No Relief for Pain Bills

On January 13, 2014, the Supreme Court refused to review the constitutionality of an Arizona law prohibiting virtually all abortions during and after the twentieth week of pregnancy, as measured by the first day of the woman's last menstrual period (LMP). The law, based on model legislation developed by Americans United for Life (AUL), banned abortion at twenty weeks because of medical evidence that the unborn child can experience pain at that stage of pregnancy and because abortions during and after the twentieth week of pregnancy are more dangerous to women's health than carrying the child to term. The twentieth week of pregnancy (LMP) is three to four weeks before viability, that stage of pregnancy when the unborn child can survive outside of the mother, with our without medical assistance.

The law was challenged by physicians who perform abortions up to but not after viability. A federal district court upheld the law, but the court of appeals struck down the law as it applies to pre-viability abortions (the law was not challenged with respect to its post-viability applications). The court of appeals concluded that, under binding Supreme Court precedent, *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992), a State may not prohibit abortions before viability. The defendants asked the Supreme Court to review the court of appeals judgment, but, as noted, the Court denied review. *Horne v. Isaacson*, No. 13-402.

Although the Supreme Court's denial of review does not necessarily mean that the Court agreed with the court of appeals, it does mean that at least six Justices did not want to review the court's judgment (the Supreme Court follows an informal "Rule of Four," under which the Court will grant review if at least four Justices vote to hear a case). Significantly, *no* Justice dissented from the denial of review – neither Justice Scalia nor Justice Thomas, both of whom have repeatedly called for *Roe* and *Casey* to be

1338 Avondale Road South Euclid, OH 44121 (216)333-1365
humanfamilyresearch@gmail.com

overruled, nor Chief Justice Roberts nor Justice Alito, who have not revealed their views on *Roe* and *Casey* in any judicial opinions, nor Justice Kennedy, who was one of the three Justices who wrote the Joint Opinion in *Casey* reaffirming the viability rule of *Roe* (that the States may not prohibit abortions before viability). Supporters of the Arizona law and similar laws enacted in twelve other States based upon model legislation developed by the National Right to Life Committee (NRLC) – the "Pain-Capable Unborn Child Protection Act" – were hoping that the Court would grant review and abandon the viability rule that was announced in *Roe* and reaffirmed in *Casey*. They placed their hopes on Justice Kennedy because he wrote the majority opinion in *Gonzales v. Carhart* (2007) upholding the federal "Partial-Birth Abortion Ban Act." That Act, however, was an abortion *procedure* ban, not an *abortion* ban, and, unlike the legislation proposed by AUL and NRLC, did not prohibit pre-viability abortions. Even assuming that, in addition to Justices Scalia and Thomas, Chief Justice Roberts and Justice Alito would be willing to reconsider and overrule *Roe,* the fact that the Court denied review in the Arizona case means that Justice Kennedy is not willing to do so. And it may mean that other Justices thought to be opposed to *Roe* (*e.g.* Chief Justice Roberts) would not do so, either.

In any event, the denial of review in the Arizona case and the failure of any of the Justices, particularly Justice Kennedy, to dissent from the denial of review, strongly suggests that there is not a majority on the Court, as presently constituted, to revisit the viability rule or overrule *Roe*. That, in turn, suggests that efforts to enact legislation based upon AUL's and NRLC's models is inadvisable.

Paul Benjamin Linton

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1338 Avondale Road South Euclid, OH 44121 (216)333-1365
humanfamilyresearch@gmail.com