No. 13-402

In The

SUPREME COURT OF THE UNITED STATES

TOM HORNE, ATTORNEY GENERAL OF ARIZONA;
WILLIAM GERARD MONTGOMERY,
COUNTRY ATTORNEY FOR MARICOPA COUNTY,
Petitioners,

v.

PAUL A. ISAACSON, M.D.; WILLIAM CLEWELL, M.D.;
HUGH MILLER, M.D., *ET AL.*,
Respondents.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* OF JEROME LEJEUNE FOUNDATION USA, SAVING DOWNS, AND THE INTERNATIONAL DOWN SYNDROME COALITION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are public interest organizations that provide research, care and advocacy to benefit individuals with disabilities and their families. *Amici* urge this Court to recognize the profound societal consequences of this Court's jurisprudence being broadened to give constitutional protection to abortion based on disability discrimination.

The **Jérôme Lejeune Foundation USA** is the United States branch of the public interest organization whose goal is to continue the work to which Professor Jérôme Lejeune, discoverer of Down syndrome, dedicated his life. Their mission is to provide research, care, and advocacy to benefit those with genetic intellectual disabilities. This is carried out by conducting, promoting, and funding in the United States therapeutically oriented research; by assisting in the development of healthcare services for these individuals; and by serving as their advocate in a spirit of respect for the dignity of all human persons.

Saving Downs is a is a New Zealand-based public interest group that advocates for people with Down syndrome in the area of prenatal screening and selective abortion. They have successfully secured changes to the national prenatal screening programme in New Zealand to better reflect disability rights and are working with the Human Rights Commission to further advance this work. Their effective work has expanded to advocacy in nations around the world, including a filing that was cited in the United Kingdom's "Parliamentary Inquiry into Abortion on the Grounds of Disability."

The **International Down Syndrome Association ("IDSA")** is a public interest organization operated entirely by volunteers. The IDSA offers support to parents who are new to the Down syndrome diagnosis, and advocates for the dignity and support of individuals with Down syndrome and their families with physicians, policy makers, and media.

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[1] Counsel for all parties received timely notice and have consented to the filing of this brief. Their consent letters are on file with the Clerk. No counsel for any party authored any part of this brief, nor contributed monetarily the brief's preparation or

SUMMARY OF THE ARGUMENT

The challenged portion of 2012 Arizona House Bill 2036, as codified at Ariz. Rev. Stat. § 36-2159, limits abortion after twenty weeks' gestation. The principal impact of Arizona's statute is to curtail the practice of aborting children identified as having a disability. The United States Constitution does not protect such abortions, which raise wrenching ethical questions that are best left for resolution through the democratic process. In Arizona, the democratic process has yielded a law that promotes the state's legitimate interests in, among other things, (1) disfavoring abortion of children with disabilities, (2) drawing a clear boundary against postnatal infanticide of children with disabilities, and (3) preserving the ethics and integrity of the medical profession.

The Ninth Circuit's misapplication of this Court's abortion jurisprudence places it in conflict with federal statutes and emerging societal norms that renounce discrimination against individuals with disabilities, both prenatally and postnatally.

In reversing the district court and finding the Arizona limitation on abortion at twenty weeks' gestation unconstitutional, the Ninth Circuit concluded that the emergency health exception was insufficient to save the statute in part because "the emergency procedure does not authorize abortions in cases of fetal anomaly . . . which do not pose an immediate threat to the woman's health." Pet. App. 27a-28a. Likewise, the concurring decision concluded that constitutional protection of selective abortion is justified when a disability is prenatally identified based on the rank speculation of "a hellish life of pain . . . for both mother and child." Pet. App. 27a-28a.

In Section I(A), *Amici* bring to this Court's attention provisions in the Arizona statute evidencing the state's legitimate interest in disfavoring the discriminatory practice of aborting children only because they have a disability, a practice that commonly occurs between 20 and 24 weeks of development. These provisions reflect a dramatic shift in positive societal attitudes toward people with disabilities. This Court's notorious dictum in *Buck v. Bell*, 274 U.S. 200 (1927), that "[t]hree generations of imbeciles are enough," contrasts sharply with the Congressional findings in support of the landmark "Americans With Disabilities Act" of 1990, which provides that "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society." 42 U.S.C. § 12101(a)(1) (1990). And, as recently as 2008, the societal attitude of respect for the inherent dignity of people with disabilities was also expressed in the bipartisan "Prenatally and Postnatally Diagnosed Conditions Act," 42 U.S.C. § 280g-8 (2008).

Notwithstanding these developments, the practice of aborting children with a prenatal diagnosis of disability remains fairly common because it thrives under the ideological disguise of beneficence. In Section I(B), *amici* present studies and other commentary showing that the practice of selective abortion has had a devastating impact on particular populations of people with disabilities, including Down syndrome, spina bifida and cystic fibrosis.

In Section I(C), *amici* urge this Court to grant certiorari so that it may definitively clarify that there is no constitutional right to abort children because they have been detected to have a disability. This is necessary because the Ninth Circuit, without analysis, misapplied this Court's abortion jurisprudence by going beyond the premise that the Constitution protects "the availability of abortion in the event that contraception should fail." *Planned Parenthood v. Casey*, 505 U.S. 833, 857 (1992). Rather than recognizing that *Casey* afforded constitutional protection to "the decision whether to bear or beget *a child*," *Id.* at 852, the Ninth Circuit instead erroneously broadened the *Casey* decision to give constitutional protection to the decision of whether to bear or selectively abort *this particular child* – when the abortion decision in that very different context is based on the unborn child's identifiable traits of genetic variation, disability, or other health condition.

Amici also bring to this Court's attention persuasive authority from the Federal Circuit, *Britell v. United States*, 372 F.3d 1370 (Fed. Cir. 2004). That decision indicates that there is a legitimate state interest in guaranteeing equal treatment of unborn children whether or not they have a disability, therefore standing, if not in direct conflict, at least in profound tension with that of the Ninth Circuit.

In Section II, *Amici* present how the Arizona statute advances three legitimate state interests, in addition to those identified by Petitioners. Section II(A) addresses how the challenged statute advances the State's interest in disfavoring discriminatory abortion, and permitting children with disabilities to be born on equal footing with children without disabilities. Aborting children with disabilities is a form of discrimination that threatens to devalue the lives of people born and living with disabilities. A recent Inquiry conducted by the British Parliament echoed similar concerns about the practice of aborting children with disabilities, and observed its inconsistency with the UN Convention on the Rights of the Child and the UN Convention on the Rights of Persons with Disabilities. The practice of disability-selective abortion is closely parallel to the widespread practice of sex-selective abortion in non-western countries, which was recently condemned by the European Parliament as "ruthless sexual discrimination" and "gendercide." The practice of aborting children with disabilities is no less discriminatory, and the State of Arizona may enact reasonable restrictions to curtail this practice.

Section II(B) addresses how the Arizona statute serves the legitimate interest in erecting a clear boundary against the practice of postnatal eugenic infanticide, in accord with this Court's reasoning in *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007). Numerous voices have called for the legitimization of infanticide of infants born with disabilities, including children with Down syndrome. Curtailing the practice of aborting children with disabilities erects a clear boundary against the erosion of social and ethical prohibitions against eugenic infanticide.

Finally, Section II(C) points out how the Arizona statute protects the integrity and ethics of the medical profession, an interest that this Court also recognized as valid in *Gonzales*. A physician's involvement in a decision to abort a child late in pregnancy due to disability places that physician in a position fraught with enormous social and ethical difficulty. Arizona validly concluded that abortions after 20 weeks, especially when performed on the basis of disability, "implicate[] additional ethical and moral concerns that justify a special prohibition." *Gonzales*, 550 U.S. at 158.

REASONS FOR GRANTING CERIORARI

I. If Left Standing, the Ninth Circuit's Misapplication of this Court's Jurisprudence Places It in Conflict with Federal Law That Rejects Discrimination Against People with Disabilities, both Prenatally and Postnatally

A. The Arizona Statute Reflects Emerging Societal Norms and Federal Statutes that Reject Discrimination Against Individuals with Identity Traits of Genetic Variation, Disability or other Health Conditions

The previous century has witnessed a dramatic shift in societal attitudes toward individuals with disabilities. There is a sharp contrast between Justice Holmes's notorious dictum in *Buck v. Bell*, 274 U.S. 200 (1927), and the Congressional findings in the Preface to the Americans With Disabilities Act, 42 U.S.C. § 12101. *Buck v. Bell* approved, by an 8-1 vote, the compulsory sterilization of a "feeble minded" woman who had been adjudged "the probable potential parent of socially inadequate offspring." *Id.* at 205, 207 (Holmes, J.). This Court stated:

> We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute

> degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind…. Three generations of imbeciles are enough.

Id. at 207. Sixty-three years later, in a dramatic reversal of societal mores, the U.S. Congress made the following findings in support of the Americans With Disabilities Act:

> The Congress finds that
>
> (1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination…
>
> (2) historically, society has tended to isolate and segregate individuals with disabilities, and … such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem; [and] …
>
> (8) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous….

42 U.S.C. § 12101(a). No longer viewed as "imbeciles" who are "manifestly unfit," 274 U.S. at 207, people with mental and physical disabilities have the right to "fully participate in all aspects of society"—including birth itself. 42 U.S.C. § 12101(a)(1).

Another positive leap in societal attitudes came in 2008 with the bipartisan enactment of the "Prenatally and Postnatally Diagnosed Conditions Act," 42 U.S.C. § 280g-8, co-sponsored by Senator Edward M. Kennedy (D-Mass) and Senator Sam Brownback (R-Kansas). That legislation provides federal grants to "increase patient referrals to providers of key support services for women who have received a positive diagnosis for Down syndrome, or other prenatally or postnatally diagnosed conditions." *Id.*

These positive societal trends are also reflected in uncontested "informed consent" provisions of the Arizona statute, which clearly evidence the state's interests in disfavoring disability-selective abortion and postnatal infanticide, and in protecting the integrity of the medical profession by limiting the involvement of medical professionals in disability discriminatory practices.

Immediately preceding the challenged "twenty-week limitation," a series of unchallenged provisions lay out positive steps medical professionals must take to

aid parents considering the abortion of unborn children diagnosed with fetal anomalies. Those provisions, now codified at ARIZ. REV. STAT. § 36-2158(A)(1)-(2), state that a woman's consent shall be considered voluntary and informed only if she is given notice, at least twenty-four hours before the abortion, of perinatal hospice services and resources if she is considering abortion of an "unborn child diagnosed with a lethal fetal condition." ARIZ. REV. STAT. § 36-2158(A)(1). If the woman is "seeking abortion of her unborn child diagnosed with a nonlethal fetal condition" (such as Down syndrome, cystic fibrosis, or spina bifida, among others), the statute requires that the woman be given 24 hours' notice of a variety of information aimed at helping the woman choose life for her special needs child.

Furthermore, the statute requires the Arizona Department of Health Services to maintain a website and printed materials regarding a host of resources, including "evidence-based information" concerning the range of physical and educational outcomes for individuals living with the diagnosed condition, along with "national and local peer support groups and other education and support programs" and information about adoption. ARIZ. REV. STAT. § 36-2158(A)(2). These provisions are modeled on the federal "Prenatally and Postnatally Diagnosed Conditions Act," *supra*, reflecting Arizona's interest in following the emerging societal norm that was expressed as follows by one congressman in support of the federal law:

> Rep. Tim Ryan (D-Ohio) said it would reduce abortions by telling prospective parents of children with disabilities that "society will be there to support you. We will bring every resource to bear to ensure that you are able to raise a beautiful baby. Never should a pregnant woman feel that her options are limited by a lack of public support for the types of social services that could help her, her family or her baby."

Patricia E. Bauer, *Congress OKs Kennedy Brownback Disability Diagnosis Bill*, September 25, 2008, *available at* http://www.patriciaebauer.com/2008/09/25/kennedy-brownback-3-3302/ (last visited October 25, 2013).

B. The Principal Impact of Prohibiting Abortion Between 20 and 24 Weeks of Development Is To Curtail the Practice of Aborting Children with Disabilities.

This case principally concerns the abortion of children because a disability has been detected. In challenging the Arizona statute, Respondents assert a right to abortion between 20 and 24 weeks of gestation—roughly, five to six months of development – expressly on the basis of disability.

For example, Respondent Isaacson attested in the district court that "[a]pproximately 70 percent of my patients seeking abortions at or after 20 weeks do

so due to a serious or lethal fetal anomaly." Isaacson Decl. ¶ 11. *See also, e.g.,* Plaintiffs Proposed Findings of Fact, ¶ 23 ("Plaintiffs have shown that the ban could interfere with the decision-making process of their patients receiving diagnoses of serious fetal anomalies"); Pl. Memorandum in Support of Motion for Preliminary Injunction at 4 ("Other of Plaintiffs' patients seek abortions at or after 20 weeks because the fetus has been diagnosed with a serious problem."), *citing* Isaacson Decl. ¶ 21; Clewell Decl. ¶¶1 4-15.

Because the most informative diagnostic procedures take place between 18 and 20 weeks' gestation, it appears that the vast majority of abortions to terminate unborn children diagnosed with disabilities occur after 20 weeks of development. *See, e.g.*, Mayo Clinic Staff, *Fetal Ultrasound*, *available at* http://www.mayoclinic.com/health/fetal-ultrasound/MY00777 (last visited Oct. 27, 2013) (specifying that in-depth fetal ultrasounds for the purpose of identifying birth defects typically occur between 18 and 20 weeks' gestation); *see also* Johns Hopkins Medicine Health Library, *Amniocentesis Procedure*, *available at* http://www.hopkinsmedicine.org/healthlibrary/test_procedures/gynecology/amniocentesis_procedure_92,P07762/ (last visited Oct. 27, 2013) (specifying timing of amniocentesis procedures for fetal diagnosis).

Moreover, as Respondents also contended below, the vast majority of elective abortions—for reasons other than fetal disability—are performed much earlier in pregnancy. *See, e.g.*, Centers for Disease Control, *Abortion Surveillance – United States 2008* (Nov. 25, 2011), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/ss6015a1.htm?s_cid=ss6015a1_w (last visited Oct. 27, 2013) (reporting that, in 2008, only 1.3 percent of abortions took place at 21 weeks' gestation or later).

Though some abortions of children with disabilities involve diagnoses that are likely to be fatal, many involve non-fatal conditions such as Down syndrome, cystic fibrosis, and spina bifida. The numbers of pregnancy terminations following a prenatal diagnosis of certain disabilities are alarmingly high. A systematic review that synthesized U.S. data on abortion rates following a diagnosis of Down syndrome determined that the "weighted mean termination rate was 67% (range: 61%–93%) among seven population-based studies, 85% (range: 60%–90%) among nine hospital-based studies, and 50% (range: 0%–100%) among eight anomaly-based studies." Jaime L. Natoli, et al., *Prenatal Diagnosis of Down Syndrome: A Systematic Review of Termination Rates (1995-2011)*, 32:2 PRENATAL DIAGNOSIS 142 (February 2012).

Similarly, recent evidence suggests that as many as 95 percent of parents receiving a prenatal diagnosis of cystic fibrosis elect to terminate the child. Amy Harmon, *Burden of Knowledge: Tracking Prenatal Health; In New Tests for Fetal Defects, Agonizing Choices for Parents*, N.Y. TIMES, June 20, 2004 (reporting one

managed health organization's findings that 95 percent of parents receiving a prenatal diagnosis of cystic fibrosis terminated the pregnancy), *available at* http://www.nytimes.com/2004/06/20/us/burden-knowledge-tracking-prenatal-health-new-tests-for-fetal-defects-agonizing.html?pagewanted=all&src=pm (last visited Oct. 27, 2013).

Such prenatal screening for disabilities has resulted in widespread prenatal termination of many classes of people with disabilities. It is now widely reported that the increase in prenatal screening has resulted in sharply declining numbers of living persons with disabilities such as Down syndrome, cystic fibrosis, and spina bifida. *See, e.g.*, Centers for Disease Control and Prevention, *U.S. Children and Adolescents with Spina Bifida* (June 13, 2011) (reporting decline in incidence of spina bifida in part because of prenatal screening), *available at* http://www.cdc.gov/features/dsspinabifidaestimates/index.html (last visited Oct. 27, 2013); Associated Press, *Dreaded Diseases Dwindle With Gene Testing*, Feb. 7, 2010 (reporting reduced incidence of cystic fibrosis as a result of prenatal testing), *at* http://www.nbcnews.com/id/35430449/#.Ul9wK9Ksg6Y (last visited Oct. 27, 2013).

To a society that values the richness and diversity brought by people with disabilities, *see* 42 U.S.C. § 12101, these numbers reflect a devastating loss. For example, recent studies strongly confirm that families of children with Down syndrome find their lives greatly enriched by the experience of living with and loving this unique family member. *See* Shaun Heasley, *Down Syndrome Study Finds Families Are Happy*, DISABILITY SCOOP, Sept. 22, 2011, *at* http://www.disabilityscoop.com/2011/09/22/down-syndrome-families-happy/14087/ (last visited Oct. 27, 2013).

Disability activists point to the incommensurable but valuable "difference" of people with disabilities: "Human beings 'of difference' (whether of color, of ability, of age, or of ethnic origin) have much to share with all of us about what it means to be human. We must not deny ourselves the opportunity for connection to basic humanness by dismissing the existence of people labeled 'severely disabled.'" Marsha Saxton, *Disability Rights and Selective Abortion*, ABORTION WARS, A HALF CENTURY OF STRUGGLE: 1950 TO 2000 (Univ. of Cal. Press, 1998), *available at* http://www.gjga.org/conference.asp?action=item&source=documents&id=17 (last visited Oct. 27, 2013).

In light of the enrichment of families and society by persons with disabilities, even individuals who advocate for abortion rights have expressed discomfort and dismay at the use of disability selective abortion. Amy Harmon, *Genetic Testing + Abortion = ???*, NY TIMES, May 13, 2007, *available at* http://www.nytimes.com/2007/05/13/weekinreview/13harm.html?_r=0 (last visited Oct. 27, 2013). Indeed, "many [supporters of abortion rights] are finding that, while

they support a woman's right to have an abortion if she does not want to have a baby, they are less comfortable when abortion is used by women who don't want to have a particular baby." *Id.*

C. This Court Has Never Recognized a Right To Abort Children Identified as Having Disabilities, and It Should Not Recognize Such a Right.

As noted above, one of the Respondents' most vigorously advanced objections to the Arizona statute is that it would interfere with the common practice of aborting children because they have a disability. The opinions of the lower courts in this case uncritically adopted this assumption. All opinions presumed—without any significant reflection, analysis, or citation of authority—that there exists a constitutional right to abort a highly developed unborn child that has been diagnosed with a disability.

For example, in considering the allegation that "in certain unique circumstances, a diagnosis of fetal anomalies will not occur until after 20 weeks," Pet. App. 59a, the District Court presupposed that "the statute would be unconstitutional as applied" in such a case. *Id.* The court concluded, however, that such situations could be addressed through as-applied challenges. *Id.* Similarly, in rejecting the argument that the Arizona statute is saved by the existence of an emergency health exception, the Ninth Circuit panel opinion reasoned that the emergency health exception was insufficient to save the statute in part because "the emergency procedure does not authorize abortions in cases of fetal anomaly … which do not pose an immediate threat to the woman's health." Pet. App. 27a-28a.

Most striking, the concurring opinion of Judge Kleinfeld opined that "birth of a severely deformed child is highly likely to impair all of a mother's bodily and mental functions for the rest of her life, because of the extraordinary burdens the child's disabilities and illnesses will likely cause a loving mother to suffer." *Id.* He concluded that there must be a constitutional right to terminate such children before birth, because their birth would result in "[a] hellish life of pain … for both mother and child." *Id.*

Notably, neither plaintiffs nor the opinions in the courts below cited any authority in this Court's cases, or elsewhere, holding that there is a constitutional right to abort an otherwise-*wanted* pregnancy due to a diagnosis of fetal disability. And there is no such authority.

On the contrary, "It is important to make the distinction between a pregnant woman who chooses to terminate the pregnancy because she doesn't want to be pregnant, versus a pregnant woman who wanted to be pregnant, but rejects a

particular fetus . . . ." Saxton, *Disability Rights and Selective Abortion*, *supra.* Picking and choosing among particular children raises the specter of abortion as "a wedge into the 'quality control' of all humans. If a condition (like Down's syndrome) is unacceptable, how long will it be before experts use selective abortion to manipulate -- eliminate or enhance -- other (presumed genetic) socially charged characteristics: sexual orientation, race, attractiveness, height, intelligence?" *Id.*

Perhaps for these reasons, this Court has never endorsed a right to abort children only because they have been detected to have a disability. In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), this Court repeatedly premised its reaffirmation of abortion rights in terms of the right to terminate an unintended pregnancy. This Court quoted approvingly from its statement in *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972), that the liberty under consideration in *Casey* pertained to "the decision whether to bear or beget a child," *Casey*, 505 U.S. at 851. This Court has never framed the protected abortion decision as whether to bear or abort a *particular* child based on identified traits of genetic variation, disability, or other health condition. Instead, *Casey* formulated the abortion decision as one confronting a woman "when the woman confronts the reality that, despite her attempts to avoid it, she has become pregnant," *id.* at 853—not when she accepts a pregnancy at first, but then comes to perceive the child she is carrying as defective.

Casey went on to emphasize that a principal basis for reaffirming the right to abortion recognized in *Roe* was that women had come to rely upon abortion "in the event that contraception should fail." *Id.* at 856. This Court stated:

> [F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.

Id.[2]

Not only do this Court's cases contain no support for a right to discriminatory abortion based on disability, but there is persuasive authority to the contrary in the U.S. Courts of Appeals for the Federal Circuit. In *Britell v. United States*, 372 F.3d 1370 (Fed. Cir. 2004), the Federal Circuit considered an equal protection challenge

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[2] *Amici* respectfully disagree that abortion is entitled to protection under the U.S. Constitution. However, as long as this Court upholds such a right, *amici* urge this Court to recognize the profound societal consequences of abortion based on disability discrimination, and thus uphold the challenged Arizona statute.

to a restriction on the use of Department of Defense funds for abortion. *Id.* at 1372. The plaintiffs in *Britell* had been parents of an unborn child diagnosed with a lethal fetal anomaly. The parents elected to abort the child, then later filed suit when the Department of Defense denied their request for reimbursement for the cost of the abortion. *Id.* The plaintiffs contended that there was no rational basis to apply the funding restriction in their case, on the ground that the government's interest in "potential human life" did not extend to the life of an anencephalic unborn child. *Id.* at 1372, 1374.

The Federal Circuit rejected this argument, concluding that the funding restriction was rationally related to the government's legitimate interest in "the protection and promotion of potential human life." *Id.* at 1380. In reaching its decision, the court explicitly considered and rejected the notion that the lesser value could be assigned to an anencephalic unborn child:

> For us to hold, as Britell urges, that in some circumstances a birth defect or fetal abnormality is so severe as to remove the state's interest in potential human life would require this court to engage in line-drawing of the most non-judicial and daunting nature. This we will not do…. It is not the role of courts to draw lines as to which fetal abnormalities or birth defects are so severe as to negate the state's otherwise legitimate interest in the fetus's potential life…. No reason has been presented, nor do we see one, to explain why consciousness (or extended life span) is the lynchpin of potential human life.

Id. at 1383.[3]

As *Britell* explicitly recognized, the state has a legitimate interest in protecting the lives of children even with the most severe disabilities. Unlike the Ninth Circuit in this case, *Britell* refused to draw any distinction between the value unborn children based on whether or not the child had a disability. Therefore, the Ninth Circuit's decision lies, if not in direct conflict, at least in profound tension with the Federal Circuit's decision.

II. Arizona's Limitation on Abortions After 20 Weeks of Development Advances the State's Legitimate Interests in Disfavoring Disability Selective Abortion, Erecting a Barrier Against

[3] This Court has since abandoned its former use of the phrase "potential human life," in light of the science of human embryology. In *Gonzales v. Carhart,* the majority frequently referred to "fetal life," or the "life of the fetus." 550 U.S. 124 (2007).

Postnatal Eugenic Infanticide, and Preserving the Integrity and Ethics of the Medical Profession.

A. The Statute Promotes Arizona's Legitimate Interest in Disfavoring the Discriminatory Abortion of Children with Disabilities and Allowing Them an Equal Opportunity for Birth.

As noted above, there has been a dramatic shift between *Buck v. Bell* and the Americans with Disabilities Act/Prenatally and Postnatally Diagnosed Conditions Act. Our Nation's recognition of the equal dignity of the people with disabilities has led to an emerging sense of disquiet about the practice of disability selective abortion. Alert commentators have raised serious questions about the practice of prenatal screening for fetal disabilities and subsequent abortion. *See* Amy Harmon, *Genetic Testing + Abortion = ???*, *supra*; Saxton, *Disability Rights and Selective Abortion*, *supra*. In particular, permitting this practice risks eliminating entire communities of people with disabilities, despite the fact that our nation has made a commitment to the effect that "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society." 42 U.S.C. § 12101(a)(1).

Moreover, the widespread practice of selective abortion casts doubt on the inherent value and dignity of those who are born with disabilities. Medical ethicists note that eliminating children with disabilities before birth "should give us pause." Marilynn Marchionne, *Testing curbs some genetic diseases*, SEATTLE TIMES, Feb. 16, 2010, *available at* http://seattletimes.com/html/nationworld/2011099346_gene17.html (last visited Oct. 27, 2013) (quoting ethicist Dr. Bernard Lerner). "If a society is so willing to screen aggressively to find these genes and then to potentially have to abort the fetuses, what does that say about the value of the lives of those people living with the diseases?" *Id.*

The practice of selective abortion is the subject of grave and growing concern in other countries as well. For example, on July 17, 2013, a commission of the Parliament of the United Kingdom issued a detailed report calling into question § 1(1)(d) of the Abortion Act of 1967, which expressly permits the abortion of children with disabilities until birth. *See* Parliamentary Inquiry into Abortion on the Grounds of Disability (July 17, 2013), *available at* http://www.abortionanddisability.org/resources/Abortion-and-Disability-Report-17-7-13.pdf ("Parliamentary Inquiry")(last visited October 27, 2013).

The report emphasized that Britain (like the United States) is a signatory to the Convention on the Rights of the Child, which states that a child "needs special safeguards and care, including appropriate legal protection, before as well as after

birth." *Id.* at 3 (*quoting* Preamble to Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3); *see also* Parliamentary Inquiry at 10, 12.

It also noted the potential conflict with the Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3. Parliamentary Inquiry at 10, 48 (to which Britain and the U.S. are also signatories). The commission recommended that Parliament "review[] the question of allowing abortion on the grounds of disability and consider[] at the very least the two main options for removing those elements which a majority of witnesses believe are discriminatory," including the prospect of "repealing Section 1(1)(d) altogether." *Id.* at 48-49.

Furthermore, the growing international concern about sex-selective abortions in non-western countries highlights the parallel concerns raised by disability-selective abortions. It is commonly acknowledged, even among strong supporters of abortion rights, that it is morally unacceptable to abort a child solely on the basis that she is female. The European Parliament recently adopted a report describing such abortions as instances of "ruthless sexual discrimination." European Parliament Resolution of 8 October 2013 on Gendercide: The Missing Women?, ¶ B, P7_TA-PROV(2013)0400, *available at* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0400+0+DOC+XML+V0//EN (last visited Oct. 27, 2013); *see also, e.g.*, Rahila Gupta, *On sex-selective abortion, we must not make a fetish of choice,"* THE GUARDIAN, Oct. 8, 2013 (arguing that "[a] feminist perspective on abortion must take into account a girl's right to life and avoid an absolutist defence of choice"), *available at* http://www.theguardian.com/commentisfree/2013/oct/08/sex-selective-abortion-choice-right-life (last visited Oct. 27, 2013).

"For those with 'disability-positive' attitudes, the analogy with sex-selection is obvious." Saxton, *Disability Rights and Selective Abortion*, *supra.* Just as selecting females for abortion is an example of "ruthless discrimination" on the basis of gender, so also selecting children with disabilities for abortion constitutes discrimination against them.

Thus, Arizona has a legitimate interest in disfavoring abortion based on disability. Arizona's law directly advances this interest by limiting abortions during the late period of fetal development when the large majority of disability-selective abortions occur, and by discouraging disability-selective abortions at earlier stages through detailed informed-consent provisions.

B. The Statute Promotes Arizona's Legitimate Interest in Drawing a Clear Boundary Against the Practice of Postnatal Eugenic Infanticide.

Arizona's statute also serves the state's legitimate interest in drawing a clear boundary against the practice of postnatal eugenic infanticide. "This Court has in the past confirmed the validity of drawing boundaries to prevent certain practices that extinguish life and are close to actions that are condemned. *Glucksberg* found reasonable the State's 'fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia.'" *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 732-735 (1997)); *see also Stenberg v. Carhart*, 530 U.S. 914, 961 (2000) (Kennedy, J., dissenting).

The concern about the advent of eugenic infanticide is not merely hypothetical. For example, Professor Peter Singer, who holds an endowed chair at Princeton University, has offered a public justification for infanticide, based on his position that "[i]f the fetus does not have the same claim to life as a person, it appears that the newborn baby does not either, and the life of a newborn baby is of less value to it than the life of a pig, a dog, or a chimpanzee is to the nonhuman animal." Peter Singer, PRACTICAL ETHICS 169 (2d ed., Cambridge Univ. Press 1997); *see also, e.g.,* H. Kuhse & P. Singer, SHOULD THE BABY LIVE? THE PROBLEM OF HANDICAPPED INFANTS (Oxford Univ. Press 1985). This is because, according to Professor Singer, a being's claim to life is based upon "characteristics like rationality, autonomy, and self-consciousness," in which a newborn infant or even a small child differs in no degree from an unborn human. *Id.*

And as recently as 2012, similar proposals have been advanced by like-minded thinkers, including open advocacy for infanticide of children with Down syndrome. Alberto Giubilini & Francesca Minerva, *After-birth abortion: why should the baby live?*, JOURNAL OF MEDICAL ETHICS (Feb. 23, 2012), *available at* http://jme.bmj.com/content/early/2012/03/01/medethics-2011-100411.full (last visited Oct. 27, 2013) (arguing that parents of infants with disabilities such as Down syndrome should be allowed to terminate the lives of those born children, since "the same reasons which justify abortion should also justify the killing of the potential person when it is at the stage of a newborn"); *see also* Michael Tooley, *Abortion and Infanticide*, 2:1 PHILOSOPHY & PUBLIC AFFAIRS 25 (Autumn 1972).

In light of these serious proposals for eugenic infanticide based on Down syndrome and similar conditions, the State may choose to draw a clear boundary against the adoption of such practices. Arizona's statute "draw[s] boundaries to prevent certain practice that extinguish life and are close to actions that are condemned," such as eugenic infanticide. *Gonzales*, 550 U.S. at 158.

C. The Statute Promotes Arizona's Legitimate Interest in Protecting the Integrity and Ethics of the Medical Profession.

"There can be no doubt that the government 'has an interest in protecting the integrity and ethics of the medical profession.'" *Gonzales v. Carhart*, 550 U.S. at 157 (*quoting Washington v. Glucksberg*, 521 U.S. at 731). "Under our precedents it is clear the State has a significant role to play in regulating the medical profession." *Id.* Arizona's law protects the integrity and ethics of the medical profession by preventing doctors and counselors from becoming inextricably involved in practice of late-term abortion based on an identified disability.

Disability selective abortion implicates not only parents, but also doctors and other medical practitioners who engage in decision-making surrounding a prenatal diagnoses of disability. The participation of doctors and counselors in the decision to abort children with disabilities is "fraught with enormous social and ethical difficulty." Saxton, *Disability Rights and Selective Abortion*, *supra.*

The United Kingdom's Parliamentary Inquiry into the Abortion on the Grounds of Disability raised a similar concern about the ethical murkiness of the doctor's involvement in selective abortion. One commentator, quoted by the Commission, observed that "[e]valuating whether a life is worth living is beyond the expertise of the medical profession," and that "the current guidelines place the medical profession in the position of discriminating between disabilities and their severity." Parliamentary Inquiry, at 17. In such cases, "[t]he medical profession is being indirectly asked to make decisions that are legal, social, and ethical which are outside their competence." *Id. Cf. Gonzales*, 550 U.S. at 157 (citing very similar concerns about "confus[ing] the medical, legal, and ethical duties of physicians to preserve and promote life" in upholding Congress's ban on partial-birth abortions).

The widespread availability of disability selective abortion places medical professionals – both those that perform abortions and those ordering and conducting prenatal diagnostic tests – in a questionable, sometimes untenable, ethical position. Arizona could, and did, validly "conclude that [disability selective abortion] implicates additional ethical and moral concerns that justify a special prohibition." *Gonzales*, 550 U.S. at 158. By disfavoring and substantially curtailing discriminatory abortions, Arizona's statute promotes the important state interest in protecting the integrity and ethics of the medical profession.

CONCLUSION

For these reasons, *Amici* respectfully urge this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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