

Gonzales v. Carhart: Women Tell the Court About Abortion

Teresa Stanton Collett
University of St. Thomas School of Law, tscollett@stthomas.edu

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GONZALES V. CARHART: WOMEN TELL THE COURT ABOUT ABORTION: AN INTRODUCTION

TERESA STANTON COLLETT*

In an unusual, but not unprecedented act,¹ Justice Ginsburg expressed her strong disagreement with the majority's opinion in *Gonzales v. Carhart*, upholding the federal Partial-Birth Abortion Act of 2003, by reading a summary of her dissent from the bench.² A major focus of the dissent was what she perceived to be the majority's uncritical acceptance of the claim that women sometimes come to regret their decisions to have abortions.

[T]he Court invokes an antiabortion shibboleth for which it concededly has no reliable evidence: Women who have abortions come to regret their choices, and consequently suffer from “[s]evere depression and loss of esteem.” Because of women’s fragile emotional state and because of the “bond of love the mother has for her child,” the Court worries, doctors may withhold information about the nature of the intact D & E procedure. The solution the Court approves, then, is *not* to require doctors to inform women, accurately and adequately, of the different procedures and their attendant risks. Instead, the Court deprives women of the right to make an autonomous choice, even at the expense of their safety.³

The footnote supporting her characterization of the majority's concern as “an antiabortion shibboleth” cites conflicting results of studies regarding the existence, nature and extent of post-abortion regret.

Tellingly absent from the dissent's litany of studies are references from medical texts providing instruction on the performance of abortions. A

* Professor of Law, University of St. Thomas School of Law (Minneapolis). The author served as counsel of record for Congressman Ron Paul and various medical groups in the filing of an amicus brief in support of the Petitioner in *Gonzales v. Carhart*, 550 U.S. --, 127 S.Ct. 1610 (2007).

1. Linda Crawford Greenburg, *The Last Word* at http://blogs.abcnews.com/legalities/2007/04/the_last_word.html (noting that Justice Kennedy read portions of his dissent in *Stenberg v. Carhart*, 530 U.S. 914 (2000) from the bench).

2. David Stout, *Supreme Court Upholds Ban on Abortion Procedure* NY TIMES, April 18, 2007.

3. *Carhart*, 127 S.Ct. at 1648-49 (2007) (citations omitted).

1995 medical text on induced abortion describes the extent and cause of emotional harm in the following manner:

In the USA, it is estimated that 20% of women suffer from severe feelings of loss, grief and regret. These feelings may progress to anger (at herself and at her partner), or to depression and even obsession. These feelings are more likely to arise in women who: lack social support; whose decision to terminate the pregnancy is in conflict with their family or their religious beliefs; who feel they were pressurized into having an abortion; who have abortion because of fetal anomaly; and who are very young or have a very late abortion.⁴

A 1999 medical text on abortion techniques, prepared under the auspices of the National Abortion Federation, identifies the risk factors for psychiatric illness following an abortion as prior or concurrent psychiatric illness, coercion, genetic or maternal medical indications, lack of social supports, paralyzing ambivalence, and advanced gestational age.⁵ These texts identify women particularly at risk of regretting their abortions, or experiencing what some authors call “post-abortion stress syndrome,”⁶ as women who feel pressured into having abortions, who obtain abortions due to fetal anomalies, and who abort pregnancies at an advanced gestational age. Interestingly, these categories correspond neatly to the categories of women who seek partial-birth (or dilation and extraction “D&X”) abortions described by the *Brief of the Institute for Reproductive Health Access and Fifty-Two Clinics and Organizations as Amici Curiae in Support of Respondents in Gonzales v. Planned Parenthood Federation of American, et al., No. 05-1382*, reproduced in this issue of the UNIVERSITY OF ST. THOMAS JOURNAL OF LAW & PUBLIC POLICY.

Of the women who provided accounts, approximately 30 percent obtained second-trimester procedures after their pregnancies were diagnosed with severe fetal anomalies. Less than five percent obtained procedures when their own health became imperiled by their pregnancies;

4. Anna Glasier, *Counseling for Abortion*, in MODERN METHODS OF INDUCING ABORTION 112, 117 (David T. Baird et al. eds., Blackwell Publishers 1995); see also Jo Ann Rosenfeld, *Emotional Responses to Therapeutic Abortion*, 45 AM. FAM. PHYSICIAN 137-38 (1992); Additional sources are collected and discussed in Thomas R. Eller, *Informed Consent Civil Actions for Post- Abortion Psychological Trauma*, 71 NOTRE DAME L. REV. 639 (1996).

5. Carol J. Rowland Hogue et al., *Answering Questions About Long Term Outcomes*, in A CLINICIAN’S GUIDE TO MEDICAL AND SURGICAL ABORTIONS, 217, 225 (Maureen Paul et al. eds., Churchill Livingstone 1999); See also E. Joanne Angelo, *The Psychological Aftermath of Three Decades of Abortion* and Elizabeth M. Shadigian, *Reviewing the Evidence, Breaking the Silence: Long-term Physical and Psychological Health Consequences of Induced Abortion*, in THE COST OF “CHOICE”: WOMEN EVALUATE THE IMPACT OF ABORTION 63 (Erika Bachiochi, ed., Encounter Books 2004).

6. Kathryn Jean Lopez, *Looking Beyond Choice*, NATIONAL REVIEW ONLINE, Nov. 7, 2001, http://www.nationalreview.com/nr_comment/nr_comment110701b.shtml (last visited May 21, 2007).

and approximately 55 percent obtained second-trimester procedures for other reasons primarily because of delayed access to abortion services due to financial or geographic obstacles.⁷

Thus, as many as eighty-five percent of the women described in the Institute for Reproductive Health Access brief supporting the availability of dilation and extraction or “partial-birth” abortion are at risk of psychological harm related to their abortions according to abortion instructional texts. Unfortunately researchers can not obtain additional information from this group of women due to the absence of any identifying information regarding the women.

In contrast, the *Brief for Sandra Cano et al. as Amici Curiae in No. 05-380*, excerpts 180 women’s affidavit testimonies regarding adverse emotional affects they suffered in relation to their abortions. Many of the women are identified by name and state. Justice Kennedy relied upon these testimonies when observing, “While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.”⁸ Sandra Cano’s brief and a selection of the affidavit excerpts are contained in this issue of the UNIVERSITY OF ST. THOMAS JOURNAL OF LAW & PUBLIC POLICY .

By including both the brief of Sandra Cano and the brief of the Institute for Reproductive Health Access, the JOURNAL provides readers an opportunity to hear the voices of women describing varied experiences of abortion. From these varied experiences grow dramatically differing conclusions regarding the morality and legality of induced abortion. If Justice Ginsburg is correct that *Gonzales v. Carhart* provides greater opportunity for legislative action regarding abortion, these women’s stories must be part of the debate.

7. *Brief of the Institute for Reproductive Health Access and Fifty-Two Clinics and Organizations as Amici Curiae in Support of Respondents in Gonzales v. Planned Parenthood Federation of American, et al., No. 05-1382*, 1 UST. J.L. & PUB. POL’Y 209, 212-13 (2007).

8. *Carhart*, 127 S.Ct. at 1634 (2007) (citations omitted).

BRIEF OF SANDRA CANO, THE FORMER “MARY DOE” OF *DOE V. BOLTON*, AND 180 WOMEN INJURED BY ABORTION AS AMICI CURIAE IN SUPPORT OF PETITIONER* **

STATEMENT OF INTEREST OF THE AMICI CURIAE

Consent to file this amicus brief was given by both parties. This brief supporting Petitioner was prepared by counsel for amici.¹

At the heart of this case is the future of the “health” exception articulated in *Roe v. Wade* and *Doe v. Bolton*. Amici Sandra Cano is the “Doe” of *Doe v. Bolton*. It was *Doe v. Bolton* which provided for the health exception and led to partial-birth abortion and abortion on demand. While it is unusual for a successful litigant to file an amicus brief opposing the health exception which was the heart of her case, Mrs. Cano in fact never wanted an abortion in *Doe v. Bolton* and fraud was perpetrated on the Court. Her Affidavit is Appendix A. In addition, the three-doctor provision of the Georgia statute which provided actual verification and protection for women was struck down in *Doe*. Furthermore, the “health” exception has been broadly interpreted and thereby ultimately led to partial-birth abortion. Mrs. Cano supports Congress’ position omitting the “health” exception and urges this Court to give deference to Congress and hold the ban on partial-birth abortion constitutional.

Other amici are 180 post-abortive women who have suffered the adverse emotional and psychological effects of abortion. Congress in its findings only discussed the physical health consequences of abortion. However, other health consequences not stated in Congress’ findings would be helpful to the Supreme Court in making its decision. The women attest

* Linda Boston Schlueter, Counsel of Record, Counsel for Amici Curiae Sandra Cano and post-abortive women.

** *Editor’s Note:* All citations have been converted to footnotes but are otherwise unchanged.

1. Counsel for amici authored the brief in whole. The Justice Foundation is a nonprofit legal foundation that handles cases in landmark decisions. The Foundation is supported through private contributions of donors who have made the preparation and submission of this brief possible. No party contributed to the writing or finances of this brief.

to the fact that there are adverse emotional and psychological health effects that have affected their lives. All of the women have used their full name in the original Affidavits, but some have requested that only their initials be used publicly to protect their confidentiality.

Although the Supreme Court only made non-evidence based assumptions in *Roe v. Wade* and *Doe v. Bolton* because abortion was generally not legal or widespread, the post-abortive women amici provide this Court with their real life experiences and attest that abortion in practice hurts women's health. Post-abortive women were asked, "How has abortion affected you?" Some of the women's Affidavit testimony is in the brief with the complete answer to that question from the amici in Appendix B. The post-abortive women amici are: D.Q. (Tennessee); Myra J. Rasmussen (Tennessee); Donna M. Razin (Florida); C.R. (Georgia); Cathy L. Moffat (Utah); J.L.M. (Texas); Dana Renee Nickles (Arkansas); S.O. (Florida); Kristen Pettibone (Georgia); Mary A. Hill-Griffith (Florida); Dana Nicole Landers (Florida); Julie Thomas (Georgia); S.T. (Tennessee); Teresa Renee Zell (North Carolina); Mary Ellen York (Michigan); E.A.W. (Tennessee); Lorene Elaine Woods (Tennessee); J.S.W. (California); Carolyn Weedon (Texas); Darla Weaver (Texas); B.J.W. (Colorado); H.T. (Texas); T.J.H. (California); Caroline Burnett (Florida); Deborah R. Paine (Georgia); Rhonda Kay Plumb (Illinois); Tami T. Rohrbacher (Wyoming); Leslie Bowen (Florida); Janice L. Bartlett (Florida); Mary Catherine Coburn (Georgia); Hemda Ben-Judah (Georgia); Becky Abell (Oklahoma); Muriel A. Ramos (Florida); C.L.R. (Arizona); Nancy M. Haberling (Ohio); Beverly A. Green (Minnesota); Jackie Lynn Garner (Oklahoma); K.G. (California); O.F. (Maryland); Angela Eckstein (Ohio); Mary J. Duncan (South Carolina); Deborah L. Dowless (Virginia); T.D. (Pennsylvania); Darlene Crumbo (California); Jamie Renee Carter (West Virginia); Cynthia Carney (Oklahoma); Elizabeth Campbell (California); Elvira T. Brand (Florida); Paula S. Botos (Kentucky); Kim Marie Blackowiak (Minnesota); Loretta Bingham (Florida); Pamela Berry (Texas); Brandie M. Atwood (Arkansas); Melody A. Athey (Kansas); Paulette C. Heller (Tennessee); J.M.H. (Texas); Lori Harrington (Mississippi); Diane M. Hanson (Colorado); Kathleen Vaunae Hansel (California); Deanna Hall (California); M.J.H. (Tennessee); Karen Sue Green (Texas); Deborah Longford (Tennessee); V.L. (Oklahoma); Rose Lewis (California); Jana M. Lewis (Montana); S.A.L. (Oklahoma); C.L. (California); D.L. (Louisiana); L.L. (California); S.C.K. (California); Carolyn Knapschaefer (Kentucky); Marene M. Kissinger (California); M.M.K (Tennessee); Gale Denise Jones (Texas); Donna A. Jones (Florida); Kyra L. Janke (Texas); Lori Crossman (Michigan); Tammy Craven (North Carolina); R.A.C. (Alabama); Margaret Conway (Michigan); Pamela T. Colip (California); D.M. (Kansas); April Miera (New Mexico); Roxanne Mergenthaler (Montana); Amy Lynn Meole

(Connecticut); Patricia A. Meixelsperger (Wisconsin); S.B.M. (Arkansas); Vanessa McDonald (Texas); J.M.M. (Louisiana); Debra Mays (Michigan); Sandra Mauldin (Arkansas); G.M. (New York); Dana Mann (Ohio); N.A.M. (Idaho); S.M.L. (Virginia); L.M.S. (Washington); Marie Skurka (Louisiana); Amy Susan Shattrick (Ohio); Sebrina Seay (California); D.M. (California); Karyn Schneider (California); Rose A. Sarcione (Missouri); Sara Sarginson (Michigan); Tammy Joe Rutthofsky (Michigan); K.R. (Texas); Rosa Maria Rosas (West Virginia); Esther Monica Ripplinger (Oregon); Kathy S. Rice (West Virginia); Dorothy Rice (California); Melinda L. James (Mississippi); L.M.J. (Michigan); E.K.J. (Texas); Nancy C. Sweitzer (Pennsylvania); A.A.S. (Missouri); P.S. (Virginia); Brenda Hilliard Stockdale (Georgia); Lori A. Stirrup (Texas); Debra J. Storm (California); M.H.S. (Ohio); Judy Sullivan (New York); Tracy A. Stalsberg (Wisconsin); Natalie Ann South (Mississippi); N.M. (Florida); C.M.S. (North Carolina); Judee Oris (New York); M.E.M. (California); D.M. (Texas); LuAnn Morton (Colorado); Kathleen Murz (Texas); Maranda Music (Kentucky); Leslie D. Musick (Tennessee); Mary L. Neikam (Pennsylvania); T.M.N. (Wisconsin); Linda Newberry (Tennessee); Deborah Peterson (New Hampshire); Alison Phillips (Colorado); Lauralee Peterson (Minnesota); Dianne Pesares (Georgia); Kelli R. Perkins (Kentucky); J.A.P. (Texas); Elizabeth C. Patchet (Wisconsin); Debbie Otto (Montana); Laurie A. Moore (Kentucky); D.R. (California); T.R. (Tennessee); Janice K. Rathkey (Oregon); Lynn F. Raspberry (Texas); Angie Ramsey (Arkansas); K.G.R. (Florida); Regina Pulliam (Oklahoma); Connie Pollner (Georgia); Paisley Pryor (Florida); D.S.P. (Florida); Jana L. Phillips (Missouri); Leslie A. Patterson (Oklahoma); Joann L. Ostrowski (Pennsylvania); K.O. (Arizona); Kaye Peterson (Texas); Karen M. Kowalewski (California); M.M.P. (Minnesota); M.L.M. (Tennessee); Sherry Mae Morgan (Tennessee); Camelia M. Murphy (Texas); Tara L.K. Musico (Hawaii); Diane K. Musselman (Pennsylvania); Wendy Miller (Missouri); Mary Ann Novak (Pennsylvania); K.N. (Mississippi); Kristene O'Dell (Texas); Jeanette Parks (Arkansas); Dianne Marie Donaudy (Georgia); Tina C. Brock (Georgia); Rhonda Arias (Texas); Myra M. Myers (Texas); Kathy Rutledge (Kentucky); Karen Bodle (Pennsylvania); Cynthia Collins (Louisiana); Caron Strong (California).

SUMMARY OF THE ARGUMENT

I

At the heart of this case is the future of the “health” exception established in *Doe v. Bolton*. The health exception has been broadly interpreted to even include the partial-birth abortion procedure which Congress has defined as “gruesome and inhumane.” This Court has recognized that the state may promote but not endanger a woman’s health when it regulates the methods of abortion. But after thirty-three years of real life experiences, post-abortive women and Sandra Cano, “Doe” herself, now attest that abortion hurts women and endangers their physical, emotional, and psychological health. Therefore, the ban on partial-birth abortion which excludes a health exception should be held constitutional.

II

This Court should re-evaluate the health exception considering the extensive evidence that Congress heard and its findings of fact. Congress found that the partial-birth abortion procedure is never medically necessary to preserve the health of the mother and, in fact, poses serious risks to the long-term health of women. Numerous state legislatures are currently holding hearings and also are finding the long-term negative health effects of abortion. The sworn Affidavit evidence of post-abortive women also demonstrates that abortion hurts women physically, emotionally, and psychologically. This Court now has the benefit of fact-finding by Congress and the states as well as the real life experience of post-abortive women and therefore should give deference to those findings and exclude a health exception.

III

This case demonstrates the need to examine the underlying assumptions of a “health” exception. This case also demonstrates that the health exception involves complex physical, emotional, and psychological health issues. Such issues are best left to fact-finders and policy makers in the federal and/or the state legislative branches. Therefore, this Court should give deference to Congress’ findings of fact and hold the partial-birth abortion ban constitutional.

ARGUMENT

I. THE “HEALTH” EXCEPTION IS NOT A PER SE REQUIREMENT AND THIRTY-THREE YEARS OF REAL LIFE EXPERIENCE DEMONSTRATES THAT IT SHOULD BE ABANDONED BECAUSE THE “HEALTH” EXCEPTION IN FACT CREATES SERIOUS ADVERSE CONSEQUENCES TO WOMEN’S HEALTH.

The health exception has been defined so broadly that it allows abortion on demand and the partial-birth abortion procedure which Congress defined as “gruesome and inhumane.”² In a precursor to *Roe v. Wade*, this Court had an opportunity to analyze the word “health” in the District of Columbia abortion statute.³ This Court stated that the general usage and modern understanding of the term “health” includes both psychological and physical wellbeing.⁴

In *Roe v. Wade*, the Court did not focus on the health exception as it did in *Doe v. Bolton*. However, the Court made the following observation: “Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent.”⁵

In *Doe*, the Court stated that the health exception could be judged “... in light of all factors - physical, emotional, psychological, familial, and the woman’s age relevant to the well-being of the patient.”⁶ In his concurring opinion, Chief Justice Burger recognized that the term health was used “in its broadest medical context.”⁷ At the time, he believed that the decision would not have the sweeping effect that the dissenting Justices forewarned because physicians would observe the standards of their profession and only act after careful deliberation concerning judgments of life and health.⁸ He also believed that the Court rejected “any claim that the Constitution requires abortions on demand.”⁹ Unfortunately, Chief Justice Burger’s assumptions have not been realized in the thirty-three years of real life experiences of the post-abortive women. Because of the broad definition of health and the fact that “health” is determined solely by one woman and one abortionist profiting from the abortion, America in effect has abortion on

2. Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531, subsec. (1).

3. *United States v. Vuitch*, 402 U.S. 62 (1971).

4. *Id.* at 72.

5. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

6. *Doe v. Bolton*, 410 U.S. 179, 192 (1973).

7. *Id.* at 208 (Burger, C.J., concurring).

8. *Id.*

9. *Id.*

demand and partial-birth abortion. Furthermore, there is not a careful or narrow view of “health” and abortionists and women do not have a normal doctor-patient relationship as the post-abortive women attest.¹⁰

The broad interpretation of “health” is certainly evident in Justice Douglas’ concurring opinion.¹¹ Justice Douglas elaborated on the meaning of health with a very broad definition. He stated: “Elaborate argument is hardly necessary to demonstrate that childbirth may deprive a woman of her preferred lifestyle and force upon her a radically different and undesired future.”¹²

Justice Douglas expanded the definition of “health” to include “hardships” by stating:

The vicissitudes of life produce pregnancies which may be unwanted, or which may impair ‘health’ in the broad *Vuitch* sense of the term, or which may imperil the life of the mother, or which in the full setting of the case may create such suffering, dislocations, misery, or tragedy as to make an early abortion the only civilized step to take. These hardships may be properly embraced in the ‘health’ factor of the mother as appraised by a person of insight.

In *Casey*, this Court stated that “psychological well-being is a facet of health.”¹³ This Court also stated that there could be “devastating psychological consequences” if a woman’s decision was not fully informed and truthful, not misleading.¹⁴ The post-abortive women amici attest to the “psychological consequences” that they experienced when they were not fully informed of the physical and psychological consequences of abortion and the information they were given by the abortionist or the abortion facility staff was in fact misleading.¹⁵

In *Stenberg v. Carhart*,¹⁶ this Court held that the Nebraska statute violated the Constitution because it lacked the health exception. But this

10. For example, H.T. (Texas) - “Experienced major clinical depression during and after birth of oldest living child after I learned how abortions were performed and more about fetal development.” App. B at 30. M.J.H. (Tennessee) - “I had ten years of depression, anxiety, and panic attacks that I had trouble understanding ... Those ten years of my life were spent in anguish due to a decision that I had made based upon misinformation and untruths.” App. B at 39.

11. *Doe v. Bolton*, 410 U.S. 179, 209 (1973) (Douglas, J., concurring).

12. *Id.* at 214-15.

13. *Planned Parenthood v. Casey*, 505 U.S. 833, 882 (1992).

14. *Id.*

15. For example, C.R. (Georgia) - “No one ever showed me the stages of pregnancy. If someone had, I wouldn’t have went through it. If I would have known the emotional effects that was years later, I would have reconsidered.” App. B at 12-13. Muriel A. Ramos (Florida) - “It made my life go into a downward spiral from emotional and spiritual pain to absolute symptoms of ill health.... However, the reality of the abortion was exasperated. [*sic*] I was forever changed in an unhealthy way from that legal choice I made, however misinformed that I was.” App. B at 23-24.

16. *Stenberg v. Carhart*, 530 U.S. 914 (2000).

Court also cautioned that “a State may promote but not endanger a woman’s health when it regulates the methods of abortion.”¹⁷ This Court indicated that it had invalidated statutes that in the process of regulating the methods of abortion had imposed significant health risks.¹⁸ It is not, however, the method of abortion that creates the health risk, it is the abortion itself. Congress found that “partial-birth abortion is never necessary to preserve the health of a woman” but “poses significant health risks to a woman ...”¹⁹ Thus, the State would actually be endangering the woman’s health by allowing partial-birth abortion. In other procedures such as silicone breast implants, a woman and her doctor cannot make that surgery choice because the federal Food and Drug Administration placed a moratorium on the device due to the health risks that were involved.²⁰ Therefore, they should not be able to “choose” abortion which is a more dangerous and risky procedure.

In the most recent decision concerning the health exception, the Court of Appeals for the Sixth Circuit found that the health exception is not a per se requirement.²¹ In that case, the Ohio statute prohibited the use of RU-486 for the purpose of inducing an abortion unless certain criteria were met.²² Challenges were made to the statute including that it lacked the constitutionally mandated health exception.²³ The district court held that the health exception was required, thus imposing a per se requirement.²⁴ The Court of Appeals, however, stated this was erroneous and that no such blanket per se requirement has been imposed.²⁵ The court concluded that the health exception is “constitutionally necessary where substantial medical authority indicates that a banned procedure would be safer than the other available procedures, not just when banning the procedure subjects a woman to risks from the pregnancy itself.”²⁶

In the present case, Congress concluded after extensive hearings that the partial-birth abortion procedure is never medically necessary to preserve the health of the mother.²⁷ In fact, Congress found that the partial-birth

17. *Id.* at 931.

18. *Id.*

19. Partial-Birth Abortion Ban Act, 18 U.S.C. § 1531, § 2, subsec. (5).

20. On January 6, 1992, the FDA called for a moratorium on the use of silicone gel-filled breast implants. FDA Breast Implant Consumer Handbook - 2004, www.fda.gov/cdrh/breastimplants/handbook2004. The FDA found that the implants caused such problems as fibrous capsular contracture, silicone gel leakage and migration, infection, interference with early tumor detection, human carcinogenicity, and autoimmune disease.

21. *Planned Parenthood v. Taft*, 2006 U.S. App. LEXIS 4459 (6th Cir. 2006).

22. *Id.* at 5-6.

23. *Id.* at 8.

24. *Id.* at 10.

25. *Id.* at 10-11.

26. *Id.* at 22.

27. Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531, subsec. (1).

abortion procedure poses “serious risks to the long-term health of women and in some circumstances, their lives.”²⁸ Thus, there is no per se requirement for inclusion of the health exception, and therefore, the ban on the partial-birth abortion procedure is constitutional.

II. CONGRESS CORRECTLY OMITTED THE “HEALTH” EXCEPTION CONSIDERING THE SIGNIFICANT FACTUAL FINDINGS THAT THE PARTIAL-BIRTH ABORTION PROCEDURE IS NEVER MEDICALLY NECESSARY TO PRESERVE THE MOTHER’S HEALTH AND POSES SERIOUS ADVERSE CONSEQUENCES TO A WOMAN’S HEALTH.

This Court should re-evaluate the health exception considering the extensive evidence that Congress heard and its findings of fact. It is clear that Congress recognizes the problems with the health exception.²⁹ In addition, one state has banned abortion based on the negative health consequences to women³⁰ and several other state legislatures are considering or have considered similar legislation.³¹ The sworn Affidavit evidence of post-abortive women also attest that abortion hurts women physically, emotionally, and psychologically. In this case, the Court now has the benefit of fact-finding by Congress, the states, and real life experiences of post-abortive women as discussed below.

A. Deference Should Be Given to Congressional Findings.

As a co-equal branch of government, deference should be given to Congress’ findings which were based on extensive hearings and evidence. Congressional findings should be given great deference.³² In *Turner*, this Court stated that “In reviewing the constitutionality of a statute, ‘courts must accord substantial deference to the predictive judgments of Congress ...’ “ and that its “sole obligation is ‘to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.’”³³ Congress has drawn “reasonable inferences based on substantial evidence” and the post-abortive women amici can attest based on their real life experiences that abortion hurts women physically,

28. *Id.* at subsec. (2).

29. Partial-Birth Abortion Ban Act, 18 U.S.C. § 1531.

30. HB 1215, 2006 Leg., 81st Sess. (S.D. 2006).

31. For example, Alabama, Indiana, Georgia, Kentucky, Louisiana, Missouri, Michigan, Mississippi, Ohio, Oklahoma, Tennessee, and West Virginia.

32. *Turner Broadcasting Sys., Inc. v. FCC (Turner II)*, 520 U.S. 180 (1997).

33. *Id.* at 195 (quoting *Turner Broadcasting Sys., Inc. v. FCC (Turner I)*, 512 U.S. 622, 665-66 (1994)).

emotionally, and psychologically.³⁴

Congressional findings should particularly be given deference in medical or health issues.³⁵ Congress should make factual findings because it is “an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue.”³⁶ Furthermore, the courts should not second-guess legislative judgments.³⁷ By way of analogy, this Court was not willing to second-guess Congress’ findings that child pornography is “harmful to the physiological, emotional, and mental health of the child.”³⁸ In fact, this Court noted that “sexually exploited children are unable to develop healthy affectionate relationships in later life, have sexual dysfunctions ...” and are “predisposed to self-destructive behavior such as drug and alcohol abuse or prostitution.”³⁹ Post-abortive women also attest to similar problems.⁴⁰ In this case, Congress’ findings should not be second-guessed.

Congress made numerous findings concerning the partial-birth abortion procedure.⁴¹ The amici believe that Congress correctly found that (1) partial-birth abortion “is a gruesome and inhumane procedure that is never medically necessary and should be prohibited;”⁴² (2) “partial-birth abortion remains a disfavored procedure that is not only unnecessary to preserve the health of the mother, but in fact poses serious risks to the long-term health of women and in some circumstances, their lives;”⁴³ (3) the overwhelming evidence after extensive congressional hearings “demonstrates that a partial-birth abortion is never necessary to preserve the health of a woman, poses significant health risks to a woman upon whom the procedure is performed and is outside the standard of medical care;”⁴⁴ and, (4) Congress had substantial evidence to conclude that “a ban on partial-birth abortion is not required to contain a ‘health’ exception, because the facts indicate that a

34. See Appendix B where the relevant portions of post-abortive women amici Affidavits are provided.

35. See e.g., *Jones v. United States*, 463 U.S. 354, 365 (1983) (stating courts should “pay particular defense [sic] to reasonable legislative judgments” in a case where congressional findings that individuals acquitted by reason of insanity were likely to be dangerous); *Marshall v. United States*, 414 U.S. 417, 427 (1974) (stating “courts should be cautious not to rewrite legislation” in case where Congress determined that drug addicts were less likely to be rehabilitated); *Lambert v. Yellowley*, 272 U.S. 581, 294-95 (1926) (deferring to Congress that alcohol had no medicinal uses).

36. *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 330 (1985) (rejecting procedural due process challenge on statutory limitation of fees paid to attorneys who represent veterans on veteran benefit claims).

37. *New York v. Ferber*, 458 U.S. 747, 758 (1982).

38. *Id.*

39. *Id.* at n.9.

40. See Appendix B for the Affidavits of post-abortive women.

41. Partial-Birth Abortion Ban Act, 18 U.S.C. § 1531, § 2.

42. *Id.* subsec. (1).

43. *Id.* at subsec. (2).

44. *Id.* at subsec. (5).

partial-birth abortion is *never* necessary to preserve the health of a woman, poses serious risks to a woman's health, and lies outside the standard of medical care."⁴⁵ The amici support Congress' findings and urge this Court to give the congressional findings great deference because its findings were based on extensive hearings, a substantial record, and were "reasonable inferences based on substantial evidence."

B. Recent State Legislative Findings Also Support Congress' Findings of the Serious Physical, Emotional, and Psychological Harm to Women.

Prior to *Roe* and *Doe*, health issues like abortion were decided by the states who are able to hold hearings and determine whether the medical and scientific knowledge are more advanced to warrant a different legal conclusion. Recently, there are some important examples of states making determinations about the emotional and psychological health consequences of abortion.

In Texas, the Legislature passed the "Women's Right to Know" Act⁴⁶ in 2003. As a result, the medical board of the Texas Department of Health held hearings and ultimately produced a booklet entitled "A Woman's Right to Know" which is to be distributed to women who are thinking about having an abortion.⁴⁷ The booklet provides women with information concerning the unique DNA of the baby,⁴⁸ calls the baby an "unborn child,"⁴⁹ shows the growth and development of the child from four weeks gestation to thirty-eight weeks gestation,⁵⁰ describes the procedure,⁵¹ and explains the physical, emotional, and psychological risks to women.⁵²

Specifically, the Texas Department of Health's "Woman's Right to Know" booklet describes the partial-birth abortion procedure or dilatation and extraction (D&X) procedure which it states can be done after sixteen weeks.⁵³ The booklet lists the following possible side effects and risks:

- A hole in the uterus (uterine perforation) or other damage to the uterus.
- Injury to the bowel or bladder.
- A cut or torn cervix (cervical laceration).

45. *Id.* at subsec. (13) (emphasis added).

46. Women's Right to Know Act, Tex. Health & Safety Code § 171.001 et seq. (2003).

47. The booklet is available through the Texas Department of Health or on its website at www.dshs.state.tx.us/wrtk/pdf/booklet.pdf.

48. "Women's Right to Know" booklet at 2.

49. *Id.*

50. *Id.* at 3-8.

51. *Id.* at 14-15.

52. *Id.* at 15-17.

53. *Id.* at 14.

- Incomplete removal of the unborn child, placenta, or contents of the uterus, requiring an additional operation.
- Infection.
- Complications from anesthesia such as respiratory problems, nausea and vomiting, headaches, or drug reactions.
- Inability to get pregnant due to infection or complication from an operation.
- A possible hysterectomy as a result of complication or injury during the procedure.
- Hemorrhage (heavy bleeding).
- Emergency treatment for any of the above problems, including the possible need to treat with an operation, medicines, or a blood transfusion.
- Rarely, death.⁵⁴

In addition, the Texas Department of Health notes in its booklet “A Woman’s Right to Know” that Former Surgeon General C. Everett Koop and the Physician’s Ad Hoc Coalition for Truth stated in 1996 that the partial-birth abortion procedure “... is never medically necessary to protect a mother’s health or her future fertility. On the contrary, this procedure can pose a significant threat to both.”⁵⁵

The Texas Department of Health’s pamphlet warns of the “emotional side of an abortion.”⁵⁶ It states:

Some women may feel guilty, sad, or empty, while others may feel relief that the procedure is over. Some women have reported serious psychological effects after their abortion, including depression, grief, anxiety, lowered self-esteem, regret, suicidal thoughts and behavior, sexual dysfunction, avoidance of emotional attachment, flashbacks, and substance abuse. These emotions may appear immediately after an abortion, or gradually over a longer period of time. These feelings may recur or be felt stronger at the time of another abortion, or a normal birth, or on the anniversary of the abortion.⁵⁷

Currently, a number of state legislatures are considering removing or in some other way limiting abortion or the health exception.⁵⁸ A notable example is South Dakota which has made substantial and detailed findings

54. *Id.* at 15.

55. *Id.*

56. *Id.* at 16.

57. *Id.*

58. For example, Alabama, Indiana, Georgia, Kentucky, Louisiana, Missouri, Michigan, Mississippi, Ohio, Oklahoma, Tennessee, and West Virginia.

after extensive hearings. This led to the ban on abortion except to save the life of the mother.

In South Dakota, the Legislature enacted HB 1233 which created the South Dakota Task Force to Study Abortion [hereinafter Task Force]. The Task Force was specifically charged to study ten aspects of abortion including the physical and mental effects of abortion on women.⁵⁹ It was also charged with preparing a report that detailed its findings along with any proposals for additional legislation that the Task Force would deem advisable.⁶⁰

In compliance with its charge, the Task Force initially met on August 1, 2005 and then scheduled four full days of hearings.⁶¹ “The Task Force heard live testimony of approximately fifty-five witnesses, including thirty-two experts, and considered the written reports and testimony from another fifteen experts” and the live testimony “was divided almost equally between witnesses who support the position that abortion is harmful to women and should be illegal and those who think it should be legal.”⁶² In addition, the Task Force received approximately 3,500 pages of written materials, studies, reports, and testimony.⁶³ The Task Force noted that of particular significance were the Affidavits of almost 2,000 post-abortive women who provided statements about their real life experiences.⁶⁴ The Task Force stated that “[o]f these post-abortive women, *over 99% of them* testified that abortion is destructive of the rights, interests, and health of women and that abortion should not be legal.”⁶⁵

After hearing all of the evidence from experts and post-abortive women, the Task Force stated:

59. Report of the South Dakota Task Force to Study Abortion (December 2005), available at www.ivotemyvalues.com/pdf/contentmgmt/Task-Force-Report.pdf. The Task Force was to study (1) the practice of abortion since its legalization; (2) the body of knowledge concerning the development and behavior of the unborn child which has developed because of technological advances and medical experience since the legalization of abortion; (3) the societal, economic, and ethical impact and effects of legalized abortion; (4) the degree to which decisions to undergo abortions are voluntary and informed; (5) the effect and health risks that undergoing abortions has on the women, including the effects on the women’s physical and mental health, including the delayed onset of cancer, and her subsequent life and socioeconomic experiences; (6) the nature of the relationship between a pregnant woman and her unborn child; (7) whether abortion is a workable method for the pregnant woman to waive her rights to a relationship with the child; (8) whether the unborn child is capable of experiencing physical pain; (9) whether the need exists for additional protections of the rights of pregnant women contemplating abortion; and, (10) whether there is any interest of the state or the mother or the child which would justify changing the laws relative to abortion. *Id.* at 6.

60. *Id.* at 6.

61. *Id.*

62. *Id.* at 6-7.

63. *Id.* at 7.

64. *Id.*

65. *Id.* (emphasis added).

Further, the Task Force finds that the pre-abortion counseling provided often does not prepare women who have abortions for the psychological outcomes they may experience after their abortions. In addition, women who receive little or no information about possible emotional health risks of this procedure may significantly compromise their mental health and the quality of their lives for years to come. Due to the very limited information disclosed by abortion providers, women are not fully aware that abortion carries with it the potential to damage their physical, emotional, interpersonal, and spiritual well-being.⁶⁶

The Task Force also addressed the issue of the psychological consequences of terminating the life of the child. The Task Force stated:

Perhaps worse, the pregnant mother is not told prior to her abortion that the procedure will terminate the life of a human being. The psychological consequences can be devastating when that woman learns, subsequent to the abortion, that this information was withheld - information that would have resulted in her declining to submit to an abortion. Her anger at being deceived and being prevented from making an informed decision for herself is exacerbated by her realization that she was implicated in the killing of her own child in utero. Aside from the injustice of her being deprived of making her own informed decision (see Section II-D), the psychological harm of knowing she killed her child is often devastating.⁶⁷

In addition, the Task Force found that:

... it is simply unrealistic to expect that a pregnant mother is capable of being involved in the termination of the life of her own child without risk of suffering significant psychological trauma and distress. To do so is beyond the normal, natural, and healthy capability of a woman whose natural instincts are to protect and nurture her child.⁶⁸

The Task Force heard testimony from Dr. Vincent Rue, Ph.D., who is a psychotherapist, professor, and was special consultant to then-U.S. Surgeon General Dr. C. Everett Koop on abortion morbidity. The Task Force stated: "In 1981, Dr. Rue provided the first clinical evidence of post-abortion trauma, identifying this psychological condition as 'Post-abortion Syndrome' in testimony before the U.S. Congress."⁶⁹ The Task Force heard evidence that individuals with Post-abortion Syndrome "experience symptoms of avoidance (efforts to escape from reminders of the event),

66. *Id.* at 47.

67. *Id.*

68. *Id.* at 47-48.

69. *Id.* at 53.

intrusion (unwanted thoughts, nightmares, and flashbacks related to the event), and arousal (exaggerated startle reflex, sleep disturbance, irritability) for a month or more following exposure to a traumatic event.”⁷⁰ Although for some women, the initial response is one of relief, many women later avoid the problem through repression and denial, usually for years - “5 years is common, 10 or 20 is not unusual.”⁷¹

The Task Force found the following mental health outcomes:

1. Based on methodological improvements characterizing these studies, prior works indicating that abortion is an emotionally benign medical procedure for most women are invalid and little reliance can be placed upon them;
2. In all the analyses conducted, women with a history of abortion were never found to be at a lower risk for mental health problems than their peers with no abortion experience;
3. Women with a history of induced abortion are at a significantly higher risk for the following problems: a) inpatient and outpatient psychiatric claims, particularly adjustment disorders, bipolar disorder, depressive psychosis, neurotic depression, and schizophrenia; b) substance use generally, and specifically during a subsequent pregnancy; and c) clinically significant levels of depression, anxiety, and parenting difficulties;
4. When compared to unintended pregnancies carried to term and other forms of perinatal loss, abortion poses more significant mental health risks; and
5. Cross-cultural data call into question the often voiced view that psychological problems associated with abortion are socially constructed, as women living in a culture where abortion is normative and a much less volatile social issue, have been found to also suffer psychological effects of abortion.⁷²

Based on all of the evidence the Task Force concluded “that to fully protect the rights, interests, and health of the mother and the life of her unborn child, a ban on abortions is required.”⁷³ It is the real life experience of the post-abortive women amici that abortion hurts women emotionally and psychologically, and therefore, abortion should be banned to protect the health of the mother.

C. The Real Life Experiences of Postabortive Women Demonstrate that

70. *Id.* at 44.

71. Willke & Willke, *Abortion 50* (Hayes Pub. Co. 2003).

72. Report of the South Dakota Task Force to Study Abortion 42-43 (December 2005), available at www.ivotemyvalues.com/pdf/contentmgmt/Task_Force_Report.pdf.

73. *Id.* at 69.

Abortion Hurts Women, and Therefore, Congress Correctly Banned the Partial-Birth Abortion Procedure.

While Congress, in this case, focused on the physical consequences of abortion, the amici's real life experiences concur with Congress' findings that there are harmful and negative physical consequences to abortion. Abortion also has negative psychological effects on women. In *Planned Parenthood v. Casey*,⁷⁴ the Court placed abortion in the range of choices that are "central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."⁷⁵

The Court of Appeals for the Fifth Circuit recently cited testimony that abortion as practiced is "almost always a negative experience for the patient..."⁷⁶ In *Bell*, the court struck down Texas abortion facility regulations that required Texas abortions to be done in a manner that enhanced women's "self-esteem" and "dignity."⁷⁷ Contrary to the non-evidence-based assumption in *Casey*, the decision in *Bell* and the Women's Affidavits refute the assumption that abortion enhances female dignity, self-esteem, and autonomy.⁷⁸

Dr. David Reardon, one of the world's leading experts on the effects of abortion on women, further demonstrates the devastating psychological consequences of abortion. Dr. Reardon states that following temporary feelings of relief, there is emotional "paralysis" or post-abortion "numbness," guilt and remorse, nervous disorders, sleep disturbances, sexual dysfunction, depression, loss of self-esteem, self-destructive behavior such as suicide, thoughts of suicide, and alcohol and drug abuse, chronic problems with relationships, dramatic personality changes, anxiety attacks, difficulty grieving, increased tendency toward violence, chronic crying, difficulty concentrating, flashbacks, and difficulty in bonding with later children.⁷⁹

The real life experiences of the post-abortive women also confirm what

74. 505 U.S. 833 (1992).

75. *Id.*

76. *Women's Medical Center v. Bell*, 248 F.3d 411, 418 (5th Cir. 2001).

77. *Id.*

78. For example, Tami T. Rohrbacher (Wyoming) - "Stripped my self-esteem ..." App. B at 20. Cathy L. Moffat (Utah) - "Depression, low-self [*sic*] esteem, guilt, condemnation, and shame, sleepless nights, nightmares and torment, thoughts of self-hate and suicide, lost, confused, destroyed relationships throughout my life, unloved, unlovable ..." App. B at 13-14. Teresa Renee Zell (North Carolina) - "Depression, nightmares, hospitalizations, suicidal thoughts and actions, guilt, anger at myself and those who forced the abortion, fear, eating disorder, alcoholism, low-self [*sic*] esteem, anxiety, stress." App. B at 26. Camelia M. Murphy (Texas) - "I have suffered with low-self [*sic*] esteem, self-hatred, suicidal impulses, constant anxiety (especially about sex and about making decisions) ..." App. B at 95.

79. "The Aftereffects of Abortion," www.afterabortion.info/complic.html (calling abortion a public health issue and listing the physical and psychological effects of abortion).

the research has discovered. The women were asked: *How has abortion affected you?* Typical responses from their sworn Affidavits⁸⁰ which are located at Appendix B included depression,⁸¹ suicidal thoughts,⁸² flashbacks,⁸³ alcohol and/or drug use,⁸⁴ promiscuity,⁸⁵ guilt,⁸⁶ and secrecy,⁸⁷

80. In addition, approximately 2,000 similar Affidavits from post-abortive women were given to the Task Force on Abortion in South Dakota which provided evidence that led to that State's ban.

81. For example, Cynthia Carney (Oklahoma) - "For 23 years, I went into crying spells, depression, suicidal thoughts. Emotionally it devastated me." App. B at 31. Elizabeth Campbell (California) - "i suffered from depression, migraine headaches, low-self-esteem [*sic*]. No self-worth ..." App. B at 32. D.Q. (Tennessee) - "It has completely messed up my life. It was not the best way to start out in marriage. I was depressed, didn't want my husband to touch me, felt guilty, had suicidal thoughts, cried a lot, *terribly* depressed!" App. B at 11. S.O. (Florida) - "For twenty-eight years, I have mourned, gone thru depression around Victoria's birthdate, became angry as the years passed." App. B at 15-16.

82. For example, Donna M. Razin (Florida) - "Deep regret - initially I was suicidal - as the years have progressed I have developed a heightened level of bitterness and anger and self-hate." App. B at 12. Kim Marie Blackowiak (Minnesota) - "Yes, I was extremely sad, depressed, and suicidal after my abortion. After my abortion - I used drugs and alcohol frequently to numb the feelings." App. B at 33. Brandie M. Atwood (Arkansas) - "Abortion turned a 14-year-old school girl into a suicidal teenager that lived with feelings of guilt, rejection, and helplessness." App. B at 35.

83. For example, C.R. (Georgia) - "Yes. I feel emotionally scarred. Years went by of hiding it. Then something started triggering flash backs. Children's birthdays bring on extreme sadness. Christmas time brings on times of depression, regret, and wondering what would my children have been like. Could they have made a difference in the world. [*sic*] Why couldn't I have given them a chance at life like my mother gave me!" App. B at 12-13. S.T. (Tennessee) - "Depression and flashbacks after the abortion. I had no self-worth. I turned to drugs and alcohol and relationships with no meaning." App. B at 25.

84. For example, J.L.M. (Texas) - "11 years later I am obviously still affected. Initially, I suffered from depression, alcohol use increased, increased promiscuity, due to my lowered self esteem. My grades suffered in college. Relationships were difficult. I had nightmares, flashbacks, and grief." App. B at 14. Kristen Pettibone (Georgia) - "My abortion devastated me. I lost respect for my boyfriend, respect for myself. I became an alcoholic, dabbled in drugs to forget what I had done!" App. B at 16. Dana Nicole Landers (Florida) - "For years my abortion decision led me down a self-destructive path even until the point of wanting to die. I went from an honor roll student in high school to a drug addict. I suffered from depression, anger, guilt, regret, and denial just to name a few." App. B at 17. Deborah R. Paine (Georgia) - "I turned to 11 years of alcohol and drug addiction to cope with the regret. In my need to punish myself, I had a tubal ligation (sterilization). So I am childless. After killing my children, I did not deserve to be a mother." App. B at 19.

85. For example, Janice L. Bartlett (Florida) - "Devalued, dehumanized me. Took away my dignity and self-worth. Suffered from shame and guilt. Became depressed and even attempted suicide. Also led to use of alcohol, drugs, and sexual promiscuity." App. B at 22. C.L.R. (Arizona) - "My abortion immediately led to hopelessness, promiscuity, and drinking binges. I could not escape the pain and guilt. I've been through 19 years of intermittent counseling." App. B at 24. E.A.W. (Tennessee) - "Drugs and promiscuity didn't help." App. B at 27. Beverly A. Green (Minnesota) - "I went into a black tunnel for years. Started using drugs, drinking, more promiscuity, very insecure, hated myself - the list goes on ..." App. B at 41.

86. For example, Hemda Ben-Judah (Georgia) - "I have lived with guilt for many years." App. B at 22. Connie Ambrecht (Georgia) - "Guilt felt for years ..." App. B at 21. Mary Ellen York (Michigan) - "I was affected dramatically by my abortion. For years I couldn't even look at a baby and when I heard the word "abortion" I would just cringe. I suffered depression and I

Each of them made the “choice” to abort their baby, and they have regretted their “choices.”⁸⁸ The emotional and psychological pain does not go away,⁸⁹ and therefore, abortion is a short term solution with long term negative consequences.

Congress’ findings, the findings of the South Dakota Task Force on Abortion, and sworn Affidavits of the women in Appendix B are only the tip of the abortion iceberg. Care Net⁹⁰ and other pregnancy resource centers attest that their organizations had over 100,000 women in post-abortion recovery programs in 2004 alone. It is estimated that there are more than one million abortions each year. If even 1 in 10 women suffer from negative psychological consequences of abortion, then Congress and the state legislatures should hold hearings, make factual findings, and pass legislation concerning abortion. Congress and the state legislatures should be allowed to protect women’s health from the negative physical and psychological effects of abortion.

Failing to allow the federal and state legislative branches to hear the evidence concerning abortion only prolongs the anguish and debate that has divided this country. Although Justice O’Connor called “the contending sides of a national controversy to end their national division by accepting a

didn’t like myself very much. Feelings of guilt. I found it very hard to forgive myself. It took my life from me.” App. B at 26. J.S.W. (California) - “Guilt, shame, feelings of being a really horrible person.” App. B at 28.

87. For example, T.J.H. (California) - “... deep sense of loss and guilt/secretcy.” App. B at 18. Melody A. Athey (Kansas) - “I repressed any memory of the experience for 25 years. My whole lifestyle changed after my abortion. I started drinking heavily and married an alcoholic shortly after. I tried suicide once and considered it several times. I had repeated periods of depression especially around the anniversary date of my abortion. The guilt I felt was overwhelming.” App. B at 35.

88. For example, Cathy L. Moffat (Utah) - “I have regretted my choices the rest of my life.” App. B at 13-14. Diane M. Hanson (Colorado) - “It changed my life, how I viewed myself, it took away my self-worth. It was devastating and caused several years of intense pain and sorrow. The hardest part was knowing ‘it was my choice’ that caused my baby’s death and I couldn’t do anything to change that or make it better!” App. B at 38. Lori Crossman (Michigan) - “It devastated me emotionally, mentally, and spiritually. I cannot go back and reverse my “choices” - I cannot get my children back. They are dead because abortion was legal and easy to access.” App. B at 45. Dana Renee Nickles (Arkansas) - “In the beginning I thought I was doing the right thing. Only afterwards did I realize the TRUTH! My conscience was seared, my heart was broken. I lived in a state of depression looking at drugs as the answer to my problem. And the problem - I had killed my child! See you don’t realize what happens to yourself until it’s too late, you’ve already done it and there’s no turning back. I can’t turn back time - if I could - I WOULD’N’T HAVE AN ABORTION!! I was emotionally torn apart.” App. B at 15.

89. For example, Caroline Burnett (Florida) - “It took my innocence. Robbed me of self-worth ... I thought it would be over after one day but fifteen years later, I’m still haunted by the memories and the tremendous guilt of, now when I understand, having robbed my children of life.” App. B at 18.

90. Care Net was founded in 1975. In 1980, Care Net opened its first affiliated pregnancy center in Baltimore, Maryland. Its focus is to develop, equip, and promote more than 900 pregnancy centers across North America. See www.care-net.org.

common mandate” which she alleged was rooted in the Constitution,⁹¹ this has not been the case. Justice Scalia recognized what has become the national reality:

Quite to the contrary, by foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.⁹²

The post-abortive women amici urge this Court to end its “rigid national rule” and allow the federal and state legislative branches of government to determine the health facts about abortion. Congress and state legislatures should be allowed to protect women by holding hearings, making findings of fact, and enacting legislation based on the evidence.

III. THIS CASE DEMONSTRATES ABORTION ISSUES ARE VERY COMPLEX ISSUES THAT ARE FACT BOUND AND INVOLVE NATIONAL AND STATE POLICY THAT ARE BEST LEFT TO THE LEGISLATIVE BRANCHES OF GOVERNMENT, AND THEREFORE, CONGRESS’ EXCLUSION OF THE HEALTH EXCEPTION SHOULD BE UPHELD.

Prior to *Roe v. Wade*⁹³ and *Doe v. Bolton*,⁹⁴ health issues such as abortion were traditionally state issues.⁹⁵ The *Roe* Court noted that the Texas statute was “typical of those that have been in effect in many States for approximately a century”⁹⁶ and traced the history of abortion and referenced the state statutes pertaining to abortion.⁹⁷ The *Roe* and *Doe* Court, however, constitutionalized the right to abortion and thereby overturned the abortion laws in all fifty states.⁹⁸ In addition, the federal courts were empowered to strike down state or federal abortion laws that

91. *Planned Parenthood v. Casey*, 505 U.S. 833, 867 (1992).

92. *Id.* at 1002 (Scalia, J. dissenting).

93. 410 U.S. 113 (1973).

94. 410 U.S. 179 (1973).

95. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 204 (1824) recognized that under what was later called the state’s “police power” the states could regulate “health laws of every description.” The Court stated “[T]hat immense mass of legislation which embraces everything within the territory of a state not surrendered to a general government; all of which can be most advantageously exercised by the states themselves. Inspection laws, quarantine laws, health laws of every description, as well as for regulating the internal commerce of a State ... are component parts of this mass.” *Id.* at 203.

96. *Roe v. Wade*, 410 U.S. 113, 116, 118

97. *Id.* at 132-145.

98. See generally Forsythe & Presser, *The Tragic Failure of Roe v. Wade: Why Abortion Should Be Returned to the States*, 10 Tex. Rev. L. & Pol. 85, 88 (2005).

prohibited or regulated abortions.⁹⁹ This became evident in *Stenberg v. Carhart*¹⁰⁰ where the Court invalidated the laws in Nebraska as well as those in twenty-nine other states that prohibited the partial-birth abortion procedure. It is also true in this case where federal courts in California,¹⁰¹ Nebraska,¹⁰² and New York¹⁰³ enjoined Congress' Partial-Birth Abortion Ban Act of 2003.¹⁰⁴

Because the *Roe* Court recognized a constitutional right to abortion, it also removed the abortion debate from the legislative and political process. In 2003, Norma McCorvey, the "Roe" of *Roe v. Wade*, filed a Rule 60¹⁰⁵ Motion to vacate that 1973 decision because of significant changes in the factual and legal conditions which make the decision no longer just or equitable.¹⁰⁶ At the Court of Appeals for the Fifth Circuit,¹⁰⁷ Judge Edith Jones reviewed McCorvey's legally sufficient and compelling evidence consisting of 5,347 pages of post-abortive women's affidavits, medical experts, and former abortion clinic personnel. Judge Jones correctly stated in her concurring opinion the importance of the Supreme Court re-evaluating *Roe* and expressed her fervent hope that this Court would acknowledge the developments and re-evaluate *Roe*.¹⁰⁸ Judge Jones summarized the evidence including evidence of the long-term emotional and psychological damage which is currently in issue with the health exception and the "perverse result"¹⁰⁹ that an issue that affects millions of women and unborn babies cannot be heard or meaningfully debated:

At the same time, because the Court's rulings have rendered basic abortion policy beyond the power of our legislative bodies, the arms of representative government may not meaningfully debate McCorvey's evidence. The perverse result of the Court's having determined through constitutional adjudication this fundamental social policy, which affects over a million women and unborn babies each year, *is that the facts no longer matter ...*¹¹⁰

Judge Jones concluded:

99. *Id.*

100. 530 U.S. 914 (2000).

101. *Planned Parenthood Fed'n of Am. v. Ashcroft*, 320 F. Supp. 2d 957 (N.D. Cal. 2004), *appeal sub nom. Planned Parenthood Fed'n of Am. v. Gonzales*, 435 F.3d 1163 (9th Cir. 2005).

102. *Carhart v. Ashcroft*, 331 F. Supp. 2d 805 (D. Neb. 2004), *aff'd sub nom. Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005).

103. *Nat'l Abortion Fed'n v. Ashcroft*, 330 F. Supp. 2d 436 (S.D.N.Y. 2004), *aff'd sub nom. Nat'l Abortion Fed'n v. Gonzales*, 437 F.3d 278 (2d Cir. 2006).

104. Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531.

105. Fed. R. Civ. P. 60(b).

106. *McCorvey v. Hill*, 2003 U.S. Dist. LEXIS 12986 (N.D. Tex. 2003).

107. *McCorvey v. Hill*, 385 F.3d 846 (5th Cir.), *cert. denied*, 543 U.S. 1154 (2005).

108. *Id.* at 853.

109. *Id.* at 852.

110. *Id.* (emphasis added).

One may fervently hope that the Court will someday acknowledge such developments and re-evaluate *Roe* and *Casey* accordingly. That the Court's constitutional decision making *leaves our nation in a position of willful blindness* to evolving knowledge should trouble any dispassionate observer ...¹¹¹

Furthermore, in 1973 when the Supreme Court decided *Roe v. Wade* and *Doe v. Bolton*, abortion was illegal in most states and relatively rare.¹¹² No evidence existed then regarding how widespread legalized abortion would actually affect women. The Court assumed that abortion would be good for women and made many non-evidence-based assumptions. The Court assumed abortion was like other medical procedures and as safe as childbirth because the long-term effects of abortion on women were unknown at the time.¹¹³ Based on the little evidence before it, a single affidavit from Norma McCorvey, the "Roe" of *Roe v. Wade*, the Court knew that unwanted pregnancies could put pressure on women and that women needed help and compassion in such situations.¹¹⁴ The Court had no evidence or experience on whether abortion would in fact help or hurt women in the long run.

The evidence from post-abortive women now shows that abortion is merely a short-term "solution" with long-term negative physical and psychological consequences. Thus, deference should be given to Congress' factual findings and its ban on partial-birth abortion should be held constitutional. Sandra Cano and the post-abortive women amici urge this Court to uphold the ban on partial-birth abortion and the exclusion of the health exception.

CONCLUSION

For the foregoing reasons and those in Petitioner's brief on the merits, Congress' ban on partial-birth abortion should be upheld.

111. *Id.* at 583 (emphasis added).

112. *Roe v. Wade*, 410 U.S. 113, 118, n. 2 (1973).

113. *Id.* at 149-50.

114. *Id.* at 153.

APPENDIX A

AFFIDAVIT OF SANDRA CANO STATE OF GEORGIA COUNTY OF FULTON

KNOW ALL MEN BY THESE PRESENTS:

BEFORE ME, the undersigned authority, on this day personally appeared SANDRA CANO, who after being duly sworn upon his [sic] oath deposed and said as follows:

“1. My name is Sandra Cano, and I reside in Georgia. I am competent to make this Affidavit. I have personal knowledge of the facts stated herein and the following is true and correct.

2. In 1973, I was the woman designated as ‘Mary Doe’, the Plaintiff in *Doe v. Bolton*, 410 U.S. 179 (1973), the companion case to *Roe v. Wade*, 410 U.S. 113 (1973). Although the courts understood that ‘Mary Doe’ was not my real name, what the courts did not know was that, contrary to the facts recited in my 1970 Affidavit, I neither wanted nor sought an abortion. I was nothing but a symbol in *Doe v. Bolton* with my experience and circumstances discounted and misrepresented. During oral arguments before the United States Supreme Court one of the Justices stated that it did not matter whether I was a real or fictitious person. This is where the Court was so very wrong. It did matter. I was a real person, and I did not want an abortion.

3. Abortion is just like *Doe v. Bolton*. It discounts the real experiences of the mothers. It misrepresents that abortion is for them. Just as Mary Does’ [sic] true desires were hidden from the courts by those promoting abortion, so, too, have the real facts about abortion been hidden. Today, this Court will know the real truth about the real woman who was used to deceive, not only the courts, but the women of this nation about the reality of abortion.

4. ‘Sandra Race Bensing’ was my real name in 1970. I was twenty-two years old and pregnant with my fourth child when I first met the *Doe v. Bolton* attorney, Margie Pitts Haines. I had gone to legal aid to get a divorce and to find an attorney to help me regain custody of my two children. My husband was not supporting us, and we had to live at the Salvation Army. At times we lived with my mother, but my stepfather did not want us there. I loved my children, but I could not care for them financially.

5. I was a trusting person and did not read the papers placed in front of me by my lawyer. I truly thought Margie Pitts Haines was having me sign divorce papers. I did not even suspect that the papers related to abortion until one afternoon when my mother and my lawyer told me that my suitcase was packed to go to a hospital, and that they had scheduled an

abortion for the next day. They advised me that my doctor, Dr. Donald Block, was going to perform an abortion. I told both my mother and my lawyer that I would not have an abortion. Not then. Not ever. They persisted in their demands upon me.

6. When the demand for an abortion persisted, I fled to Oklahoma and stayed at the home of my ex-husband's grandmother. I remained in Oklahoma until my mother and lawyer assured me that they would cease their pressuring me to have an abortion. I was relieved that the ordeal was ended. Because they promised never to force me to have an abortion, I returned to Georgia.

7. My lawyer sent me a plane ticket so I could fly from Oklahoma to Georgia. She wanted me to be in a courtroom with other pregnant mothers. The night before I went to court, my mother and my lawyer expressed concern that I would leave again, and so they had me stay at the apartment of a legal-aid lawyer. Before the court appearance, I was told by my lawyer not to say anything in court. As a result, I never did say anything in court.

8. My predicament made it difficult for me to take care of my children, but I didn't need an abortion. I needed help, but all of the people around me - my husband, my mother and my lawyer - refused to help me with my children.

9. Instead of real help, my mother, stepfather and my lawyer persisted in their demands that I have an abortion. Those demands were made for themselves so they would not be burdened. It was, in my mind, a demand for what they thought was the easiest way for them to get out from under any obligation to help my new baby and me. But the abortion was not in my interest. I was the mother of a baby for whom I was responsible. I had a natural desire to have my baby and to raise her. I carried my child to full term and gave birth. Because no one would help me I felt compelled to surrender my rights and give my baby up for adoption.

10. One day in 1973, my mother and stepfather called me into their bedroom. Their television was on. They shouted to me excitedly, "Look! You won! You won!" Margie Pitts Haines was on television and the story reported that the United States Supreme Court had made abortion legal. At that time, I did not fully comprehend what my role was in the Court's decision in *Doe v. Bolton*.

11. Over the years, I gained a greater and greater sense that I was wrongfully used in *Doe v. Bolton*. A number of years ago, I decided that I wanted to see my file in the case so I could see what was said about me. I went to the courthouse to see my records which were under seal. An attorney, Wendell Bird, agreed to represent me and he asked that my records in my case be unsealed. I produced my driver's license, my birth certificate, and my marriage certificate. The attorney who represented me in *Doe v. Bolton*, Margie Pitts Haines, tried to stop me from getting my own

records, and I did not understand why.

12. It was only when I first saw the opened records in *Doe v. Bolton* that I understood why Margie didn't want me to see them. The records stated that I applied for an abortion, was turned down, and, as a result, sued the state of Georgia. According to the records, I had applied for an abortion through a panel of nine doctors and nurses at a state-funded hospital, Grady Memorial Hospital. That was a false statement. After reading the court records, I contacted the hospital and tried to obtain my records. At first I was told there were records, but when my new attorney sent his legal assistant to review the records, we were told that they did not exist. The hospital said they didn't have any records. I never sought an abortion there or anywhere else.

13. At times, I have been forced to reflect upon the events that led up to that day in 1973 when my mother and stepfather told me about the Supreme Court decision in *Doe v. Bolton*. In 1970, my life was a mess. I was having my fourth child, but no responsible husband or real place to live. I was uneducated. When I came back from Oklahoma, I was so relieved that no one was going to pressure me to have an abortion that I took part in a court proceeding without understanding what was really happening. I was used wrongly, but I didn't inquire enough. In retrospect, there were big signs which revealed what was happening.

14. Once a television man came to Margie's office and I was asked what I thought of abortion. I told him that, "I don't believe in abortion and I don't want an abortion." I also said I didn't care if anyone else had an abortion, that it wasn't my business. All I cared about, at that time, was that I didn't want an abortion. I was not thinking of the other women. I did not understand that I was involved in a case that sought to legalize abortion. I was naive. In retrospect, perhaps, I could have discovered what was going on. But I was in a crisis. I depended on my mother's help. My lawyer became upset with me because I would never say to anyone that I would have an abortion. I should have, perhaps, understood what was happening, but I was simply attempting to survive. I remember Margie debating me. She claimed we were involved in a liberation right. She said women were entitled to equal pay for equal work, and I agreed. I never saw the pleading filed in court.

15. Many years later, when I saw the unsealed records in my case, I could not believe what the certification filed in my name said. I am certain the signature on the affidavit that said I wanted an abortion was not mine. I never saw that affidavit until the records were unsealed. If it was my signature, it was obtained without my knowing the contents of the affidavit. I had fled to Oklahoma to avoid an abortion. My lawyer knew I would never say I wanted one. The only reason I went to a lawyer was to get my children back. My predicament was used to argue that my new baby's life

should be terminated.

16. I have often rethought how my involvement in *Doe v. Bolton* came about. Over the years it has haunted me. I never had an abortion, but I know what it is like to feel responsible for one. I know what it is like to feel like a mother who helped terminate the life of her own child. After *Doe v. Bolton* was decided and I was told about my involvement, I felt responsible for the experiences to which the mothers and babies were being subjected. In a way, I felt that I was involved in the abortions - that I was somehow responsible for the lives of the children and the horrible experiences of their mothers. I have felt that experience that the death of a child is my fault; the helplessness the mother feels as events occur around her without any power to stop them; and the guilt that is associated with being told by the courts and society that the child's death was performed for the mother and only the mother.

17. This last assertion - that abortion is performed for the mother - is the cruelest misrepresentation of all. My own circumstance, the one used to justify legal abortion in the first place, is a perfect example of this reality. There are many doctors, and clinics and others who were plaintiffs in *Doe v. Bolton*. As Mary Doe, I was the only pregnant mother who was a plaintiff. All of these other people - the doctors, nurses and clinics were using the Court to do what they thought was in my interest. They pressured the Court claiming I need the right to terminate the life of my own child. It was their solution, not mine. They claimed they did it out of compassion for me. But it was a false compassion. A true compassion would result in the fathers living up to their responsibilities. A true compassion, once a mother is in the predicament that the child's father abandoned her, would advise her how to get help and would provide her help. Unfortunately, the legal right to an abortion was sought in my case because others thought it was too hard for them to give me real help. The abortion was sought for them, not for me.

18. But no matter how hard life happens to be, no one has the right to kill a baby - especially the baby's mother. She is the trustee of her child's life. She, of all people, has the sacred duty to protect the child. But the child's interests are not at odds with her own. They are in concert with one another. The mother derives a great benefit from her relationship with her child. It is as beneficial to her as it is the child. It is never in the interest of a mother to terminate the life of her own child.

19. I have been forced to live with the consequence of this false compassion for too long for me not to bring to the attention of the Court the fact that abortion is not in a woman's interest, and the fact that legalization of abortion began with manipulations and misrepresentations. Too many women who lost their children through abortion have told me of their emptiness, their sadness, the void in their lives, and how others forced them

to have abortions and then blamed the abortion on the mother.

20. The experience of *Doe v. Bolton* must be understood and accounted for, not simply to correct the record in my own case, but to correct the law of abortion in general: abortion is not in the interest of a mother. It is a false solution imposed upon a mother by others.

20. *Doe v. Bolton* and my circumstanced [sic] were misused. *Doe v. Bolton* was a fraud upon the court. *Doe v. Bolton* was a secret case about abortion, which is a secret procedure. This secretiveness allows others to prevail upon the mother and others can act against her interest. Women have told me how they were forced to have an abortion against their will. If it was alleged that I spoke for other women in *Doe v. Bolton*, then I gladly speak for other women in this case to say that abortion is too coercive by nature; too much the will of others; too much the will of a society which finds abortion more convenient for it than a commitment to the well being of the mother and the child.

22. The real experiences of the women must be known and taken into consideration by the court. Abortion is too much what others would like a woman to do, rather than what is in her interest and what she really wants.

23. Others told the court that I wanted an abortion. The law has developed, in part, based upon what my lawyer claimed I wanted, and that abortion was in my interest. I feel I have the duty to tell this Court the truth about what I really thought then, and what I think now. As the Plaintiff in *Doe v. Bolton*, I have a very substantial interest in the litigation before this court in the matter of *Roe v. Wade* and I can provide the court a unique perspective of the *Doe v. Bolton* case not available from any other source.

24. In the 1970s the people closest to me successfully manipulated my circumstances to justify abortion and wanted me to have an abortion, but I refused. Today this Court has the opportunity to review, not just the real facts surrounding the *Roe v. Wade* and *Doe v. Bolton*, the original abortion decisions, but the opportunity to review the testimony of hundreds of women who have real, true, experiences with abortion and not perpetuate the *Doe v. Bolton* fraud upon the Court.

Further Affiant sayeth not.”

/s/ Sandra Cano

Sandra Cano a.k.a. Mary Doe of *Doe v. Bolton*

SWORN TO AND SUBSCRIBED BEFORE ME, the undersigned authority, on this 12th day of Aug., 2003.

/s/ Justin [Illegible]

NOTARY PUBLIC IN AND FOR THE STATE OF GEORGIA

My commission expires:

Notary Public, Fulton County, Georgia

My Commission Expiers [sic] Oct. 18, 2005

APPENDIX B*

AFFIDAVIT
THE STATE OF GEORGIA
HEMDA BEN-JUDAH

How has abortion affected you? I have lived with guilt for many years. I am convinced I am forgiven. But pain comes daily. I have lied about it, kept it from some family members. Lied to myself that I had no pain that I was OK. And yet inside I was weeping for my child regretting, regretting what I had done. I have been an emotional rollercoaster, cried when I didn't know what I was crying for. Please when you read this know that there must be a change. We are still healing yet still I hurt. I am overly protective of my own children. And I dread the day I have to say to my little girls and boys that I killed their sibling.

AFFIDAVIT
THE STATE OF GEORGIA
JULIE THOMAS

How has abortion affected you? Spiritually, emotionally, physically and mentally. I could not forgive myself, consumed with guilt and shame. Don't deserve happiness. Depression on years on medication. Have depression related physical illness. Cannot have long-term relationships. Could not get close to God as I didn't feel worthy.

AFFIDAVIT
THE STATE OF OKLAHOMA
CYNTHIA CARNEY

How has abortion affected you? Emotionally, physically, and psychologically. For 23 years, I went into crying spells, depression, suicidal thoughts. Emotionally it devastated me.

AFFIDAVIT
THE STATE OF GEORGIA
DIANNE MARIE DONAUDY

How has abortion affected you? It affected me in so many ways I can't list them all. I lost trust in people - in love - in God. I looked into reincarnation in hopes that my child would return in another pregnancy. I felt hopeless

* Appendix B of the brief is 95 pages in length. Due to the journal's page constraints, a representative sampling of the affidavits are excerpted here.

inside and used “cocktail hour” to get through my life.

AFFIDAVIT
THE STATE OF TEXAS
MYRA J. MYERS

How has abortion affected you? The truth was that two months following the abortion I would lose my womb causing a gradual reduction in my estrogen production, leading to estrogen deprivation resulting in delayed depression dinting an early and hard menopause. An abortion, not a pregnancy, caused serious consequences. The truth was that the night before my abortion appointment I asked aloud, “God, is there anything wrong in what I am going to do. Man says it isn’t even life. What do You say?” I didn’t hear an audible response and assumed it was OK. However, in the morning, a clerk from the clinic called to let me know that the doctor had to cancel his appointments for that morning and asked me what I wanted to do. I did not remember the night before, I did not make the connection. I was not listening. I informed my husband and he asked about the next Saturday. So, I made another appointment and I became responsible for my child’s death. Guilty of murder.

AFFIDAVIT
THE STATE OF TEXAS
RHONDA ARIAS

How has abortion affected you? It has severed my sense of purpose. It made me feel worthless and ashamed. Loneliness and depression overwhelmed my life.

AFFIDAVIT
THE STATE OF LOUISIANA
CYNTHIA COLLINS

How has abortion affected you? Suffer Depression [*sic*], guilt, miscarriage, and problems conceiving. Also, have Fibrocystic Disease, which I believe was related to abortion. Carried trauma into relationship with marriage. Was bedridden during subsequent full term pregnancies for total of seven months due to bleeding and concerned for weakened cervix.

AFFIDAVIT
THE STATE OF PENNSYLVANIA
KAREN BODLE

How has abortion affected you? I suffered a nervous breakdown and spent about 6 weeks in a mental hospital. I had 2 miscarriages after my abortion. I felt shame and struggled with depression. I felt dirty on the inside. I believed that people would reject me if they knew I had an abortion. I had

deep emotional pain and was not allowed to grieve the loss of my child.

AFFIDAVIT
THE STATE OF KENTUCKY
KATHY G. RUTLEDGE

How has abortion affected you? The physical effects I suffered included violent premature labor and massive hemorrhaging from numerous fragments of decidual and placental tissue retained in my uterus for over a month requiring a second surgical procedure to remove and from which the second doctor stated I could have died. Long-range physical effects included cervical incompetence due to the cervical dilation device used during the abortion procedure causing two subsequent miscarriages in my mid 20's. Bed confinement following heavy bleeding from a prematurely opened cervix allowed me to finally give birth at age 29. Observation of the dead baby that was birthed caused devastating emotional and psychological complications. Suicidal thoughts afterwards caused me to seek professional and spiritual help to overcome the shame and horror that I had killed a real baby. I endured chronic depression and emotional dysfunction as a result of flashbacks and other post-abortive syndromes ... The short-term relief of terminating an unwanted pregnancy is completely overshadowed by this traumatic delivery for which a woman cannot possibly prepare herself psychologically. I thought I could handle terminating a "fetus" when I made my decision, but I could not handle terminating the small dead baby I witnessed. Women need protection from life-long physical and emotional complications that are suffered even more acutely from mid-term and late abortions, and women need the truth about the life, not "fetal tissue", they are carrying to make informed decisions.

AFFIDAVIT
THE STATE OF PENNSYLVANIA
DIANE K. MUSSELMAN

How has abortion affected you? Let's say the last 32 years were filled with pain emotionally, low-self [sic] esteem, poor relationship with family and friends, never married and childless. Distant myself to children, aware of what I did each "likely birth date, October, feeling worthless - not being able to forgive myself to this day, makes learning to love myself very hard and know I am loved. The physical aspects are I have aberrations that have my intestines and uterus glued together and numerous infections. At age 20, I can say that abortion was responsible for my downward spiral of destructive lifestyle that I am only now at 53 putting back together.

AFFIDAVIT
THE STATE OF GEORGIA
DIANNE PESARES

How has abortion affected you? It has left an emptiness and pain that never goes away.

**BRIEF OF THE INSTITUTE FOR
REPRODUCTIVE HEALTH ACCESS AND
FIFTY-TWO CLINICS AND ORGANIZATIONS
AS AMICI CURIAE IN SUPPORT OF
RESPONDENTS IN GONZALES V. PLANNED
PARENTHOOD FEDERATION OF AMERICA,
ET AL., NO. 05-1382 * ****

INTEREST OF AMICI CURIAE¹

Amici Curiae are fifty-three clinics and organizations that work with and/or on behalf of women seeking second-trimester abortions. This Brief is submitted to provide the Court with accounts of individual women who obtained abortions in their second-trimester of pregnancy. As organizations that hear first-hand about the impact abortion has in women's lives, *Amici* have an interest in the future of access to second-trimester abortions threatened by the Federal Abortion Ban. Individual *Amici* statements of interest are contained in the Appendix to this Brief. *See* Appendix.

SUMMARY OF ARGUMENT

Abortion is one of the most intimate and personal acts subject to consideration by Congress and this Court. In the more than thirty years since *Roe v. Wade*, 410 U.S. 113 (1973), the reasons individual women seek abortions in the second trimester have been overshadowed by the politics and rhetoric of “pro-choice” and “pro-life.” It is essential therefore for this

* J. Peter Coll, Jr., Linda A. Rosenthal Counsel of Record, Orrick, Herrington & Sutcliffe LLP.

** *Editor's Note:* All citations have been converted to footnotes but are otherwise unchanged.

1. Counsel drafted this Brief with the advice and consent of *Amici*, and all of the parties have consented to the filing of this Brief in *Gonzales v. Planned Parenthood Federation of America, et al.*, No. 05-1382 and *Gonzales v. Carhart, et al.*, No. 05-380. Consistent with Supreme Court Rule 37.6, this Brief was not authored in whole or in part by counsel for any party. No person, other than *Amici* or their counsel, has made a monetary contribution for the preparation or submission of this Brief.

Court to consider the individual women whose lives and liberty may be impacted by a ban on any - let alone all - safe second-trimester abortion procedures.

In this Brief, *Amici* excerpt testimonials from over 150 women who shared their stories of second-trimester abortions. The women hail from across the country, and they are from diverse racial, religious and socio-economic backgrounds. Their experiences are remarkably similar, however, and reveal that individual women find themselves facing second-trimester abortions primarily when: (1) they are carrying wanted pregnancies in which the fetus is diagnosed with grave anomalies; (2) their own health becomes endangered by their pregnancy; or (3) they have been unable to access care because of financial, geographic, or other delays. Their stories also demonstrate that, in each of these circumstances, women consistently consider abortion for moral reasons that are fundamental to their religious, personal, and family values.

ARGUMENT

I. *AMICI* COLLECTED ACCOUNTS OF MORE THAN 150 WOMEN WHO HAD SECOND-TRIMESTER ABORTIONS.

The Federal Abortion Ban prohibits at least one safe second-trimester abortion procedure² with no exception to preserve a woman's health.³ See Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (codified at 18 U.S.C. § 1531) (hereinafter the "Federal Abortion Ban" or "Ban"); see also *Planned Parenthood Fed'n of America, Inc. v. Gonzales*, 435 F.3d 1163 (9th Cir. 2006); *Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005). In attempting to proscribe second-trimester abortions, Congress and the Attorney General focus on the Government's interest in legislating the morality of abortion without any meaningful regard to the concerns of the individual women who seek those procedures.

In this Brief, *Amici* present the stories of women who have had second-

2. The second trimester of pregnancy is generally regarded as beginning at twelve to fourteen weeks, determined as a function of gestational age or "last menstrual period" dating. See, e.g., *Stenberg v. Carhart*, 530 U.S. 914, 923 (2000).

3. The Attorney General acknowledges that the Federal Abortion Ban prohibits the "dilation and extraction" method of abortion. See, e.g., Br. of Pet'r at 2-3; 18 U.S.C. § 1531, Pub. L. No. 108-105 (2003) (Congressional findings). There are three primary methods of abortions in the second trimester: dilation and evacuation (D&E); dilation and extraction (D&X); and induction. See *Carhart v. Gonzales*, 413 F.3d 791, 793-94 (8th Cir. 2005). D&X is a variant of the D&E procedure and the terms "dilation and extraction," "D&X" and "intact D&E" are used interchangeably. *Stenberg*, 530 U.S. at 928 (2000). Ninety-five percent of second-trimester abortions are performed before 20 weeks' gestation and prior to fetal viability, notwithstanding that they are sometimes deemed "late term." See *Stenberg*, 530 U.S. at 924.

trimester abortions.⁴ Excerpted below are testimonials culled from more than 150 interviews, letters, and e-mails provided by women specifically to support the right to safe second-trimester abortion threatened by the Federal Abortion Ban. In order to find women willing to tell their stories, The Institute for Reproductive Health Access (the “Institute”) contacted abortion clinics across the country and provided them with fliers to distribute to women. The fliers advised women they could send an e-mail or telephone a toll-free number to tell their stories about second-trimester abortions.

Abortion clinics across the country also permitted the Institute, as well as attorneys from the domestic offices of Orrick, Herrington & Sutcliffe LLP (“Orrick”), to conduct on-site interviews of women willing to tell their stories for this *Amicus* Brief. Women were also advised they could submit their stories by letter.⁵

It is not easy for women to come forward and speak about their personal reasons for obtaining second-trimester abortions, let alone to share their stories in support of a public filing. Indeed, this Court has long recognized that women may be deterred from asserting their rights if they are required to make their abortion decisions public. Accordingly, the Court has permitted women to proceed as plaintiffs using pseudonyms, *see, e.g., Roe v. Wade*, 410 U.S. at 124; *Doe v. Bolton*, 410 U.S. 179, 187 (1973), and has held that physicians have standing to assert the interests of their patients, in part, because a woman may be deterred from asserting her own rights “by a desire to protect the very privacy of her decision from the publicity of a court suit.” *Singleton v. Wulff*, 428 U.S. 106, 117 (1976) (opinion of Blackmun, J.).

To ensure the privacy and safety of the individual women who submitted stories, we refer to them herein by first name only, although many authorized us to use their full names. For those women who requested we not use their real names, we identify them solely as “Jane Doe,” and when possible we describe the regions of the country from which women shared their stories.

The testimonials collected for this Brief are not sworn testimony or record evidence, but they are a unique source of insight into the circumstances and lives of individual women who chose to have second-

4. The majority of the women who came forward to share their experiences had second-trimester abortions in the last six months and during the pendency of the underlying litigation in this case. Several women submitted stories of abortions performed more than ten years ago and we have noted those stories when cited.

5. In addition to canvassing the country to find women willing to come forward to tell their stories for this Brief, the Institute approached groups that routinely gather women’s accounts of why they obtain second-trimester procedures. For example, the Institute approached organizations that provide funds to women who cannot afford to pay for abortion services. A number of funds shared their collected stories, provided counsel did not use any identifying information about the individual women, and we have honored that request.

trimester abortions. The Court has routinely accepted similar testimonials in the past. *See, e.g., Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 749 (1986) (referencing brief filed by NARAL); *see also Harris v. U.S.*, 536 U.S. 545, 568 (2002) (citing *amicus* brief excerpting letters from sentencing judges). The women did not receive any remuneration for sharing their stories, and all of the letters, e-mails, and taped interviews collected for this Brief are on file in Orrick's New York office.⁶

It is worth noting that no individual woman's story is repeated in the Brief; each woman is quoted only once. Moreover, although the Institute received a significant number of testimonials, each story is in itself significant. Each woman's story demonstrates how the right to abortion is singularly fundamental to the personal liberty of each and every woman who chooses to exercise it.

II. WOMEN SEEK SECOND-TRIMESTER ABORTIONS FOR THREE PRIMARY REASONS.

At current rates, one in three American women will have an abortion by age 45.⁷ The majority of induced abortions in this country take place in the first trimester of pregnancy; nevertheless second-trimester abortions are not uncommon.⁸

Women who have second-trimester abortions are from different races, backgrounds, geographic regions, and religious faiths.⁹ Of the women who provided accounts, approximately 30 percent obtained second-trimester procedures after their pregnancies were diagnosed with severe fetal anomalies. Less than five percent obtained procedures when their own health became imperiled by their pregnancies; and approximately 55 percent obtained second-trimester procedures for other reasons primarily

6. The women's submissions have been compiled into two bound volumes also on file with Orrick, and it is to these volumes that the citations below refer.

7. *See* Stanley K. Henshaw, *Unintended Pregnancy in the U.S.*, *Fam. Plan. Persp.*, Jan.-Feb. 1998, at 28.

8. In 2002 the Centers for Disease Control and Prevention (CDC) estimated that 87% of abortions were performed during the first trimester. *See* Lilo T. Strauss, *et al.*, *Abortion Surveillance: U.S. 2002*, *Morbidity & Mortality Wkly. Rep.*, Nov. 2005, at 1-31, *avail. at* www.cdc.gov/mmwr/preview/mmwrhtml/ss5407al.htm. Between 9-10% of abortions from 1990 to 2001 took place in the second trimester. *See* U.S. Census Bureau, *Statistical Abstract of the U.S.* (123d ed. 2004), *avail. at* www.census.gov/compendia/statab/vital_statistics/family_planning_abortions/.

9. In their accounts, individual women self-identified as Baptist, Catholic, "conservative Christian," Jehovah's Witnesses, Jewish, Muslim, Presbyterian, atheist, and "spiritual." Individual women identified as members of different racial and ethnic groups, including African-American, Asian-American, Caucasian, and Latina. The women who submitted their stories are from more than half of the States, including, *inter alia*, Alaska, Arizona, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Louisiana, Maryland, New York, New Jersey, Ohio, Oregon, Pennsylvania, Virginia, and Washington.

because of delayed access to abortion services due to financial or geographic obstacles. As noted below, at least two of the women obtained abortions performed using the “dilation and extraction” method - the procedure Congress seeks to ban outright under the Federal Abortion Ban. *See, e.g.*, Br. of Pet’r at 2-3; 18 U.S.C. § 1531 (Congressional findings).¹⁰

A. Wanted Fetuses Diagnosed with Grave Anomalies in the Second Trimester.

One of the tragic realities of second-trimester abortions is that many women who obtain them are carrying pregnancies that were entirely wanted. As many of the women note, tests to assess whether certain grave conditions or disorders affect a pregnancy cannot be administered prior to the second trimester.¹¹ As a result, a woman whose fetus is critically impaired will often not learn that fact until well into the second trimester of her pregnancy. Often women learn, only for the first time in the second-trimester, of mortally serious conditions and disorders such as Trisomy 18 [*sic*] or Patau’s syndrome;¹² Trisomy 18 or Edward’s syndrome;¹³ Cat Eye syndrome or chromosome 22 disorder;¹⁴ congenital CMV;¹⁵ or Turner

10. While two of the women’s stories make clear they obtained D&X procedures, some of the women’s testimonials refer alternatively to having obtained a D&E and a D&X procedure, suggesting that more than two of the women who submitted stories may have obtained a D&X procedure.

11. Amniocentesis is the most common and accurate prenatal test used to diagnose serious birth defects. It is generally not available before the fifteenth week of pregnancy. “Chorionic villus sampling,” or CVS, is a test available starting at ten to thirteen weeks in pregnancy but is useful to identify a limited subset of abnormalities identifiable by amniocentesis. *See* F. Gary Cunningham, *et al.*, *Williams Obstetrics* 329-30 (22d ed. 2005).

12. Median survival rate for infants born with Trisomy 13 is seven days. Only 10% of infants with the chromosomal disorder will celebrate their first birthday. Eighty to 90% of infants with Trisomy 13 will suffer from cardiac defects, and 70% will suffer from a spectrum of significant cranio-facial malformations. *See* Williams, *supra* n.11, at 291; *see also* Support for the Trisomy 13, and Related Disorders, Trisomy 13 Facts, www.trisomy.org/html/trisomy_13_facts.htm (visited Aug. 9, 2006).

13. Most infants born with Trisomy 18 die within fourteen days of birth and only 10% survive more than one year. Those who survive are profoundly retarded and 95% have cardiac defects. Williams, *supra* n.11, at 290; *see also* Support for the Trisomy 18, and Related Disorders, Trisomy 18 Facts, www.trisomy.org/html/trisomy_18_facts.htm (visited Aug. 9, 2006).

14. Cat Eye syndrome typically results in the grotesque malformation of a fetus’s skull and facial features. Additional conditions associated with the chromosomal disorder include malformations of the heart, kidneys, and intestinal and anal systems. *See* Nat’l Inst. of Health, Nat’l Library of Med., *avail. at* www.nlm.nih.gov/egi/jablonski/syndrome.cgi?index=93 (visited Aug. 9, 2006); *see also* Nat’l Org. for Rare Disorders, Cat Eye Syndrome, *avail. at* www.rarediseases.org/search/rdbdetail-abstract.html (visited Aug. 9, 2006).

15. In 90% of infants born that show no symptoms of CMV at birth, 15% will develop one or more neurological abnormalities, usually in the first two years of life. Of the 10% that show symptoms at birth, up to 20% will die and about 90% of the survivors suffer from serious neurological defects. *See* Williams, *supra* n.11, at 1282-84; *see also* March of Dimes, Cytomegalovirus Infection in Pregnancy, *avail. at* www.marchofdimes.com/professionals/681-1195.asp (visited Aug. 9, 2006).

Syndrome.¹⁶

As the women describe, not only are some of the initial diagnostic tests administered only in the second trimester, but confirmatory tests - essential to the woman making an informed decision - take additional time.

Erin, a 35-year-old woman from the West Coast, describes her life as “pretty ‘apple pie’.” She explained the timing involved in receiving a diagnosis for her pregnancy:

In addition to the terrible news about the probability of the baby having a serious problem came another nasty surprise: We would not be able to confirm if there was a problem or make any decision about how to proceed for quite some time....

Waiting to get the amnio was one of the most stressful, heart-rending, agonizing times of my life. My belly was growing, and my pregnancy was no longer a private matter because of that. I wanted to be upbeat, but I was terrified. The more research I did on Trisomy 13 and 18, the more terrified I got....

The amnio date finally arrived in the middle of my 15th week of pregnancy. During the amnio, they discovered that I also had a complete placenta previa - a condition where the placenta implants over the cervix. They felt my case was unlikely to resolve itself, which meant I would be at risk for severe bleeding as the pregnancy progressed.... [W]e tried to remain hopeful that the amnio results would show that the baby at least didn’t have a fatal trisomy.... But unfortunately, the amnio results came back confirming our baby had trisomy 18. At this point I was 16 weeks along and had begun feeling the baby kick. It should have been sweet, but instead the kicks were torture. We were utterly crushed.

Erin, submitted by e-mail, May 11, 2006, at 62-63.

Cara, a married Catholic woman with an almost-three-year-old son, has “always dreamed of having a big family.” She described the time it took to obtain information needed about her pregnancy:

I was about 17 weeks pregnant at the time.... [T]hey scheduled us for our Level II ultrasound a few weeks early so they could look in more detail at the baby....

A few days [after the ultrasound], we received the news that would change our lives forever. Our son was infected with CMV (cytomegalovirus). This was the worst possible scenario (of the

16. The majority of fetuses with Turner Syndrome that survive until the second trimester have major cardiac malformations. It is also common for these fetuses to have “cystic hygromas” or sacs of fluid that form from the neck and may be the size of or larger than the fetal head. Williams, *supra* n.11, at 395. Less than 2% of fetuses with Turner Syndrome survive pregnancy. *See id.* at 291. Of those infants who survive, 98% will be infertile and some will have heart, kidney, and neurological problems. *See also* Nat’l Inst. of Health, Turner Unit, *avail. at* <http://turners.nichd.nih.gov/ClinFrTables.html> (visited Aug. 9, 2006).

possibilities we were given)....

Although I have always been pro-choice, I had winced at the thought of late-term abortions or “partial birth” abortions, thinking that it was just inhumane or irresponsible. Now I know differently. In my case, we were not able to confirm our diagnosis until 19 or 20 weeks gestation. I terminated at 22 weeks.... I was completely heartbroken....

Cara, submitted by e-mail, May 11, 2006, at 42-43.¹⁷

Carrie, a 40-year-old woman from the Southwest who was happily married for nine years when she became pregnant described the timing of her genetic testing and decision to end her pregnancy:

On November 11, 2005, I elected to have [a] CVS test.... Then, the test results came in.... We knew chromosome 14 was incompatible with life, and chromosome 22 could mean Cat Eye Syndrome. Both my husband and I wanted the baby very much, and neither one of us was willing to terminate the pregnancy on a “maybe.”...

I had the amnio on 12/26/05, and the results came in on Jan. 13, 2006. It confirmed without doubt - she had Cat Eye Syndrome tetrasomy in every cell of her body. The last 3 sonograms showed ... our baby’s kidneys were beginning to malfunction....

We made this decision because we loved our daughter so much. We didn’t want her to suffer the definite and the untold problems she was sure to endure, if she even made it. We made the best decision we could with the information we had. We fought for her. We wanted her. But we didn’t want to condem[n] her to [a] life of agony.

Carrie, submitted by e-mail, May 30, 2006, at 111-13.

Beyond the time it takes to obtain a diagnosis, there is the time it takes to decide what to do when the diagnosis is devastating. Heather, a 33-year-old woman from the Midwest, explained:

It took me an agonizing week to make this heartbreaking choice, but in the end I know it was the best decision for me, my family and most importantly, our child. We lost our oldest son at 6 years and 10 months old, to complications from having a rare type of dwarfism. That dwarfism was exactly the reason why we had the CVS test done. We knew without a doubt that we could never in good conscience bring another child into this world with that

17. Some of the women who submitted stories identify as “pro-choice,” while others continue to identify as “pro-life.” *See, e.g.*, Jane Doe, on-site clinic interview, June 23, 2006, at 292 (“I was pro-choice and I just felt that America as a democracy should give people the right to choose”); Jocelyn, telephone interview, May 25, 2006, at 168 (“I’m always pro-life,” explaining decision to terminate pregnancy with severe fetal anomalies); *see also* Sara, submitted by letter, May 12, 2006, at 5 (“I once was against abortion until it came to the future of the family I already have.”).

disease.... Most genetic defects come with their own list of extra problems, which I didn't take into account, and put that child at risk for painful procedures and even death. No child deserves to come into a world of pain. That is what made my decision for me....

Heather, submitted by e-mail, May 17, 2006, at 65-66.

Women repeatedly state that one of the main reasons they choose to terminate wanted pregnancies is that the information they learn in the second-trimester confirms, if the fetus were to survive, its life would be short and fraught with pain. One 37-year-old married woman and mother of a three-year-old daughter, explained:

So all the fluid was shown on the brain [and] stomach and [the physician] believed the baby had a very severe case of heart defect. And most likely - 90% chance that he was going to die in utero.... And even the 10% that he was going to be born he wasn't going to live very far without, I mean, even with major interventions it was very unlikely that he was going to survive.... [S]o at the time, we made a decision to terminate because I couldn't - knowing the outcome of what was going to happen I just couldn't carry on. I mean why put the baby through suffering if I can end his life and set him free of his suffering that he had to endure. That was our thinking.

Jane Doe, telephone interview, May 10, 2006, at 123.

Another woman and her husband learned at 18-20 weeks ("depending on which sonogram was right") that their pregnancy had Turner Syndrome. They too decided to abort to spare their child's suffering:

Apparently, the lymph nodes didn't seal off, and the body was filled with fluid. This fluid was pushing on all the organs, and restricting the growth of the heart and lungs.... She was drowning from the inside, and I was able to save her from that immeasurable pain.

Jane Doe, submitted by e-mail, May 9, 2006, at 78-79.

Kara, a married woman with a three-year-old daughter from the Mid-Atlantic, learned at 25 weeks that her fetus was "missing a chamber of her heart which was causing a back flow of blood into another chamber and good and toxic blood were mixing":

The physician ... said if everything goes perfectly, [the child] will have to undergo 3 open heart surgeries and still will not have a long life expectancy. She couldn't tell us how long she would survive. She said "it could be a year, maybe three, maybe ten. That is, if she survives the pregnancy to term, the C-section, and all the surgeries." After the surgeries, she would be plagued with heart infections and would be constantly monitored at the hospital. If we were lucky and she did survive long enough to walk, she would never be able to run and play with her sister....

This is not the life we wanted for our precious little girl. Not only would she suffer her entire existence but it would have emotionally destroyed our other little girl as well.

Kara, submitted by e-mail, May 17, 2006, at 115-16.

Jane Doe, a 21-year-old woman from the Northeast, decided to end her pregnancy after her fetus was diagnosed with Turner Syndrome:

[I]t was my first pregnancy so I went to the doctor and they found out [it] had Turner Syndrome and they told me my options and ... they were surprised that she lived as long as she - her legs - she was swollen, one side of her body was swollen and she had a tumor around her neck and there wasn't enough fluid.... I made up my mind to have the procedure done 'cause I didn't know if she was suffering, 'cause she didn't have enough fluid, so I didn't know if she was ill. Nobody knew. They couldn't tell me so I feel like I had to do ... what was best for her and that's what I thought was best for her.... I know like I did it for a good reason but it's like I don't regret it, but it's still hard. Because I really wanted my child.... Me personally I would [have] never thought I would have to get an abortion because no matter how young, if I was 15 and I got pregnant I would you know and everything was okay. Even if my child had Down Syndrome I would've had my child. But knowing that my child is swollen and there's not enough fluid and they don't know ... if there's something wrong with her like if she suffers....

Jane Doe, telephone interview, May 5, 2006, at 134-35.

B. Pregnancy Imperils Women's Health in the Second Trimester.

Another reason women decide to have a second-trimester abortion is because their pregnancies imperil their own health. Again, because these pregnancies are wanted, these women will often wait until the last possible moment to have an abortion, hoping to carry the fetus to term. Melissa, a 33-year-old nurse, described her situation:

I have Lupus. The first 12 weeks or so were pretty normal. Then I was put on bed rest.... I had discharge, cramping....

I was real sick - with the disease and complications. Practically every complication that I could have - pre-term labor, starting first trimester, cramping, shortening of the cervix all the way through....

I was put on bed rest for another week and told to drink fluids constantly but then I started hemorrhaging.... They put me on bed rest in the hospital, upside down, with daffy ultrasound and IV calming medicine but my fluid kept getting lower. About 5 days later, the doctor said I had to make a decision.... The baby was not viable. The doctor said the baby could not survive without fluid. I begged for another day. This was a Catholic medical center.... The doctor said I'd have to go elsewhere to terminate. I was in a slight

Lupus flare-up....

They wouldn't transfer me to another hospital. They wouldn't make any arrangements....

I made the arrangements myself. I called [the local clinic] and was blessed to speak [to the counselor there].

Melissa, telephone interview, May 26, 2006, at 162-64.

Sara learned during her wanted pregnancy that it was, in fact, a molar pregnancy.¹⁸ Notwithstanding this tragic diagnosis, she tried to continue with the pregnancy:

I had early onset preeclampsia.¹⁹ ... My blood pressure which is usually around 110 over 70 was floating around 220 over 135. And all the attendant problems - the kidneys, the water retention were a nightmare.... And there was great risk of stroke or seizure associated with the blood pressure.... And I also had the placenta previa - the placenta blocking the birth canal - and the placenta was also abnormally massive so even if my body had tried to spontaneously end the pregnancy it would have created a different set of problems with me. If that placenta was ruptured there was a great chance that I would have massive hemorrhaging or - so we didn't have many options. And the preeclampsia was just gonna get worse.... My child was dying and I was really sick.... Eventually they ... gave me the option to do D and E, dilation and extraction.... [W]e did the D&E later that afternoon.

Sara, telephone interview, June 16, 2006, at 150, 152-53.

Jane Doe, a 19-year-old from the Midwest, has PKU disorder²⁰ and describes:

My PHE levels are too high to bring a child in this world [a]nd not expect to have some medical problems. My child is almost guaranteed to be born and live only 2 or 3 years or be born and have mental retardation, [h]eart defects, and a very small head. I

18. Molar pregnancies are non-viable 100% of the time whether "complete," in which case no fetus is formed (although the placenta may develop), or "partial," in which case the fetus has serious abnormalities. Treatment for molar pregnancy is the removal of the pregnancy. See Williams, *supra* n.11, at 274-78.

19. Preeclampsia is a rapidly progressive condition where a woman's blood pressure becomes seriously elevated and she develops large amounts of protein in her urine. It typically occurs after 20 weeks' gestation. Treatment is the removal of the fetus. See *id.* at 763, 787-88, 797; see also Nat'l Inst. of Health, Nat'l Library of Med., *avail. at* www.nlm.nih.gov/medlineplus/ency/article/000898.htm (visited Aug. 9, 2006).

20. Phenylketonuria (PKU) results from an enzyme deficiency that, untreated, leads to elevated levels of the amino acid phenylalanine (Phe) in the bloodstream. Fetuses exposed to high levels of Phe are vulnerable to mental retardation, congenital heart disease, and other disorders. See Williams, *supra* n.11, at 192, 296-97; see also Nat'l Inst. of Health, Press Release, NIH Consensus Panel Recommends Comprehensive Approach to Life Long Care for PKU (Oct. 18, 2000), *avail. at* www.nih.gov/news/pr/oct2000/omar-18.htm (visited Aug. 9, 2006).

can't be selfish like that and have this child under the circumstances.

Jane Doe, submitted by abortion fund, Feb. 1, 2006, at 350.

Women also have second-trimester abortions to preserve their ability to have healthy children in the future. Amanda is a 27-year-old woman from the Northeast who lives with her boyfriend and their four-year-old son. She decided to have an abortion after learning that her pregnancy had a cystic hygroma caused by Turner Syndrome:

Unfortunately it was quickly made clear that it was too dangerous to continue my pregnancy. The hygroma was too large on the baby's head. It was a guarantee that she was going to die. The only question was when. I tried to fight it.... If I waited and let her die naturally I would have risked my own health and possibly my ability to have any future children.... All possibilities ended with the same eventual outcome. My decision ended her suffering and kept us from prolonging the loss that was inevitable.

Amanda, submitted by letter, July 7, 2006, at 386-87.

Catherine and her husband of eight years live in the Midwest, and learned during the 14th week of pregnancy that their child had Trisomy 13 and that the pregnancy was threatening her health:

[I]f I tried to carry to term and suffered a late-term fetal death or miscarriage, there was a serious chance of complications for me. I might hemorrhage [sic], I might get an infection, the trisomy might interfere with the development of the placenta and leave me deathly ill. My OB told me, in very plain language, that if I carried this pregnancy to term, there was a very high chance that I would never bear another child. There was no good choice. There was no hope of a healthy child. There was no hope of a living child. I could have an abortion, or I could see how my luck went with carrying this doomed pregnancy to term and risk my life and future fertility, and I elected to have an abortion.

Catherine, submitted by e-mail, May 26, 2006, at 50-51.

C. Obstacles Delay Access to Abortion.

Finally, some women find themselves in the second trimester of their pregnancies because they had problems accessing abortion services at an earlier time or because they only first became aware they were pregnant during their second trimester. Often, these women would have preferred to have abortions in the first trimester, but due to financial²¹ or geographical²²

21. The Federal Government and 33 states refuse to provide public funding for medically necessary abortions. As a result, low-income women on average delay accessing abortion an additional two to three weeks because of difficulties in obtaining funds. See, e.g., Stanley K. Henshaw & Lynn S. Wallisch, *Medicaid Cutoff and Abortion Servs. for the Poor*, 16 Fam. Plan.

factors they were unable to do so.

For instance, Deria, a mother of three, noted that she delayed until the second trimester because: "I was just waiting for my insurance. That was the only reason. Because I got the new job and I had to wait for my insurance to kick in." Deria, on-site clinic interview, June 3, 2006, at 207.²³

Tamera, a single mother of two, explained:

I was trying to get the money up but the longer you wait the more it is. Then I'm Rh negative so you have to pay for the shot. And it's just more and more. It builds up to the point where - what if I didn't have it today and it was \$1500 in a week? And then it was almost \$2000....

Tamera, on-site clinic interview, June 3, 2006, at 232.

For women who do not live close to a clinic, there are often delays as they try to arrange transportation and the necessary funds. Liz, a 20-year-old woman from the Northwest, described her efforts to find a clinic where she could access an abortion:

Once I realized and accepted I was pregnant, I made my appointment at Planned Parenthood of Idaho and was 5 days past the deadline. I was 14 weeks. Scared but being responsible I took a seven hour bus drive to Salt Lake City and was turned away again because I was 7 days past 18 weeks (which increases by \$500). I therefore had to leave.... I am currently at [a clinic in Oregon].... I am 21 weeks and am sure of my decision.

Liz, submitted by letter, May 11, 2006, at 25.

Some women do not realize for several months that they are pregnant. Many of the women interviewed were on birth control and thus were not anticipating the possibility of pregnancy. Crystal, a 20-year-old married woman, explained:

Persp., July-Aug. 1984, at 170. This delay itself costs women money, as the average cost of an abortion increases as the gestational age of the fetus increases (along with the relative complexity of the procedure). See also Jane Doe, on-site clinic interview, June 23, 2006, at 299 ("today would've been 16 weeks. Which would've made it 200 more dollars. Then I would've been stuck trying to get 200 more dollars by Friday and then if I didn't get it next Friday it would've jumped up another 200 dollars so that's 400 I didn't get in 2 weeks and I can't pay my electric bill.... Money is a major issue.").

22. As of 2000, abortion providers operated in only three non-metropolitan counties in the United States and 87% of counties overall had no abortion provider. See Lawrence B. Finer & Stanley K. Henshaw, *Abortion Incidence and Servs. in the U.S. in 2000*, Persp. on Sex'l and Reprod. Health, Jan.-Feb. 2003, at 6-15. Thirty-three percent of providers offer abortion services at 20 weeks gestation and 24% provide services at 21 weeks. Stanley K. Henshaw & Lawrence B. Finer, *Accessibility of Abortion Servs. in the U.S. 2001*, Persp. on Sex'l and Reprod. Health, Jan.-Feb. 2003, at 18.

23. Seventy-four percent of women pay "out-of-pocket" for abortion procedures, and four states restrict private insurers from providing coverage except in cases that would endanger a woman's life if carried to term. See Guttmacher Inst., *State Policies in Brief, Restricting Ins. Coverage of Abortion*, Sept. 1, 2006, at 1.

I had an IUD inserted in early November, and I was told that it was common for women to stop menstruating. I conceived a week after my IUD was inserted, despite using condoms as a back-up method. I wasn't even aware I was pregnant until the end of January, and even then, I only took a test out of paranoia.... The risks from an IUD pregnancy, coupled with our financial situation led us to make the decision for abortion. It was too soon for us to have another child. My daughter is still just an infant, and deserves all our love and attention.

Crystal, submitted by e-mail, May 15, 2006, at 59.²⁴

Others were young and unfamiliar with their bodies and did not recognize the signs of pregnancy.²⁵ For example, one 16-year-old explained she did not realize she was pregnant:

I just felt tired all the time. I just thought it was stress because I was like studying for my finals and everything. I guess I was like I don't feel good. Always had these headaches or something. So, I was like it's just stress, it's just stress. So I would just like run. The first time I went to the doctors and I found out ... it was just a big shock.

Jane Doe, on-site clinic interview, June 23, 2006, at 302.²⁶

Still other women experienced stressful life events that masked the source of their missed menstrual cycles. Rahel explained:

I was unemployed and had no health insurance ... I had no doctor, I had no gynecologist and was just trying to get a job so that I could support myself and take care of my immediate needs. So my health was very secondary. Also, because of my personal health history it was normal for me to not menstruate for extended periods of time ... especially when ... I'm feeling stressed.... So because of those factors I just wasn't aware of what had happened.

24. The rights to privacy and personal liberty have long been recognized to include the right to use contraceptives. *See, e.g., Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965). No contraceptive is 100% safe and effective, however, and as demonstrated in the women's stories, contraception often fails despite conscientious use. *See American Acad. of Family Physicians, Choosing a Birth Control Method That's Right for You 2* (2005), *avail*, at <http://familydoctor.org/016.xml>; *see also* Krystal, submitted by e-mail, May 5, 2006, at 76 ("I thought in my head 'I know I'm not pregnant I'm on birth control' "); Jane Doe, on-site clinic interview, June 2, 2006, at 189 ("I was on birth control. I had gotten sick and was on medication, which I found out afterwards had made my birth control less effective.").

25. Teenagers face an additional "serious, and in some cases insurmountable barrier" to abortions in states with parental involvement laws, especially teens in rural areas. *See Patricia Donovan, Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions*, *Fam. Plan. Persp.*, Nov.-Dec. 1983, at 259. One young woman, for example, delayed until she turned eighteen years old in order to have the abortion without her parents awareness. *See* Jenna, submitted by letter, June 12, 2006, at 24.

26. Some young women delay in response to the stress of being pregnant. *See, e.g., Alyssa*, submitted by letter, July 28, 2006, at 370-71 ("I am 15 years old and almost 18 weeks pregnant. When I found out I was pregnant I was very confused. I found out when I was about 6 weeks pregnant. I didn't go to the doctors until I was almost 13 weeks pregnant.").

See Rahel, telephone interview, May 24, 2006, at 145.²⁷

Finally, some women recounted being victims of sexual assault and either wanted to avoid the possibility or were embarrassed to tell others why they were pregnant. For example, Tina described being the victim of a rape witnessed by her seven-year-old daughter. Tina did not initially know she was pregnant, explaining, “[I don’t] want to have the baby given the way it happened.” See Tina, on-site clinic interview, May 24, 2006, at 235.²⁸

III. WOMEN CHOOSE SECOND-TRIMESTER ABORTIONS FOR MORAL AND INTIMATELY PERSONAL REASONS.

Regardless of the circumstances that lead them to consider a second-trimester procedure, individual women do not choose abortion lightly.²⁹ For some, God and faith figure prominently into their decision-making process.³⁰ For others, the choice to have a second-trimester abortion reflects their desire to pursue an education to improve their futures and to have children if and when the time is right. The decisions of others are informed by strong considerations of family, including what the impact of another child will have on their already-existing children or on their ability to have children in the future.³¹

A. Women Consider Religious Values.

Many women appeal to their religious beliefs to help them decide what to do when considering a second-trimester abortion. Catherine, a 38-year-old woman, described her decision to terminate her pregnancy at “two days shy of 20 weeks gestation”:

This was not an easy decision for me or my husband, as to what to

27. Rahel’s story indicates that she obtained an abortion by the D&X procedure targeted by the Ban and for which there is no health exception.

28. See also Jane Doe, on-site clinic interview, June 2, 2006, at 180-81 (“He forced his way into my door into my living room and raped me on my living room floor I ... got the pregnancy test. And it was so positive.... And I cried for days.”); see also Jane Doe, submitted by letter, July 28, 2006, at 367 (explaining that her 19-year-old daughter was having an abortion after being raped in her dorm room in January 2006). The Federal Abortion Ban contains no exception for women who have been raped.

29. The women’s stories consistently reveal that they weigh the decision to terminate seriously. See also Jenny, submitted by letter, June 28, 2006, at 317 (“It is a big decision and you need to weigh out our [sic] pros & cons and sometimes it takes a while.”).

30. According to one study, in the general population, 43% of women who had abortions identified as Protestant, 27% identified as Catholic, and 8% as a member of another religion; 22% report no religious affiliation. Thirteen percent identify as “born-again” or evangelical. Rachel K. Jones, *et al.*, *Patterns in the Socioeconomic Characteristics of Women Obtaining Abortions in 2000-2001*, Persp. on Sex’l and Reprod. Health, Sept.-Oct. 2002, at 228.

31. In the general population, 52% of women having an abortion intend to have children or more children in the future. *Id.* at 230. Six in ten women who have an abortion are already a parent. See Strauss, *supra* n.8, Table 12.

do next.... My husband is Catholic, albeit non-practicing, and really struggled with what to do. I have considered myself to be Pro Choice my entire life, but always felt like I would never be able to have an abortion myself. (Besides, I didn't think I'd ever even NEED to consider it.)...

When I called to make the appointment I was told I could not get in for another week. Having to wait another week, knowing that the life I could feel moving inside of me - the baby that we conceived purposely and in love - was not going to be there much longer was agonizing to a degree I cannot describe. I prayed every night to God to please take my baby boy peacefully. When he wouldn't move for a few hours I hoped God had answered my prayers ...

Catherine, submitted by e-mail, May 16, 2006, at 45-47 (emphasis in original).

Tina, a 32-year-old married woman with a healthy two-year-old son, learned at 23 weeks that her fetus was afflicted with Trisomy 18. She explained:

God determined his fate not my husband and I. He was going to die no matter what. We may have ended his life sooner but it was to not see him suffer. We did extensive research on this condition and knew the odds were not in his favor. We also asked many questions before making the decision to abort.... Put yourself in my shoes and try to understand how it would feel to carry a baby full term with the knowledge that it may or may not be born alive and if it is born alive only live a few hours.

Tina, submitted by e-mail, June 7, 2006, at 89.

For Gina, religious beliefs influenced her decision to terminate her pregnancy and to request an intact procedure after a diagnosis of several fetal anomalies:

As a Christian and a married woman who desperately wanted a child, I'd never given much thought[t] to abortion.... We called our pastor, who told us there was no cut-and-dried answer and urged us to make whichever decision would bring our [in utero twin] daughters the most life. "Whatever you do," he said, "we'll support you." In fact, everyone - relatives, church members, colleagues - offered us their unconditional support throughout the entire process. "Nobody here has walked in your shoes," our pastor's wife told us, "and nobody here can judge you...."

Even as I [made] the appointment, I was still hoping God could save [the in utero twins]. But if he couldn't, I wanted to be able to hold them and say goodbye before I lost them forever.

Gina, submitted by e-mail, May 3, 2006, at 107-08.³²

32. Gina recounts that she requested a D&X abortion so that she could hold her daughters

Jane Doe is from the Midwest and became pregnant after she was displaced from her home. She explained:

The lord forgives us all + I pray to him daily.... I know God puts us through things for a reason + don't give us nothing he don't think we can handle but I can't do this one ... We as women + parents do things for different reasons, I have a son that I been taking care of on my own + I can't afford another one right now.... The lord knows our decision + what we will do before we do it so I already feel like he forgave me because that's what he does, he's a forgiver - a healer, I call on him to help me get through this because I know he always listen. I rather have my kid in heaven than hell on earth because that [sic] what he/she will get if I was to have it.

Jane Doe, submitted by letter, July 7, 2006, at 314-15.

B. Women Consider Self-Determination Values.

Many women who have second-trimester abortions value their ability to control when and if they will have children, even while most women do eventually become mothers. Angela submitted her account of obtaining an abortion when she was 19 years old:

At the time of my abortion I did not have any children, and I was obviously not married. I am now married and have a daughter who will turn four in June. She is a joy and the feelings I had when I was pregnant with her were completely different considering my life circumstances and the fact I was having a baby that we both wanted. I can't say I was ready, or ever would have been, but I was comfortable and knew we would be ok. I was 23 when she was born, and am still married to her father....

I don't really think about "what if I had the baby?" And if the thought ever does cross my mind, it is full of gratitude for the doctor that provided the service to me.

Angela, submitted by e-mail, May 24, 2006, at 40.³³

In particular, many women choose to terminate their pregnancies so that they may have children when they are financially and emotionally able to

intact after the procedure. *See* Gina, *supra*, at 108. Prior to the availability of D&X, women who wanted to obtain an intact fetus to hold or for genetic testing purposes would terminate by induction. Induction abortion simulates a labor delivery. It can take hours and, prior to 20 weeks gestation, presents comparatively greater risks to a woman's health than D&X. *See, e.g., Stenberg*, 530 U.S. at 926.

33. Many women expressed gratitude not only to their physicians, but also for their ability to obtain a safe abortion. *See, e.g.,* Jessica, submitted by e-mail, May 12, 2006, at 69-70 ("I can also tell you that I'm so very grateful that I had the choice to make when nature didn't do her job."); Plata, submitted by e-mail, May 25, 2006, at 82 ("I went to [another state] for termination and was glad to know that the procedure was safe, legal and done with the utmost professionalism."); Kim, telephone interview, June 17, 2006, at 143 ("I thank God that I have that freedom and that right to make the decision and for that to happen").

provide for them. One 17 year old reflected:

I was approximately 22 weeks when I received the abortion procedure. At the age of 17 years old there was a small possibility that I would be able to support myself let alone the life of a needy child. Considering that I have very little experience with taking care of children, was also a reason for me getting the procedure. I would be a single parent so therefore I was not ready to take on that responsibility alone. The procedure didn't [a]ffect me in a harmful way, but it helped me maintain my life and be able to become someone. My decision was a huge help for my goals in life. I am now able to achieve my goals and look forward to a beautiful future. Maybe one day I will be able to have a child and have no doubts about being able to support it.

Jane Doe, submitted by letter, June 12, 2006, at 14.

For many of the younger women who shared their stories, the ability to pursue an education and shape their future figured largely into their decisions. Laura was a 19-year-old honors student on the West Coast when she had a second-trimester abortion:

I knew in my heart that abortion was my only realistic choice.... [A]fter working so hard to get into [college] and setting myself for what I hoped would be a long, fulfilling, successful career, I could not accept the idea of putting it all on hold to have a child, most likely alone, and possibly without parental support....

I also wonder, at times, what my parents would have thought. I got my answer years after my abortion, when my best friend became pregnant and decided to forgo medical school in order to have a baby. My mother - a devout, conservative Christian - told me, in hushed tones, should I ever find myself pregnant she would personally take me to get an abortion. She said my future was too important. I was shocked to hear it - given her beliefs and politics - but also somewhat relieved and reassured. In her own way, she understood that the right to choose abortion was central to any woman's ability to live a full life.

Laura, submitted by e-mail, May 8, 2006, at 119-20.³⁴

Another young woman explained "I'm leaving for the Army in August. I'm already signed up, I'm ready to [g]o and I want to go and it's like that [the pregnancy] is going to prevent me from going." Jamie, on-site clinic interview, June 1, 2006, at 210.

C. Women Consider Family Values.

Many of the women choose to terminate their pregnancies because of their strong commitment to their families. For example, many women

34. In her e-mail, Laura indicates that she had an abortion in October 1994.

consider the financial and emotional toll another child would have on their ability to provide for themselves and their children. Kourtney, a 35-year-old woman and single mother who lives in the Northeast, described:

I was raised in a very conservative [C]hristian home in which I was taught at age five that abortion was murder. I was taken to protests and rallies throughout my entire childhood....

I never thought I would be a single mom but here I was alone, thousands of miles away from my family.... I have a masters level education and a professional job. Even with a good job and an education, after paying for child care (\$17,000 per year), health insurance (\$5,200 per year) I have only \$400 per week on which to support my three children and myself....

I was lucky to get the children in bed every night by 9 so that I could do the dishes, laundry, vaccuum [sic], pay the bills, etc. Physically and emotionally I had nothing to give to myself and I knew what I had for my children was not enough. How could I possibly manage another child? ... I prayed, I cried, I begged, and I screamed every night....

I decided to take the chance that I would survive and that my three children would have their mother to raise them, rather than having four children with a mother who was destined to be in a mental hospital.

Kourtney, submitted by e-mail, May 17, 2006, at 73-74.

Lucinda from the Midwest is a 29-year-old mother who explained her decision to have an abortion:

Due to being in a relationship over the past 5 yrs. which has turned abusive the last year. And being hit in the stomach at 8 wks. pregnant. I made the choice that it [sic] best for the future of myself and my 10 yr. old and the mental and physical well being of my baby that I wait until a later date to bring another life into this already confusing world.... I prayed and felt that this was the best choice for everybody.

Lucinda, submitted by letter, June 16, 2006, at 320.

Christine, a 21-year-old woman from the Northwest, considered not only her two-year-old, but also her parents after her boyfriend abandoned her 14 weeks into her pregnancy:

I knew that having this baby would take a lot of what i [sic] could give to my daughter away. I would not be able to get my own place in time to have this child and I knew that I would have to take care of him and my almost 2 year old in one bedroom. This is not something that I wanted for the daughter that I already had nor was it something that I wanted for a newborn baby. I knew that I would have to rely on my parents who are practically in their fifties, that

still work their butt's [sic] off everyday to take financial responsibility for my children. This is not what I wanted for my parents either.... I want to be able to stand on my own two feet.... I didn't want to sole[!]y rely on the feet of others. I knew that having this baby would not enable me to do those things in time for this child to be born. I don't think it would be fair to either one of my children (born and unborn) to do that to them.

Christine, submitted by e-mail, May 25, 2006, at 56.

CONCLUSION

The stories of individual women provide the Court with a window into why women obtain second-trimester abortions. For individual women who face the decision regarding a second-trimester abortion, their ability to obtain safe abortions is fundamental to their lives. In making this decision, these women rely upon intimate moral, religious, and personal values to make the right decision for themselves and their families. This is the essence of a woman's right to privacy and liberty, and *Amici* ask this Court to hold the Federal Abortion Ban unconstitutional and affirm the decisions of the Eighth and Ninth Circuits.