) 719-4855
Email: abiller@coatsandbennett.com

* Appearing pursuant to Local Rule 83.1(d); appearance to be filed

Attorneys for Amici Curiae

November 29, 2017

COUNSEL FOR ADDITIONAL *AMICI*

STEVE MARSHALL
Attorney General
State of Alabama

LESLIE RUTLEDGE
Attorney General
State of Arkansas

CURTIS T. HILL, JR.
Attorney General
State of Indiana

JEFF LANDRY
Attorney General
State of Louisiana

BILL SCHUETTE
Attorney General
State of Michigan

DOUGLAS J. PETERSON
Attorney General
State of Nebraska

MICHAEL DEWINE
Attorney General
State of Ohio

MIKE HUNTER
Attorney General
State of Oklahoma

ALAN WILSON
Attorney General
South Carolina

MARTY J. JACKLEY
Attorney General
South Dakota

KEN PAXTON
Attorney General
State of Texas

CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.3, I hereby certify that the foregoing brief of *amici curiae* contains 3,358 words.

/s/ Anthony Biller
Anthony Biller

November 29, 2017
Date

CERTIFICATE OF SERVICE

I certify that on November 29, 2017, the foregoing document was served on the counsel of record for all parties through the CM/ECF system.

/s/ Anthony Biller
Anthony Biller

November 29, 2017
Date