No. 15-274

IN THE

Supreme Court of the United States

WHOLE WOMAN'S HEALTH, *et al.*,

Petitioners,

v.

KIRK COLE, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICI CURIAE* SUPPORTING PETITIONERS FOR NATIONAL ADVOCATES FOR PREGNANT WOMEN, A BETTER BALANCE: THE WORK AND FAMILY LEGAL CENTER, BACKLINE, THE CENTER ON REPRODUCTIVE RIGHTS AND JUSTICE AT BERKELEY SCHOOL OF LAW, CHOICES - MEMPHIS CENTER FOR REPRODUCTIVE HEALTH, CHOICES IN CHILDBIRTH, DESIREE ALLIANCE, FAMILIES FOR JUSTICE AS HEALING, FAMILIES & CRIMINAL JUSTICE, LEGAL SERVICES FOR PRISONERS WITH CHILDREN, SISTERLOVE, INC., THIRD WAVE FUND, THE WOMEN AND JUSTICE PROJECT, AND WOMEN ON THE RISE TELLING HERSTORY ("WORTH")

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STATEMENT OF INTEREST*

As described more fully in the Appendix, *Amici* are organizations that work in diverse ways to advance the interests and well-being of pregnant and parenting women and their families and to protect their constitutional and human rights. Central to our work is the belief that each of the more than six million women who become pregnant annually—four million who continue their pregnancies to term; approximately one million women who terminate their pregnancies; and another one million women who experience miscarriages and stillbirths—is entitled to equal concern and respect.[1]

Amici support pregnant women's dignity and autonomy through laws and policies providing access to abortion, preventing pregnancy discrimination, affording workplace fairness and providing benefits meaningfully designed to meet the needs of pregnant, birthing, and parenting women. *Amici* also advocate for solutions that are sincerely and genuinely designed to advance maternal, fetal and child health—including ones that ban shackling of pregnant prisoners; provide information so that women going to term are fully informed and protected from unnecessary, forced or coerced medical interventions; and ensure that women who seek

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* Pursuant to Rule 37.6, counsel certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici* or counsel made a monetary contribution to its preparation or submission. Counsel for all parties have consented to its filing.

[1] SALLY CURTIN ET AL., PREGNANCY RATES FOR U.S. WOMEN CONTINUE TO DROP, NAT'L CTR. FOR HEALTH STATS. DATA BRIEF NO. 136 (Dec. 2013).

medical help in relation to pregnancy and childbirth receive appropriate and confidential healthcare, not punishment.

Amici are deeply concerned about the provisions of the Texas law at issue in this case and the doctrine adopted by the court of appeals to uphold them. By age 44, approximately 85% of all women in the United States have become pregnant and experienced at least one birth.[2] These women are not a different group of women from those who have abortions. Indeed, 61% of the women who have abortions are already mothers of one or more children.[3] Of the women over thirty-five years of age who have an abortion, 89% are already mothers raising at least one child.[4]

Respect for women's dignity and for the integrity of the courts' role in adjudicating constitutional rights requires that the assertions that prevailed in the court of appeals—that the HB2 provisions were enacted to elevate the "quality of care" or protect the health of women *who have chosen to terminate their pregnancies*—not be uncritically accepted. As *Amici* can attest (and, we assume, both those who defended and sustained these provisions well understood), no legislature genuinely concerned with women's health and welfare would enact such provisions or any like

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[2] KAY JOHNSON ET AL., CTR. FOR DISEASE CONTROL, RECOMMENDATIONS TO IMPROVE PRECONCEPTION HEALTH AND HEALTH CARE — UNITED STATES, MORBIDITY AND MORTALITY WEEKLY REPORT NO. RR06, 2 (2006).

[3] RACHEL JONES ET AL., GUTTMACHER INST., CHARACTERISTICS OF U.S. ABORTION PATIENTS, 2008 (May 2010).

[4] *Id.*

them. On the contrary, the HB2 provisions, considered in light of empirical evidence and actual lived reality, are not merely unwarranted; they are seriously detrimental to women's health. To the extent that they are premised on or express the notion that, for pregnant women, abortion is a uniquely unsafe or harmful procedure, that notion is simply false.

The significance of the legal errors below is far-reaching. The same rationales invoked by States to make abortion procedures in safe medical settings "illegal" are being relied upon to turn women who become pregnant and are unable to navigate the thicket of abortion restrictions into *criminals*. Prosecutions of pregnant women who seek to terminate a pregnancy—and of women who go to term and those who experience a pregnancy loss—are not a far-fetched possibility; they are occurring in States nationwide.

The premise of the *Casey* decision—that the interests of the government and the fundamental rights of women are reconcilable—requires that courts independently and realistically scrutinize the means by which States pursue their interests.

Introduction and Summary of Argument

The provisions of HB2 at issue in this case harm women and violate the Constitution. The Fifth Circuit's refusal to seriously review the ostensible health rationale proffered by the State—"to raise the …quality of care for women seeking abortions" and to protect those women's "health and welfare"—cannot be reconciled with this Court's governing precedents. The Court's abortion jurisprudence is grounded in an appreciation of the complex realities that pregnancy

entails and in recognition that a woman's fundamental right to decide to have an abortion—safely and without fear of punishment—must be protected. States' *legitimate* interests in regulating medical practice reinforce that right. But disguising hostility to that right as concern for health poses a grave threat to women's dignity and equal citizenship status, as well as their well-being. It is up to the judiciary to examine carefully, not credulously, such asserted justifications.

The decision below failed to fulfill this basic responsibility. The challenged provisions of HB2 were not intended to advance the health of women who make the decision to terminate a pregnancy. Rather, the self-evident object of the provisions was to make abortion care as inaccessible as possible, irrespective of the health consequences for the Texans affected. Indeed, the measures, as partially implemented, have had their intended effect: radically reducing the total number of licensed abortion providers in Texas, and prolonging by weeks the time patients must wait for an appointment at remaining facilities.[5]

Both this Court's precedent and the Constitution's respect for women's dignity and autonomy require judicial review that evaluates abortion regulations seriously, in a way that acknowledges the complex realities of women's lives. *Amici* submit this brief principally to bring two of these realities to this Court's attention.

First, women's lives are such that when abortion in government-approved medical settings is inaccessible, some women will pursue alternatives

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[5] *See* Pet. Br. at 23, 25.

outside the medical system, and some of those alternatives will be unsafe. This does not improve women's health and, as *Amicus* National Advocates for Pregnant Women (NAPW) regularly encounters in its work, this frequently exposes women to the added burden of arrest and prosecution. The experience of Jennie Linn McCormack, an Idaho mother of three who faced felony charges for terminating a pregnancy at home, illustrates where the logic of laws like the HB2 provisions and the Fifth Circuit's rubber-stamp review of them can lead.

In Jennie McCormack's case, however, federal courts refused to credit at face value a "rational basis" argument that strained common sense and basic decency: Idaho claimed that punishing mothers like Ms. McCormack was justified by the governmental interest in protecting women's health. The McCormack case illustrates the very real risk to pregnant women and their families of credulous judicial review of laws purporting to further legitimate government interests—that States will be empowered to put those interests to illegitimate and punitive ends, including arrests, detentions, and forced medical interventions on pregnant women.

As this Court made clear in *Casey*, there is a basic constitutional difference between a State *persuading* a pregnant woman to agree with its preferred choice of childbirth and tricking her into doing so. There is an equally fundamental difference between *bona fide* health or medical practice regulations that have the incidental effect of reducing access to abortion and regulations, like those here, that are dressed in medical garb but are adopted because of (not despite) their hindering effect on access to safe abortion services in medical settings.

Second, *Amici* write to respond to an even more troubling argument advanced in defense of the challenged provisions of Texas's law: that the feelings expressed by some women who have come to regret their decisions to terminate pregnancies constitute a "health" justification for laws restricting abortion. Such arguments drastically distort the relevant facts, denying the complexity and variety of risks and considerations for self and family that pregnant women invariably navigate. And they are an impermissible affront to the core premise of this Court's decision in *Casey*: that women *are* competent—and must be treated as competent—to make this decision for themselves.

For all of these reasons, *Amici* urge the Court to overturn the Fifth Circuit's decision and ensure that restrictive laws that are enacted and defended in the name of protecting pregnant women's health actually do so.

I. The respect for women's lives and rights animating *Roe* and *Casey* does not permit States to adopt measures that degrade pregnant women's lives, health, and fundamental liberties in the name of "protection."

The balance that this Court affirmed in *Casey* does not empower States to use "women's health" considerations as a backdoor means of restricting abortion access or punishing women who have abortions. This Court has recognized that regulations designed to protect women's health are legitimate and are not made unconstitutional by the fact that they may incidentally burden a woman's decision to end a pregnancy. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 874 (1992).

Women seeking reproductive health services—whether to terminate a pregnancy or to give birth—*deserve* protection from inadequate or dangerous health practitioners and practices. Neither the application to abortion of general medical practice laws nor the adoption of abortion-specific rules similar to those governing "any other" comparably low-risk medical procedure, *see id.*, should be viewed as constitutionally suspect.

But this Court's cases have never suggested that merely asserting that a measure was meant to serve the government's interest in protecting women's health insulates the measure from scrutiny. *Cf. Adarand Constructors v. Pena,* 515 U.S. 200, 226 (1995) (emphasizing the judicial role in distinguishing between genuinely and purportedly "benign" legislation). On the contrary, *Casey* not only held that a law "designed to strike at" a woman's decision to terminate a pregnancy is impermissible on that ground, 505 U.S. at 874, it made clear that the legitimate interest in potential life may be lawfully advanced only through "truthful," "non misleading" communications with pregnant women, *id.* at 882, even if false and misleading information would advance that interest even more effectively.

That same principle governs here: neither the legitimacy of the State's interest in women's health, nor the unquestioned power to adopt genuine health measures (notwithstanding incidental effects on the availability of abortion) authorizes every restriction that bears some hypothetical relationship to women's health. *See Planned Parenthood of Wisconsin, Inc. v. Schimel*, 806 F.3d 908, 916 (7th Cir. 2015) (Posner, J.) ("[C]ourts have 'an independent constitutional duty to review [a legislature's] factual findings where

constitutional rights are at stake.'") (quoting *Gonzales v. Carhart,* 550 U.S. 124, 163-65 (2007)). The respect for women's dignity and equality underlying the *Casey* decision requires that such laws be meaningfully scrutinized to ensure that there is "real substance to the woman's liberty to determine whether to carry her pregnancy to full term." *Casey,* 505 U.S. at 869.

Indeed, this Court's equal protection and employment discrimination jurisprudence is replete with decisions invalidating laws and practices as impermissibly paternalistic and controlling of individual women's lives, notwithstanding their ostensibly benign motivation and role in furthering some legitimate purpose.[6] Abortion regulations are no exception; and the challenged provisions of HB2

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[6] *See Reed v. Reed*, 404 U.S. 71, 75-77 (1971) (striking down law claimed to advance governmental interest in administrative economy and avoiding intra-family conflict); *Frontiero v. Richardson,* 411 U.S. 677, 681-88 (1973) (invalidating law claimed to serve government's interest in efficient administration of medical and housing benefits); *Cleveland v. LaFleur*, 414 U.S. 632, 642-43 (1974) (striking down law ostensibly related to legitimate state interest in maternal and child health and quality of school instruction); *Craig v. Boren*, 429 U.S. 190, 199 (1976) (invalidating law ostensibly furthering state interest in preventing drunk-driving fatalities); *Califano v. Goldfarb*, 430 U.S. 199, 207, 217 (1977) (striking down law claimed to further government's interest in providing for the "arguably greater needs" of nondependent widows, as compared to widowers); *United States v. Virginia*, 518 U.S. 515, 533-35 (1996) (invalidating restrictive admissions policy, without questioning legitimacy of state interest in providing diversity of educational environments and methods). *See also UAW v. Johnson Controls*, 499 U.S. 187, 198-99, 208 (1991) (invalidating under Title VII an employer's sex-specific fetal protection policy notwithstanding its role in preventing *in utero* lead exposure).

cannot be insulated from meaningful review simply because they claim to further a legitimate purpose. Laws like the HB2 provisions must instead face the same probing and rigorous review that this Court required in *Casey*.[7]

As the Jennie Linn McCormack case illustrates, upholding a law simply because a women's health rationale has been claimed has profound implications not only for women's liberty in reproductive decision-making, but also for women's liberty in its most concrete sense: freedom from arrest, prosecution, and detention.

A. Jennie McCormack's experience demonstrates why States must adhere to the basic framework announced in *Roe* and *Casey* respecting pregnant women as decision-makers and why courts must ensure that States' legitimate authority to regulate abortion on health grounds is not abused.

Jennie McCormack is a mother of three children who lives in southeast Idaho and was criminally charged with the crime of "unlawful abortion," a felony offense, because she carried out a medication abortion at home.[8]

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[7] 505 U.S. at 852 (noting that the State may not insist "upon its own vision of the woman's role"). *See also id.* at 896 (noting, in the context of spousal notification provision, that abortion regulations are "doubly deserving of scrutiny" because they "touch[] not only upon the private sphere of the family but upon the very bodily integrity of the woman").

[8] *McCormack v. Herzog*, 788 F.3d 1017, 1022 (9th Cir. 2015) ("McCormack admitted to the police that she self-induced an abortion after ingesting a pack of five pills.").

When Ms. McCormack became pregnant in the fall of 2010 she had three children, ages 2, 11, and 18.[9] (She had her first child at the age of 14.[10]) In 2010, she had no source of income other than minimal child support payments between $200-250 per month.[11] An abortion would have required multiple trips back and forth to a clinic in another State, Utah, 138 miles from her home and would have cost between $400 and $2000.[12] From her own past experience and present circumstances, Ms. McCormack, understood the many obstacles standing between her and the out-of-state clinic to be insurmountable.[13]

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[9] Jessica Robinson, *Idaho Woman Arrested for Abortion is Uneasy Case for Both Sides*, NPR, Apr. 9, 2012.

[10] *Id.*

[11] Response to Motion for Partial Summary Judgment by Defendant, 2012 WL 4506416, Case No. CV-2011-433-BLW (D. Idaho 2012) at 4.

[12] *McCormack v. Hiedeman*, 694 F.3d 1004, 1007, n.1 (9th Cir. 2012).

[13] *Id.* at 1016 n.9 (noting that nearly half the abortions performed on Idaho residents in 2010 were performed out of state and that the State had only four abortion providers in 2008, meaning that 95% of the State's counties were without a provider).

Ms. McCormack learned that an abortion could be performed at home using medications obtainable over the internet.[14] This method was much more affordable than a distant out-of-state abortion and it did not require Ms. McCormack to leave her children, including her youngest, whom she is seen comforting in the picture above.[15] Ms. McCormack safely ended her pregnancy in this way.[16]

Like other women facing numerous barriers to accessing abortion services in medical facilities,[17] Ms. McCormack was in her second trimester when she

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[14] *Id.* at 1008.

[15] Jessica Robinson, *Idaho Woman Arrested for Abortion is Uneasy Case for Both Sides*, BOISE STATE PUBLIC RADIO, Apr. 11, 2012.

[16] *See* 788 F.3d at 1022 (2015). *See generally* Joanna N. Erdman, *Access to Information on Safe Abortion: A Harm Reduction and Human Rights Approach*, 34 HARV. J. L. & GENDER 413 (2011).

[17] 694 F.3d at 1017 (2012) (recognizing regulations that require women to travel long distances and make multiple trips have been shown to significantly contribute to delays in obtaining abortions, especially for low-income women).

ended her pregnancy.[18] According to news reports, Ms. McCormack told her friend about the abortion. The friend told her sister, and the sister informed the police.[19]

The police responded by going to Ms. McCormack's home, arriving just after she had finished a load of laundry and put her youngest child to bed.[20] The police came into her home and questioned her.[21] After Ms. McCormack led them to the fetal remains wrapped in bags on her back porch,[22] she went to the police station for further questioning.[23]

Prosecutors charged Ms. McCormack with having an abortion in violation of Idaho law,[24] a felony offense that carried a potential five-year prison sentence.[25] Nearly four months after Ms. McCormack was charged, a state court dismissed the criminal complaint for lack of probable cause; but it did so without prejudice, leaving open the possibility that she would be charged again.[26]

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[18] *McCormack v. Hiedeman*, 900 F. Supp. 2d 1128, 1136 (D. Idaho 2013) (recounting facts regarding stage of pregnancy).

[19] Ada Calhoun, *The Rise of DIY Abortions*, NEW REPUBLIC, Dec. 21, 2012.

[20] Robinson, *supra* notes 9 & 15.

[21] *McCormack*, 900 F. Supp. 2d at 1136 (2013).

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] Idaho Code § 18-606.

[26] *McCormack*, 900 F. Supp. 2d at 1136 (2013).

Ms. McCormack brought suit in federal court challenging the Idaho laws that could be used to punish her for having an abortion.

Idaho defended its authority to arrest, prosecute and incarcerate women who have "unlawful abortions." The State argued that its authority to punish the pregnant woman herself was grounded on "[t]he rationale for [its abortion] statutes—the woman's health and safety."[27] According to the State, "[t]he long line of decisions commencing with *Roe* itself" supported criminal punishment for the "mother's own actions even during the first trimester of pregnancy."[28] Significantly, the State sought to rely on this Court's acknowledgment in *Roe* that government "has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that *insure maximum safety* for the patient," 410 U.S. at 150.[29] On this logic, "women's health" was advanced by allowing States to put women who have had abortions—most of whom are mothers like Ms. McCormack—behind bars.

Because the federal courts properly applied *Casey* and critically reviewed the State's rationale for charging Ms. McCormack with a felony, she prevailed. But her experience offers important lessons relevant to the issues presented for decision here.

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[27] 694 F.3d at 1010-11 (2012).

[28] Brief of Appellant, *McCormack v. Hiedeman*, U.S. Ct. App. 9th Cir. Nos. 11-36010, 11-36015 (2012), at 26-27.

[29] 694 F.3d at 1012-13 (2012) (noting State's argument that this passage from *Roe* supported its authority to criminally punish Ms. McCormack).

First, Ms. McCormack's case highlights that regulations of abortion necessarily are regulations of the women and mothers who decide for their own reasons that abortion is necessary. Lack of access to abortion services near her home drastically reduced Ms. McCormack's health care options, forcing her, like many Texas women affected by the provisions of HB2, [30] to find other ways of taking care of her reproductive health needs.

Second, Ms. McCormack's case confirms what history teaches: regardless whether abortion is available or legal, women will find a way (safely or unsafely) to terminate their pregnancies when it is necessary for them and the families they already have or hope to have.[31] Evidence of this is irrefutable and

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[30] *See* Pet. Br. at 26-27; Daniel Grossman et al., *The Public Health Threat of Anti-Abortion Legislation*, 89 CONTRACEPTION 73 (2014) (finding that 7% of Texas abortion patients, compared to 2.6% nationwide, reported self-medicating attempt to end pregnancy before clinic visit, and that rates reached 12% in counties near Mexico's border); Daniel Grossman et al., *Knowledge, Opinion And Experience Related To Abortion Self-Induction In Texas*, TEXAS POLICY EVALUATION PROJECT, NOV. 17, 2015/UPDATED NOV. 25, 2015 (estimating that between 100,000 and 240,000 Texas women have ever tried to end a pregnancy on their own without medical assistance).

[31] *See also* Brief for *Amici Curiae* of Women Who Have Had Abortions and Friends, *Webster v. Reprod. Health Servs.*, No. 88-605, 1989 WL 1115239 (providing women's personal accounts of pre- and post-*Roe* abortions submitted with women's original letters); Brief for the National Abortion Rights Action League et al., *Thornburgh v. Am. Coll. Obstetricians & Gynecologists*, No. 84-495, 1985 WL 669630 (similar).

exists from around the world,[32] as well as within the United States.[33]

While multiple reasons might prompt women to terminate a pregnancy outside of an authorized medical setting, [34] lack of meaningful access is a crucial factor for many women.[35] Women who cannot realistically access abortion may be forced not only to take measures that are not the safest ones available, but also, as happened to Ms. McCormack, to hazard the additional constitutional and dignitary harm of being treated as a criminal.

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[32] *See* Gilda Sedgh et al., *Induced Abortion: Incidence and Trends Worldwide from 1995 to 2008*, 379 LANCET 625, 631 (2012) (finding "abortions continue to occur in measurable numbers in all regions of the world, regardless of the status of abortion laws...and some women who are determined to avoid an unplanned birth will resort to unsafe abortions if safe abortion is not readily available, some will suffer complications as a result, and some will die.").

[33] WARREN M. HERN, ABORTION PRACTICE 17-20 (1984) (Despite U.S. laws criminalizing abortion, before 1973 anywhere from 200,000 to 1,200,000 women each year had abortions, many from dangerous and unqualified people); Willard Cates, *Legal Abortion: The Public Health Record*, 215 SCIENCE 1586 (1982).

[34] *See, e.g.,* Jennifer Lee & Cara Buckley, *For Privacy's Sake, Taking Risks to End a Pregnancy*, N.Y. TIMES, Jan. 4, 2009 (interviewing a woman who used misoprostol to terminate her own pregnancy because she had no money to pay for a clinic abortion, no health insurance, and feared that her family might see her going into a clinic); Am. Coll. Obstetricians & Gynecologists Comm. on Healthcare for Underserved Women, *Committee Op. No. 613: Increasing Access to Abortion* at 3 (2009) ("in some cases, [funding restrictions] function as a "de facto abortion ban").

[35] *See* citations *supra* note 30.

B. Laws that, for no legitimate health or safety reason, create substantial obstacles to women seeking abortions in safe medical settings create the additional danger that women will be arrested and punished.

Ms. McCormack's experience is not unique. It is an example of the many harms to pregnant and parenting women that will result if States merely need to assert any relationship to women's health to quiet judicial scrutiny of their abortion restrictions. This Court must demand more of legislatures than the Fifth Circuit did; any other form of review would be unfaithful to the balance affirmed in *Casey* and would threaten women's fundamental right to liberty as it relates both to reproductive decision-making as well as freedom from arrest, prosecution, and incarceration.

This Court recognized in *Casey* that a legitimate interest is not itself a "sufficient predicate" for an abortion regulation. [36] Such a superficial test of constitutionality would profoundly infringe women's liberty and their dignity. Analyzing the spousal notification provision in *Casey,* the Court reasoned that a husband's legitimate interest in the potential life carried and sustained by his pregnant wife could not itself justify state regulation of her right to end a pregnancy. [37] This Court explained that if such

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[36] 505 U.S. at 898 ("The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power, even where that power is employed for the supposed benefit of a member of the individual's family.").

[37] *Id.* ("The husband's interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife.").

justification sufficed, then any decision a married woman made while pregnant, such as smoking, drinking or undergoing surgery, would be subject to her husband's consent and control.[38] The same logic applies to the governmental interest at issue in this case. Upholding such justifications would create fertile ground for States to perpetrate far-reaching infringements on pregnant women's rights, through arrest, detentions, and forced medical interventions.

Like Ms. McCormack, women in South Carolina and Massachusetts have faced criminal charges for obtaining and using medication to end their pregnancies on their own.[39] In South Carolina, Gabriella Flores, an undocumented immigrant and mother of three children, took misoprostol pills to end her pregnancy at home. Afterwards, she feared that seeking medical help would result in jail time and separation from her children.[40] She was right to be afraid. She was jailed for four months before being convicted of performing an illegal abortion and sentenced to 90 days.[41] More recently, women in

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[38] *Id.*

[39] *See, e.g.,* Lee & Buckley, *supra* n. 34 (discussing cases of Amber Abreu in Massachusetts and Gabriela Flores in South Carolina, who took misoprostol at home to end their pregnancies).

[40] Rick Brundrett, *Woman's Abortion is Unique S.C. Case*, THESTATE.COM, May 1, 2005.

[41] *See* Ann Friedman, *Mail-Order Abortions*, MOTHER JONES, Nov. 2006; Lee & Buckley, *supra* note 34.

Indiana, [42] Georgia, [43] and Arkansas [44] who were alleged to have taken medication to end their pregnancies outside of medical settings have been arrested, charged and, in one case, convicted under various state criminal laws.[45]

The risk of criminal prosecution for abortion is not limited to women who attempt medication abortions. In Kentucky, Marla Pitchford was charged with manslaughter and performing an illegal abortion after she stuck a six-inch plastic knitting needle into her uterus when she was between twenty and twenty-four weeks pregnant.[46] In New York, a woman was charged with second-degree manslaughter, criminally negligent homicide, first-degree attempted self-abortion, and second-degree self-abortion for opening

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[42] Emily Bazelon, *Purvi Patel Could Be Just the Beginning*, N.Y. TIMES, Apr. 1, 2015.

[43] *Women Who Took Abortion Pill Charged in Death of Fetus*, CBS NEWS, Jun. 9, 2015.

[44] *Mother Accused of Concealing Child's Birth Arrested in Drew County*, ARKANSAS MATTERS, Apr. 8, 2015.

[45] The offenses for which Purvi Patel, an Indiana woman who took medication she ordered online to induce an abortion, was prosecuted for and convicted of included "feticide." Her sentence on that charge was six years. Brief for Appellant at 1, No. 71A04-1504-CR-166 (Ind. Ct. App., filed Oct. 2, 2105).

[46] *Commonwealth v. Pitchford*, No. 78CR392 (Ky. Cir. Ct. Warren County Aug. 30, 1978).

her abdomen with a scalpel.[47] In California,[48] Florida,[49] Georgia,[50] and Tennessee,[51] women have been arrested and charged with having or trying to have an illegal abortion for shooting themselves while pregnant. In Utah, a woman was charged with criminal solicitation to commit murder for attempting an abortion by paying someone to punch her in the

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[47] *People v. Jenkins*, No. 900-84 (N.Y. Westchester Cnty. Ct. 1984); Lena Williams, *Woman Held For Homicide After a Self-Abortion Fails*, N.Y. TIMES, Aug. 7, 1984. *See also* Kim Carrollo, *Woman Charged with Self-Abortion After Fetus Found in Trash*, ABC NEWS, Dec. 2, 2011 (women charged with first degree self-abortion after allegedly terminating a pregnancy with an "herbal drink"); *Pregnant Woman Charged with Attempting to Abort Fetus*, THE ASSOCIATED PRESS STATE & LOCAL WIRE, Apr. 11, 2007 (reporting woman charged with self-abortion in the second degree based on allegation that she took over-the-counter medications to induce abortion at 13 weeks).

[48] *People v. Tucker*, No. 147092 (Cal. Santa Barbara-Goteta Mun. Ct. June 1973); Becca Wilson, *.22 Cal Abortion Brings Prolonged Ordeal*, SANTA BARBARA NEWS & REV., May 3, 1974 (original murder charge against pregnant woman who shot herself in the abdomen dismissed, with new charge and guilty plea to performing an illegal abortion).

[49] *State v. Ashley*, 701 So. 2d 338, 341 (Fla. 1997) (dismissing manslaughter and third-degree murder (felony murder) charges, with abortion or attempted abortion as the predicate felony, of a mother of a three-year-old boy who, while pregnant, shot herself in the abdomen, observing that "the concept of a self-induced abortion via .22 caliber bullet is dubious in itself and is highly questionable").

[50] *Hillman v. State*, 503 S.E.2d 610 (Ga. Ct. App. 1998).

[51] Carl Cronan, *Woman Ordered to Undergo Evaluation*, TIMES DAILY, Oct. 3, 1987 (reporting on Mary Celeste Brown, who was charged with an illegal abortion after she shot herself in the abdomen with at .38 caliber pistol).

abdomen.[52] In December 2015, a woman in Tennessee was charged with first-degree murder for allegedly using a coat hanger in an attempt to end her pregnancy.[53]

Women also have been arrested and charged with homicide, feticide and related offenses for attempting suicide while pregnant,[54] experiencing a stillbirth after delaying delivery by cesarean surgery,[55] and even falling down a flight of stairs.[56] In Illinois, a woman faced criminal abortion charges for trying to remove fetal remains from her body after a pregnancy loss at home.[57]

Women who face the very troubling question of what to do with embryonic or fetal remains after a miscarriage, stillbirth, or action to terminate a pregnancy outside of a medical setting, increasingly face the prospect of arrest. In Pennsylvania, a woman spent a week in jail for "abusing a corpse" and "concealing the death of a child" because she miscarried a 19-20-week pregnancy alone at home

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[52] *In re J.M.S.*, 280 P.3d 410, 411 (Utah 2011).

[53] Erik Eckholm, *Tennessee Woman Tried Coat-Hanger Abortion, Police Say*, N.Y. TIMES, Dec. 15, 2015.

[54] Ed Pilkington, *Indiana Prosecuting Chinese Woman for Suicide Attempt That Killed Her Foetus,* GUARDIAN, May 30, 2012.

[55] Rene Sanchez, *Stillbirth Results in Charge of Murder for the Mother; Woman Reportedly Refused Caesarean Section*, WASH. POST, Mar. 12, 2004.

[56] Kevin Hayes, *Did Christine Taylor Take Abortion into Her Own Hands?*, CBS NEWS, Mar. 2, 2010

[57] *People v. Lyerla*, No. 96-CF-8 (Ill. Cir. Ct. Montgomery Cnty., May 1997).

and, unsure of what to do, put the fetal remains in her freezer.[58] A couple in Los Angeles, following their doctor's advice to keep the remains from the woman's early miscarriage in their freezer while deciding whether to have tests performed or arrange a cremation, had their home raided and searched without a warrant because of what the police termed "exigent circumstances"—the report (made by the husband, at the suggestion of the funeral home) of a "fetus in a freezer."[59]

That women who become pregnant have reason to fear arrest and punishment—whether they terminate a pregnancy outside of a medical setting, experience a pregnancy loss, or even go to term while experiencing a health or other condition perceived as risky to the fetus—is now well established.[60] A peer-reviewed

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[58] Gabrielle Banks, *Fetus Case Provides Rare Common Ground*, PITTSBURGH POST-GAZETTE, May 24, 2007.

[59] Steve Lopez, *Couple's Attempt to Do Right Thing Brings More Grief*, LOS ANGELES TIMES, Mar. 11, 2009.

[60] This documentation of numerous arrests contradicts insistent claims by abortion opponents that the measures they advocate are meant to protect, not punish, the woman herself. *See* Andrea Rowan, *Prosecuting Women for Self-Inducing Abortion: Counterproductive and Lacking Compassion*, 18 GUTTMACHER POLICY REV. 70 (2015) (noting "antiabortion leader Marjorie Dannenfelser insisted that 'compassion for women…will drive the law' and that 'the focus of such laws [regulating abortion] is on protection, not punishment'; a host of other antiabortion leaders have made similar claims."). Moreover, claims that women were never targeted for punishment in the pre-*Roe* era are mistaken. While unsafe abortions and those who provided them were the primary focus of criminal abortion laws, women suspected of having illegal abortions were often subjected to humiliating police interrogation while lying, sometimes dying, in hospital beds. *See* LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN,

study documented more than 400 instances between 1973 and 2005 where pregnant women were arrested, incarcerated, punished with enhanced sentences, detained, or forced to undergo medical treatment including surgery.[61] In the vast majority of cases, these actions were taken despite a lack of explicit legal authority, and in most cases pregnancy was a "but for" factor, meaning that but for the pregnancy, the actual or attempted deprivation of liberty would not have occurred.[62]

News accounts and other sources have documented more than 600 additional arrests or equivalent deprivations of women's liberty since 2005 in ostensible furtherance of interests recognized as legitimate in abortion jurisprudence.[63] These arrests

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MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973 (1997). Moreover, women themselves *were* sometimes prosecuted. *See, e.g.*, Jon Nordheimer, *She's Fighting Conviction for Aborting Her Child*, N.Y. TIMES, Dec. 4, 1971, at 37 (A twenty-two-year-old woman who had an abortion was convicted of manslaughter (later overturned by the Florida Supreme Court, *Wheeler v. State*, 263 So. 2d 232 (1972)), and sentenced to probation with the condition that she either marry the man with whom she was living or return to live with her parents in their home.).

[61] *See* Lynn M. Paltrow & Jeanne Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POLITICS, POL. & L. 299, 300, 320 (2013) (finding that low-income women and women of color were disproportionately targeted for arrest and punishment).

[62] *Id*. at 301.

[63] *See* Nina Martin, *Take a Valium, Lose Your Kid, Go to Jail: In Alabama, Anti-Drug Fervor and Abortion Politics Have Turned a Meth-Lab Law into the Country's Harshest Weapon Against Pregnant Women*, PROPUBLICA, Sept. 23, 2015 (reporting more than 479 arrests in Alabama; 135 in South Carolina and Tennessee; and nearly

occur in contravention of overwhelming medical consensus that threatened and actual deprivations of liberty deter women from seeking care,[64] will put pressure on some women to terminate wanted pregnancies,[65] and are selectively applied based on

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2,900 women in Wisconsin subject to investigation that could lead to court ordered detention, forced medical treatment, or incarceration.). *Amici* are aware of scores of additional cases. *See*, *e.g.*, *Arms v. State*, 471 S.W.3d 637 (Ark. 2015); *People v. Jorgensen*, 26 N.Y.3d 85 (2015). *See also* R. Alta Charo, *Physicians and the (Woman's) Body Politic*, 370 NEW ENG. J. MED. 193-95 (2014).

[64] *See*, *e.g.*, Report of Am. Med. Ass'n Bd. of Trustees, *Legal Interventions During Pregnancy*, 264 J. AM. MED. ASS'N 2663, 2667 (1990); Nat'l Perinatal Ass'n, *Position Statement, Substance Abuse Among Pregnant Women* (Dec. 2013); Am. Coll. Obstetricians & Gynecologists, Comm. on Ethics, *Maternal Decision Making, Ethics, and the Law*, 106 OBSTETRICS & GYNECOLOGY 1127, 1135 (2005). *See also Ferguson v. City of Charleston*, 532 U.S. 67, 78 n.14 (2001), *citing Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (recognizing that being reported to the police in the context of prenatal care "may have adverse consequences because it may deter patients from receiving needed medical care").

[65] *See* Report of Am. Med. Ass'n Bd. of Trustees, *supra* note 64 (noting that imposing criminal or civil sanctions on pregnant women for potentially harmful behavior may also encourage women to seek abortions in order to avoid legal repercussions). In one well-documented case, Martina Greywind, a twenty-eight-year-old homeless Native American woman from North Dakota, was arrested when approximately twelve weeks pregnant. She was charged with reckless endangerment, based on the claim she was creating a substantial risk to her unborn child by inhaling paint fumes. *State v. Greywind*, No. CR-92–447 (N.D. Cass County Ct. Apr. 10, 1992). After spending approximately two weeks in the county jail, Ms. Greywind obtained release for a medical appointment where she obtained an abortion. Following the abortion, she filed a motion to dismiss the charges. The State agreed to a dismissal: "Defendant has made it known to the State that she has terminated her

medical misinformation about relative risks of harm during pregnancy.[66] Even though Texas law does not specifically authorize prosecutions of women because they have had an abortion, women who are unable to access abortion services in medical settings have reason to fear that they will be punished if they find other ways to terminate a pregnancy.[67]

In spite of numerous decisions by Texas courts rejecting the use of various criminal laws as a basis for punishing women who experience pregnancy losses or are perceived to risk harm to their fetuses, Texas authorities have arrested and prosecuted

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pregnancy. Consequently, the controversial legal issues presented are no longer ripe for litigation." Motion to Dismiss with Prejudice, No. CR-92–447, at 1. *See also*, Transcript of Record at 4, 5, 9, 12, *In the Matter of J. Doe Beltran, Unborn Child & Alicia F. Beltran, Expectant Mother*, No. 13JC30A (Wash. Cnty. Cir. Ct., July 18, 2013) (Alicia Beltran, a 14 week pregnant woman in state custody pursuant to Wisconsin's "unborn child protection" law, asking repeatedly if she would be set free if she had an abortion); *Johnson v. Florida*, 602 So.2d 1288, 1296 (1992) ("Prosecution of pregnant women…may also unwittingly increase the incidence of abortion.").

[66] *See Maternal Decision Making, Ethics, and the Law*, *supra* note 64 at 1136-37 (explaining that pregnant women should not be punished for adverse perinatal outcomes in part because the relationship between maternal behavior and perinatal outcome is not fully understood). *See also McKnight v. State*, 661 S.E.2d 354, 358 n.10 (S.C. 2008) (in overturning the homicide conviction of a woman who experienced a stillbirth, noting that trial counsel had failed to call experts who would have testified about "recent studies showing that cocaine is no more harmful to a fetus than nicotine use, poor nutrition, lack of prenatal care, or other conditions commonly associated with the urban poor").

[67] Paltrow & Flavin, *supra* note 61, at 309 (finding that Texas was among the ten States that arrested the most women).

scores of women on pregnancy-related charges,[68] invoking the Texas Penal Code provision defining an "individual" to include every stage of gestation including a fertilized egg.[69] According to news reports, more than fifty women in one Texas county alone were charged with such crimes, and many were incarcerated for significant periods of time while their cases worked their way through the court system.[70]

Against this backdrop, it becomes clear that women in Texas, who already face significant barriers to accessing abortion in medical settings and who then, predictably, take steps to terminate their own pregnancies, have reason to fear being arrested and the terrible sequelae of prosecution and incarceration —and family separation—that ensues.[71] They also have reason to avoid seeking medical help if complications occur.[72]

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[68] *See, e.g.,* Jordan Smith, *Naked City: Save the Fetus - from Mom?,* AUSTIN CHRONICLE, Sept. 10, 2004; Sean Thomas, *Court: Drugs Through Birth Not a Crime*, LUBBOCK AVALANCHE JOURNAL, Oct. 31, 2006; *Youngblood v. State*, No. 2-06-329-CR, 2007 WL 2460225 (Tex. Ct. App. 2007); *Ex parte Perales*, 215 S.W.3d 418 (Tex. Crim. App. 2007); *Smith v. State*, No. 07-04-0490-CR, 2006 WL 798069 (Tex. Ct. App. 2006) (mem.); *Ex Parte Vela*, No. AP-75,562, 2006 WL 3518116, at *1 (Tex. Crim. App. 2006); *Ward v. State*, 188 S.W.3d 874 (Tex. Ct. App. 2006); *Collins v. State*, 890 S.W.2d 893 (Tex. Ct. App. 1994); *Jackson v. State*, 833 S.W.2d 220 (Tex. Ct. App. 1992).

[69] *See supra* note 68; Tex. Pen. Code Ann. § 1.07 (26). *See also* Sylvia Gonzalez, *Pregnant Woman Charged With Child Endangerment Of Unborn Child*, NEWSWEST 9, Feb. 14, 2013.

[70] *See* Thomas, *supra* note 68.

[71] *See* Rowan, *supra* note 60.

[72] *Id.* at 74.

For all of these reasons, this Court must reject the Fifth Circuit's approach to judicial review of the challenged provisions of HB2 in favor of one in which Courts scrutinize proffered justifications against empirical reality. Any analysis of the HB2 provisions that differs from this Court's analysis in *Casey* not only would undermine the legitimacy of the balance upheld in *Casey*, but also would bless the prosecution's flawed and unjust logic in *McCormack*—that pregnancy makes women a special category of persons whose lives, health, and liberties are protected only from laws that on their face fail to further a legitimate state interest.

II. This Court should recognize that pregnancy and childbirth, no matter the outcome, are profound events in women's lives and, accordingly, reaffirm that women's decision-making about their pregnancies must be meaningfully protected.

Some proponents of the challenged provisions of HB2 argue those restrictive regulations may be sustained as lawful "health" measures, not because they make abortion safer for women who seek to terminate pregnancy, but rather because, these proponents assert, abortion is singularly harmful to women. *See, e.g.*, Brief of *Amici Curiae* Women Injured by Abortion and an Abortion Survivor at 4, *Whole Woman's Health v. Cole*, No. 14-50928 (5th Cir. 2015) ("WIA" Br.). On this view, women's health is best served by "no access" to abortion, because compelling a woman to "carry the child to term" "help[s] the mother avoid the long term physical and psychological adverse effects of abortion." *Id.* at 2, 9. Any and every abortion restriction is thereby rationally related to that state interest. *Id.*

That argument is, at the outset, foreclosed by the central holding of *Casey*: that "[t]he destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society," 505 U.S. at 852, and that the liberty secured under the Fourteenth Amendment includes the right to choose to terminate a pregnancy, notwithstanding some "reasonable people's view" that "any pregnancy ought to be … carried to full term no matter how difficult it will be [for the woman]," *id.* at 853. And this Court's subsequent decision in *Gonzales v. Carhart* did not, as WIA's argument supposes (*see* WIA Br. at 1, 6, 26, 29) retreat from that landmark holding. On the contrary, *Gonzales* explicitly affirmed that abortion was for a woman to decide, *Gonzales v. Carhart*, 550 U.S. 124, 146, (2007), and it sustained the narrowly focused measure before the Court precisely because it was found *not* to impede the rights of women seeking abortions later in pregnancy, *id* at 156-57. (The restriction in that case was not defended or sustained as a women's health protection. *Id.* at 158.).

That some women have experienced regret, guilt, and shame about abortion or sincerely believe that they have physical and mental health problems as the result of having chosen to have an abortion does not establish that abortion is especially harmful. In fact, such assertions slight this Court's due process and equal protection jurisprudence, which has long recognized the many ways that pregnancy and parenthood are determinative events with social, economic and health consequences. [73] These

[73] *See Roe v. Wade*, 410 U.S. 113, 153 (1973) (recognizing that pregnancy imposes profound physiological, psychological and life-changing burdens); *Casey*, 505 U.S. at 852 (a mother

consequences are not, as WIA asserts, alleviated by so-called "Baby Moses" laws that facilitate the surrender of newborns. [74]

This view also denies the reality that all women who become pregnant face physical, psychological and emotional risks. For example, on average, more than two women die every day in the United States from pregnancy-related causes. [75] And this most extreme

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who carries a child to full term "is subject to anxieties, to physical constraints, to pain that only she must bear"). *See also Michael M. v. Superior Court*, 450 U.S. 464, 473 (1981) (plurality opinion) (upholding California criminal law prohibiting men, but not women, from sexual intercourse with an underage person, because women already faced the "significant harmful and inescapably identifiable consequences" of pregnancy as a deterrent).

[74] WIA's claim that the Baby Moses "law in Texas shifts the entire burden of childcare to the State," WIA BR. at 6-9, is not credible in any event. Not all parents are eligible for the law's protection, and parents seeking to use it may be subject to criminal investigation. *See* TEX. DEP'T FAMILY & PROTECTIVE SERVS., CHILD PROTECTIVE SERVICES HANDBOOK § 2351 (Baby Moses) (2015); Victor O'Brien, *Newborn Found Outside KFD's Academy*, KILEEN DAILY HERALD, Apr. 29, 2010 (reporting that "[d]etectives [were] investigating" to determine whether "Baby Moses" law would apply). Moreover, suggestions that women can count on Texas to provide quality care for children entrusted to it are belied by the fact the State ranks near the bottom in child well-being measures, ANNIE E. CASEY FOUNDATION, KIDS COUNT DATA BOOK 17 (2015), and that over 30,000 children remain in Texas foster care. TEX. DEP'T FAMILY & PROTECTIVE SERVS., 2014 DATA BOOK 47 (2015).

[75] AMNESTY INT'L, USA, DEADLY DELIVERY: THE MATERNAL HEALTH CARE CRISIS IN THE USA 1 (Mar. 2010).

consequence is the "tip of the iceberg":[76] Each year, an estimated 55,000-60,000 women suffer serious, sometimes life-threatening pregnancy complications, including severe bleeding, pregnancy-induced high blood pressure and acute cardiopulmonary complications.[77]

Research establishes that pregnancy itself, including wanted pregnancy, is associated with serious mental health conditions for many women.[78] Approximately 13-20% of women experience depression during pregnancy or within the first year after delivery.[79] Suicide is a significant contributor to maternal mortality.[80]

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[76] The Joint Commission Division of Healthcare Improvement, *Reviewing Maternal Morbidity*, 6 QUICK SAFETY 1 (Sept. 2014).

[77] *See generally* William A. Grobman, et al., *Frequency of and Factors Associated With Severe Maternal Morbidity*, 123 OBSTETRICS & GYNECOLOGY 804 (2014). *See also* Pet. Br. at 21 (in Texas, risk of death from child delivery is 100 times greater than from abortion).

[78] *See generally* Patricia M. Dietz et al., *Clinically Identified Maternal Depression Before, During, and After Pregnancies Ending in Live Births*, 164 AM. J. PSYCHIATRY 1515, 1515 (2007).

[79] Katherine J. Gold et al., *Mental Health, Substance Use, and Intimate Partner Problems Among Pregnant and Postpartum Suicide Victims in the National Violent Death Reporting System*, 34 GEN. HOSP. PSYCHIATRY 139, 139-40 (2012). *See generally* NATIONAL INSTITUTE OF MENTAL HEALTH POSTPARTUM DEPRESSION FACTS, http://www.nimh.nih.gov/health/publications/postpartum-depression-facts/postpartum-depression-brochure_146657.pdf.

[80] Christie L. Palladino et al., *Homicide and Suicide During the Perinatal Period: Findings from the National Violent Death Reporting System*, 118 OBSTETRICS & GYNECOLOGY 1056 (2011).

Moreover, the negative feelings that WIA depicts as unique to abortion can and do occur with every kind of pregnancy. For example, the plain fact of a pregnancy leads some women to feel shame; this is not surprising, in light of longstanding negative societal attitudes towards sex and pregnancy. From *The Scarlet Letter* to modern-day social policy proposals, prevalent attitudes toward sex and pregnancy have generated and continue to generate significant shame for women.[81] Indeed, the history of reproduction in the United States has long been grounded in cultural ideals about sexuality and maternity that rely on social stigma to discourage sex and birth outside of heterosexual marriage or among those deemed "unfit" to parent.[82]

Other feelings and experiences that WIA would ascribe solely to abortion are likewise common to other pregnancy outcomes. For example, women who place a child for adoption often report feelings of regret and self-blame.[83] Women also report trauma

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[81] *Roe v. Wade*, 410 U.S. 113, 153 (1973) (acknowledging the "continuing stigma of unwed motherhood"). *See, e.g.,* JEB BUSH, PROFILES IN CHARACTER (1995) (arguing, in chapter titled *The Restoration of Shame*, that resort to public humiliation could help prevent pregnancies "out of wedlock"); Moriah Balingit, *At Va. High School, a Fight Over Photos of a Pregnant Teen in the Yearbook*, WASH. POST, Dec. 23, 2015.

[82] *See generally* Marcia A. Ellison. *Authoritative Knowledge and Single Women's Unintentional Pregnancies, Abortions, Adoption, and Single Motherhood: Social Stigma and Structural Violence,* 17 MEDICAL ANTHROPOLOGY Q. 322 (2003). *See also Buck v. Bell*, 274 U.S. 200 (1927) (permitting compulsory sterilization of people deemed by the State to be "unfit").

[83] *See* David Brodzinsky & Susan Livingston Smith, *Post-Placement Adjustment and the Needs of Birthmothers Who Place an Infant for Adoption*, 17 ADOPTION Q. 165, 165-67 (2014). *See*

and post-traumatic stress disorder and a range of other negative feelings related to labor and delivery.[84] In 2014, the World Health Organization issued a groundbreaking statement on the prevention and elimination of "disrespect and abuse"[85] that pregnant women experience in the context of childbirth. Pregnant women going to term in the United States increasingly have reason to fear the physical and emotional consequences of being subjected to forced or coerced medical interventions[86] and being deprived of

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generally ANN FESSLER, THE GIRLS WHO WENT AWAY: THE HIDDEN HISTORY OF WOMEN WHO SURRENDERED CHILDREN FOR ADOPTION IN THE DECADES BEFORE *ROE V. WADE* (2006).

[84] *See, e.g.,* Cheryl Tatano Beck, *Birth Trauma, In the Eye of the Beholder*, 53 NURSING RESEARCH 28 (2004); Cheryl Tatano Beck, *Post-Traumatic Stress Disorder Due to Childbirth: The Aftermath*, 53 NURSING RESEARCH 216 (2004); Pam Udy, *Emotional Impact of Cesareans*, MIDWIFERY TODAY (Spring 2009).

[85] World Health Org., *The Prevention and Elimination of Disrespect and Abuse During Facility-Based Childbirth*, WHO/RHR/14.23 (2014). *See also* DIANA BOWSER & KATHLEEN HILL, HARVARD SCHOOL OF PUBLIC HEALTH, EXPLORING EVIDENCE FOR DISRESPECT AND ABUSE IN FACILITY BASED CHILDBIRTH: REPORT OF A LANDSCAPE ANALYSIS 9 (Sept. 2010) (landmark study of disrespect and abuse in maternity care in 18 countries around the world including the U.S.).

[86] *See, e.g.,* Sarah F. Adams et al., *Refusal of Treatment During Pregnancy*, 30 CLINICS IN PERINATOLOGY 127 (2003); Julie D. Cantor, *Court-Ordered Care – A Complication of Pregnancy to Avoid*, 366 NEW ENG. J. MED. 2237 (2012); *Burton v. State*, 49 So.3d 263 (Fla. Dist. Ct. App. 2010) (appealing circuit court order preventing pregnant woman from leaving the hospital and requiring her to submit to any medical treatment deemed necessary by physician, including cesarean surgery); Letitia Stein, *USF Obstetrician Threatens to Call Police if Patient Doesn't Report for C-Section*, TAMPA BAY TIMES, Mar. 6,

their rights to medical decision-making, due process, bodily integrity, and even life.[87]

Women with wanted pregnancies that end in stillbirth, miscarriage, or neonatal death often experience loss of self-esteem, depression, grief, sorrow, and self-blame.[88] Women who give birth to children born with disabilities also sometimes blame themselves.[89]

As in *Casey*, this Court must recognize and reject the paternalism that can find practical expression—regardless of legislative intent—in abortion regulations that will prevent some women from obtaining an abortion "until it is too late," 505 U.S. at 897, and predictably result in others' finding ways to end pregnancy outside of a medical setting. All pregnancy outcomes, including full-term pregnancy and the birth of a healthy baby, have large and sometimes grave implications for women's lives, and the woman, not the State, is in the best position to decide whether and when to undertake the risks and

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2013; Anemona Hartocollis, *Mother Accuses Doctors of Forcing a C-Section and Files Suit,* N.Y. TIMES, May 16, 2014.

[87] *See* Howard Minkoff & Ann Lyerly, *Samantha Burton and the Rights of Pregnant Women Twenty Years after* In re A.C., 40 Hastings Center Report 13 (2010); Lynn M. Paltrow, Roe v. Wade *and the New Jane Crow: Reproductive Rights in the Age of Mass Incarceration*, 103 AM. J. PUB. HEALTH 17 (2013).

[88] *See generally* Anette Kersting & Birgit Wagner, *Complicated Grief After Perinatal Loss*, 14 DIALOGUES CLIN. NEUROSCIENCE 187, 188 (2012); Linda L. Layne, *In Search of Community: Tales of Pregnancy Loss in Three Toxically Assaulted Communities in the U.S.*, 29 WOMEN'S STUDIES QUARTERLY 25, 41 (2001).

[89] GAIL H. LANDSMAN, RECONSTRUCTING MOTHERHOOD AND DISABILITY IN THE AGE OF "PERFECT" BABIES 15-47 (2009).

possibilities pregnancy presents. No less than when "they marry," *Casey*, 505 U.S. at 898, "[w]omen do not lose their constitutionally protected liberty when they" become pregnant, and "[t]he Constitution protects all [pregnant women] … from the abuse of governmental power, even where that power is employed for the [individual's own] supposed benefit," *id.*

Conclusion

The decision of the court of appeals should be reversed.

Respectfully submitted,

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DESCRIPTIONS OF *AMICI CURIAE* ORGANIZATIONS

National Advocates for Pregnant Women ("NAPW") is a non-profit legal advocacy organization that works to advance and defend the constitutional and human rights of pregnant women. NAPW documents and provides representation and consultation in cases throughout the country where, as a result of pregnancy, women have been targeted for arrest, detention, forced medical intervention, and other punitive state action. NAPW believes that there is no point in pregnancy when women should lose their civil rights and advocates for policies that protect the health and welfare of pregnant women, mothers, and their families.

A Better Balance: The Work and Family Legal Center is a national legal advocacy organization dedicated to promoting fairness in the workplace and helping employees meet the conflicting demands of work and family. Through legislative advocacy, litigation, research, and public education, A Better Balance is committed to helping workers care for their families without risking their economic security. The outcome of this case will directly impact the physical and financial well-being of women, children, and families. A Better Balance has a strong interest in ensuring that low-income workers, who are hit hardest by measures that impose undue economic burdens on women seeking reproductive healthcare, need not sacrifice their health for their economic security, nor vice versa.

Backline promotes unconditional and judgment-free support for the full spectrum of decisions, feelings, and experiences with pregnancy, parenting,

abortion, and adoption. Through direct service and social change strategies, Backline is building a world where all people can make the reproductive decisions that are best for their lives, without coercion or limitation, and where the dignity of lived experiences is affirmed and honored.

The Center on Reproductive Rights and Justice at Berkeley School of Law ("CRRJ") seeks to realize reproductive rights and advance reproductive justice by furthering scholarship, bolstering law and policy advocacy efforts, and influencing legal and social science discourse through innovative research, teaching, and convenings. In essence, CRRJ propels policy solutions by connecting people and ideas across the academic-advocate divide. We believe all people deserve the social, economic, political, and legal conditions, capital, and control necessary to make genuine choices about reproduction – decisions that must be respected, supported, and treated with dignity.

CHOICES, Memphis Center for Reproductive Health is a non-profit community health agency in Memphis, Tennessee that provides reproductive health care for thousands of women, men and teens each year. Our mission is to empower individuals in the Mid-South community to make informed choices for and about their reproductive health. We are working to transform the way that reproductive health care is perceived and delivered in our community.

Choices in Childbirth ("CiC") is a non-profit organization that is a national leader in consumer advocacy and outreach for women and their families. At CiC we believe that every woman deserves a safe, respectful and deeply fulfilling birth experience. We

help women make informed decisions about where, how and with whom to birth. CiC opposes unauthorized state action that undermines women's ability to make these decisions.

Desiree Alliance believes that women should have the autonomy over every aspect their bodies. We have long been fighting this struggle to free us from government involvement, patriarchy, and decisions about our bodies. In 2015, this should not be an issue. We demand the right to own our bodies!

Families for Justice as Healing ("FJAH") promotes change from our current criminal legal system to a system based on human rights, and we do so from the voices of incarcerated and formerly incarcerated women and girls. Through public awareness and policy advocacy, we use our lived experiences, as experts in the area of justice reform, to create a shift from incarceration to family and community healing and empowerment.

Families & Criminal Justice ("FCJ") is a community service program dedicated to optimal health and development among the children of women involved in the criminal justice system. FCJ offers reproductive health, prenatal and infant/child development education and support services to pregnant prisoners and other incarcerated mothers, as well as home-based infant/child development services for formerly incarcerated mothers and their young children. FCJ believes that recent research demonstrates that mothers' interconception and prenatal health have powerful and lasting effects on infant and child development, so we work towards optimal reproductive health and reproductive freedom among mothers who receive our services, and support reproductive justice for all mothers.

Legal Services for Prisoners with Children is an organization with 35 years' history of fighting for the rights of incarcerated women. We have engaged in advocacy, litigation and legislation involving reproductive rights and protocols for pregnant prisoners.

SisterLove, Inc. is the oldest nonprofit in Georgia dedicated specifically to the education, prevention and support needs of women, men and youth at risk for HIV/AIDS. SisterLove's mission is to eradicate the impact of HIV/AIDS and other reproductive health challenges upon women and their families through education, prevention, support and human rights advocacy in the United States and around the world.

Third Wave Fund, a hosted project at Proteus Fund, is the only national foundation that supports and strengthens youth-led gender justice activism—focusing on efforts that advance the political power, well-being, and self-determination of communities of color and low-income communities in the U.S. We partner with institutions and individual donors to invest resources in under-funded regions and social justice youth movements. Over our twenty-year history, we have awarded more than 3.2 million dollars in grants, provided mentorship and technical support to dozens of organizations and leaders, and helped gender justice groups generate sustainable revenue streams.

The Women and Justice Project ("WJP") is an independent project dedicated to strengthening the movement to end mass criminalization and mass incarceration of women in the United States.

Women on the Rise Telling HerStory ("WORTH") is an association of empowered formerly incarcerated women who work to improve the lives and health of women who are affected by the criminal justice system.