No. 19-1392

IN THE

Supreme Court of the United States

THOMAS E. DOBBS, STATE HEALTH OFFICER OF THE MISSISSIPPI DEPARTMENTOF HEALTH, *et al.*,

Petitioners,

v.

JACKSON WOMEN'S HEALTH ORGANIZATION, *et al.*,

Respondents.

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

BRIEF OF *AMICI CURIAE* CARE NET, A NATIONAL AFFILIATION ORGANIZATION OF 1,200 PREGNANCY HELP CENTERS, AND ALPHA CENTER, A SOUTH DAKOTA REGISTERED PREGNANCY HELP CENTER, IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Care Net is a national non-profit corporation and one of the largest affiliation organizations for pregnancy centers in North America. Care Net provides education, support, and training for its approximately 1,200 affiliates, sixteen of which are located in Mississippi. Care Net also runs the only national call center providing immediate assistance to pregnant mothers considering giving up their rights by an abortion. In providing services in support of local pregnancy centers, Care Net seeks to protect the interests pregnant mothers have in their constitutionally protected relationship with their children.

Alpha Center, founded in 1984, is a South Dakota Registered Pregnancy Help Center on the State's registry maintained by the South Dakota Department of Health, and is highly regulated and required to follow strict policies and procedures dictated by statute.

Alpha Center's central mission is to protect a pregnant mother's interest in her relationship with her child.

Alpha Center, a 501(c)(3) charitable organization, provides pre-abortion counseling, practical assistance, and material support to pregnant mothers who want to maintain their relationship with their children, free of charge.

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1. Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than the amici curiae, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

For the past 16 years, Alpha Center has successfully defended South Dakota statutes designed to protect a pregnant mother's right to maintain her relationship with her child against abortion clinics, winning four different decisions in the Eighth Circuit.

Alpha Center is currently in litigation defending South Dakota's Anti-Coercion Statute intended to protect pregnant mothers from losing their children as a result of coerced abortions.

SUMMARY OF ARGUMENT

Roe v. Wade, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) never properly defined the conduct which the Court in those cases identified as a protected "liberty." The essential starting point in any substantive Due Process analysis is the "careful description" of the conduct asserted to be protected. *Washington v. Glucksberg*, 521 U.S. 702, 722-23 (1997); *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972); *Graham v. Richardson*, 403 U.S. 365, 374 (1971).

In its abortion jurisprudence, however, this Court has abandoned that disciplined approach and adherence to that requirement, resorting to use of vague and obfuscatory terms like "potential life" and "termination of pregnancy," avoiding direct and accurate definition of the conduct involved.

An abortion is an extraordinary procedure unlike any other in all of medicine, because it is the employment of a medical procedure to achieve a non-medical objective:

the termination of a pregnant mother's constitutionally protected relationship with her child. That termination is achieved by the termination of the life of the mother's child, a whole, separate, unique, living human being. *Planned Parenthood Minn., N..D., S.D., et al. v. Rounds, Alpha Center, et al.*, 530 F.3d 724 (8th Cir. 2008) (*en banc*) (*Rounds II*); *Planned Parenthood Minn., N..D., S.D., et al. v. Rounds, Alpha Center, et al.*, 650 F.Supp. 2d 972, 976 (U.S. Dist. Ct., S.D.D. 2009) (*Rounds III*); *Planned Parenthood Minn., N..D., S.D., et al. v. Rounds, Alpha Center, et al.*, 653 F.3d 662, 667-68 (8th Cir. 2011) (*Rounds IV*).

Any reexamination of *Roe* and *Casey* requires the acknowledgment that an abortion is the employment of a medical procedure to achieve a non-medical objective: the termination of a pregnant mother's relationship with her child, without any meaningful protection for the mother's rights, by terminating the life of the mother's child, a whole, separate, unique, living human being, one of the doctor's patients.

A pregnant mother has a fundamental intrinsic right to maintain her relationship with her child. *Lehr v. Robertson*, 463 U.S. 248, 260 (1983); *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1972); *Santosky v. Kramer*, 455 U.S. 745, 753, 758-59 (1982).

The state is duty-bound to protect the pregnant mother's right to that relationship from unconstitutional terminations whether they are termed "involuntary" or "voluntary." Pregnant mothers are routinely coerced into having abortions they do not want, resulting in the loss of their children.

Because *Roe* and *Casey* are usd to prohibit the states from providing any meaningful protection of the mothers intrinsic right to her relationship with her child, the pregnant mother's Due Process and Equal Protection rights have been routinely violated.

> "It is a necessary and proper exercise of the state's authority to give precedence to the mother's fundamental interest in her relationship with her child over the irrevocable method of termination of that relationship by induced abortion." SDCL § 34-23A-2-5.

ARGUMENT

Petitioners, Thomas Dobbs, M.D., M.P.H. and Kenneth Cleveland, M.D., have raised the conventional objections to the Court's decisions in *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

While those objections validly point to many flaws in the Court's analysis in those cases, there are other points, of significant importance, never before presented to this Court in a case scrutinizing a state's regulation of abortion.

These *amici* address two of those matters.

They are best highlighted and understood in the context of the ongoing efforts of the State of South Dakota to protect the fundamental intrinsic rights of the pregnant mothers of that state.[2]

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2. By a super majority of 83% of both chambers of its legislature, South Dakota passed a 23-page Concurrent Resolution

First, as a fundamental matter, *Roe* and *Casey* never properly defined the conduct that was claimed to be a protected "liberty" in those cases. Properly identifying and defining the conduct asserted to be protected is a basic threshold issue. *Washington v. Glucksberg*, 521 U.S. 702, 722-723 (1997).

Second, in an effort to justify its affirmance of *Roe*, *Casey* made the startling claim that:

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addressed to this Court setting forth its grievances with *Roe* and *Casey*. That resolution observed:

"Virtually every statute we have passed to protect the interests of pregnant mothers has been attacked in court by an abortion clinic and its physicians claiming that *Roe v. Wade* prohibits our rational and carefully thought out legislation. Much of that legislation was designed to protect the pregnant mothers against the negligence and dereliction of the abortion providers themselves. Despite clear conflict of interest, the abortion providers claimed in court to represent the rights of the pregnant mothers, and based upon *Roe* and its progeny, the Federal District Court permitted the abortion providers to stand in the place of the very women whose rights they violated."

"The People of South Dakota and its elected officials have stayed true to its mission of protecting its people, but, yet again, find itself embroiled in litigation over its efforts to protect the rights of its pregnant mothers. Another challenge, this time to South Dakota's 2011 Anti-Coercion Statute, is now in the courts..."

"The people of the various states will never have confidence in, or acceptance of, the *Roe* decision; and will not have confidence in the Court that reaffirmed a decision which a majority of its members knew and admitted was wrongly decided, until the Court corrects its errors of *Roe*..." *Planned Parenthood, Minn N.D., S.D., v. Noem, Alpha Center,* U.S. Dist. Ct., D.S.D., Case 4:11-cv-04071 KES, House Concurrent Resolution No. 1004, State of South Dakota, Ninetieth Session, Legislative Assembly, 2015, ECF 266-28.

> "Even on the assumption that the central holding of *Roe* was in error, *that error would go only to the strength of the state interest in fetal protection, not to the recognition afforded by the Constitution to the women's liberty*." *Casey*, 505 U.S. at 858 (emphasis added).

In fact, *Roe* and its progeny have been used to destroy one of the most important fundamental intrinsic rights a pregnant mother has in all of life.

I. An Abortion is the Employment of a Medical Procedure to Achieve a Non-Medical Objective: The Termination of the Pregnant Mother's Constitutionally Protected Relationship with Her Child, By Terminating the Life of a Whole, Separate, Unique, Living Human Being.

Glucksberg admonished that the essential starting point in any substantive Due Process analysis is the careful defining of the conduct asserted to constitute a protected liberty: "[W]e have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest." *Glucksberg*, 521 U.S. at 721 (citations omitted).

As a result, *Glucksberg* rejected the description of the "liberty" asserted by its proponent – "the right to die" – the Court determining instead that the conduct asserted as a "liberty" was more accurately described as "a right to commit suicide which itself includes a right to assistance in doing so." *Id.* at 723.

In its abortion jurisprudence, however, the Court has abandoned that disciplined approach and failed to

accurately define the "conduct" alleged to constitute a protected liberty, resorting to vague and obfuscatory terms like "potential life"[3] and "termination of pregnancy."[4] The Court has never provided"careful description" of the conduct asserted to be protected.

An abortion is an extraordinary procedure unlike any other in all of medicine.

An abortion is the employment of a medical procedure to achieve a non-medical objective: the termination of a pregnant mother's relationship with her child. See, Declaration of Glenn Ridder, M.D., *Planned Parenthood Minn., N.D., S.D., et al. v. Noem, Alpha Center, et al.*, U.S. Dist. Ct., D.S.D., civ-11-4071 KES (*P.P. v. Noem)*, ECF 246,¶6; *Id.,* Hartmann, M.D., ECF 269, ¶¶17, 34-40; *Id.,* Grossman, M.D., ECF 236, ¶16.

The termination of the pregnant mother's relationship with her child is achieved by the termination of the life of the child. An abortion terminates the life of a whole, separate, unique, living human being. SDCL § 34-23A-10.1 requires that fact to be disclosed to a pregnant mother before a physician can take a consent for an abortion. Planned Parenthood's challenge to the constitutionality of that disclosure requirement was rejected by an *en banc* court of the Eighth Circuit. *Planned Parenthood Minn, N.D., S.D., et al. v. Rounds, Alpha Center, et al.*, 530 F.3d 724 (8th Cir. 2008) (*en banc*) (*Rounds II*), held that the

3. *Roe*, 410 U.S. at 113; *Casey,* 505 U.S. at 870, 871, 872, 873, 876, 878, 886.

4. *Roe*, 410 U.S. at 140; *Casey*, 505 U.S. at 852, 869, 870, 871, 872, 874, 887, 888.

"Human Being" Disclosure is a statement of scientific fact, not a statement of ideology – as claimed by the plaintiffs – and relevant to the decision of the pregnant mother. *Id.* at 735-737.

The Eighth Circuit found that the Human Being Disclosure was a true statement of scientific fact. The *en banc* Court in *Rounds II*, when it dissolved the preliminary injunction, stressed that the "truthfulness" of the Human Being Disclosure "generates little dispute." *Id.* at 735. That court emphasized the record which included the testimony of nationally renowned experts in molecular biology and human embryology, and the detailed scientific information and analysis concerning DNA, RNA, their function and the new recombinant DNA technologies that permit observation on a molecular level. *Id.* at 728-729; *Planned Parenthood, et al. v. Rounds, et al.*, Civ. No. 05-4077-KES, Declarations of Dr. David Mark, Ph.D., ECF 25, and Dr. Bruce Carlson, M.D., Ph.D., ECF 24.

After dissolution of the preliminary injunction, and following completion of discovery in *Rounds*, the Intervenor Alpha Center moved for summary judgment concerning the truth of the Human Being Disclosure.

Despite the fact that the Plaintiffs in *Rounds* had competent counsel and excellently credentialed experts, the district court was compelled to enter summary judgment because there was no genuine dispute concerning the truthfulness of the statement that "an abortion terminates the life of a whole, separate, unique, living human being." All the objective science supported the disclosure and the Plaintiffs' experts and physicians were compelled to admit the essential truth of the statement. See, *e.g., P.P.*

v. Noem, Intervenors' Rule 56.1 Statement of Undisputed Material Facts. ECF 296, ¶¶85-112.

The district court ruled that the physician is required to make the Human Being Disclosure using the exact language of the statute. See, *Planned Parenthood, et al. v. Rounds, et al.*, 650 F.Supp. 2d 972, 976 (2009) (*Rounds III*).

The *Rounds* Plaintiffs appealed the decision granting summary judgment. The Eighth Circuit affirmed the district court. *Planned Parenthood, et al. v. Rounds, et al.*, 653 F.3d 662, 667-668 (8th Cir. 2011) ("*Rounds IV*").

Thus, *Rounds* held that the Human Being Disclosure found in South Dakota's Informed Consent Statute was a truthful, non-misleading statement of scientific and biological fact. *Rounds IV* at 667-668.

The fact that an unborn child is a human being is universally and objectively true, and *Rounds* established that it is a constitutional fact.

Legislative facts (also referred to as "universal" facts) are binding on litigants in subsequent cases. *U.S. v. Gould*, 536 F.2d 216, 219-220 (8th Cir. 1976). "Legislative facts are established truths, facts or pronouncements that do not change from court to court but apply universally... ." *Id.,* at 220.

That the earth revolves around the sun is a universally true legislative fact. So too, the fact that an abortion terminates the life of a whole, separate, unique, living human being.

A constitutional fact is one that is essential for a determination of a question of constitutional law; the fact and the constitutional determination are inextricably connected. See, *e.g., U.S. v. Lincoln*, 403 F.3d 703, 705-706 (9th Cir. 2005) (quoting *U.S. v. Hanna*, 293 F.3d 1080, 1088 (9th Cir. 2002)) ("[c]onstitutional facts are facts – such as ... whether a statement is a true threat – that determine the core issue of whether the challenged speech is protected by the First Amendment").[5]

The South Dakota Human Being Disclosure was found to be constitutional, as a matter of law, precisely because it is "truthful and non-misleading." The entire constitutionality of the disclosure rose and fell on whether it was truthful and non-misleading.

Throughout the nation, the killing of a child in utero, at any time after conception, is now recognized as the killing of a whole, separate, unique, living human being. Currently, 38 states and the federal government make it a criminal homicide to kill an unborn child in utero, and in 30 of those jurisdictions, it is a homicide to kill the child at any age after conception.[6]

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5. See also, *McIntyre v. Jones*, 194 P.3d 519, 528 (Colo. App. 2008) (an issue of 'constitutional fact' is one which affects whether the [defamatory] statement is subject to constitutional protection" (citing *NBC Subsidiary (KCNC-TV) Inc., v. Living Will Ctr.*, 879 P.2d 6, 9-11 (Colo. 1994) (*en banc*); *State v. Tomaszewski*, 782 N.W. 2d 725, 727 (Wis. Ct. App. 2010) (quoting *State v. Post*, 733 N.W. 2d 634, 636 (Wis. 2007)) ("the question of whether a traffic stop is reasonable is a question of constitutional law").

6. Alabama, Ala. Code 1975 §§ 13A-6-1 to 13A-6-4 (conception); Alaska, Alaska Stat. § 11.41.150 (conception); Arizona, Ariz. Rev. Stat Ann. §§ 13-1102-13-1105 (conception); Arkansas, Ark. Stat. Ann. §§ 5-10-102-5-10-105 (defined by id. § 5-1-102(13)(B))

It is well established that a physician who has a pregnant woman as a patient has two separate patients,

(conception); California, Cal. Penal Code § 187(a) (fetal stage); Federal, 18 U.S.C. § 1841(a)(2)(C) (conception); Florida, F.S.A. § 782.09 (defined by id. § 775.021(5)) (conception); Georgia, Ga. Code Ann. § 16-5-80 (conception); Idaho, I.C. § 18-4001 (defined by id. § 18-4016) (conception); Illinois, §§ 720 ILCS 5/9-1.2,-5/9-2.1,-5/9-3.2 (conception); Indiana, IC §§ 35-42-1-1,42-1-3,42-1-4,42-1-6 (conception); Kansas, K.S.A. §§ 21-5401-5406 (defined by id § 21-5419) (conception); Kentucky, KRS § 507A.020-.050 (defined by § 507A.010(1)(c)) (conception); Louisiana, LA. Stat. Ann. §§ 14:29-14:32.8 (defined by id. § 14:2 A(7) & (11)) (conception); Maryland, MD CRIM LAW § 2-103 (viability); Massachusetts, Comm. v. Crawford, 722 NE.2d 960 (Mass. 2000) (viability); Michigan, M.C.L.A. §§ 750.322-.323 (quickening); Minnesota, M.S.A. §§ 609.266-.2691 (conception); Mississippi, Miss. Code. Ann. § 97-3-19 (defined by id. § 97-3-37(1)) (conception); Missouri, V.A.M.S. §§ 565.020-565.027 (defined by id. § 1.205 under State v. Rollen, 133 SW.3d 57 (2003)) (conception); Montana, M.C.A. §§ 45-5-102,45-5-103 (defined by § 45-5-116(3)) (8 weeks); Nebraska, Neb. Rev. St. §§ 28-388 *to* 28-394 (conception); Nevada, N.R.S. 200.210 (quickening); New Hampshire, N.H. Rev. Stat. §§ 630:1-a to 630:4 (20 weeks post conception); North Carolina, N.C.G.S.A. §§ 14-23.1-14-23.8 (conception); North Dakota NDCC §§ 12.1-17.1-02 to 12.1-17.1-06 (defined by id. § 12.1-17.1-01(3)) (conception); Ohio, R.C. §§ 2903.01--2903.08 (defined by id. § 2903.09) (conception); Oklahoma, 21 Okl. St. Ann § 691 (defined by 63 Okl. St. Ann. § 1-730(A)(4)) (conception); Pennsylvania, 18 Pa. C.S.A. §§ 2601-2609 (defined by id. § 3203) (conception); South Carolina, SC ST § 16-3-1083 (conception); South Dakota, SDCL § 22-16-1.1 (defined by id. § 22-1-2(50A)) (conception); Tennessee, T.C.A. §§ 39-13-201 to 39-13-218 (defined by id. § 39-13-214(a)) (conception); Texas, V.T.C.A., Penal Code §§ 19.01-19.05 (defined by id. § 1.07(a)(26)) (conception); Utah, U.C.A. 1953 §§ 76-5-202 to 76-5-209 (defined by id. § 76-5-201) (conception); Virginia, VA Code Ann. § 18-2-32.2 (fetal stage); Washington, Wash Rev. Code § 9A.32.060 (quickening); West Virginia, W. Va. Code §§ 61-2-1,-2-4,-2-7 (defined by id. § 61-2-30) (conception); Wisconsin, Wis. Stat. § 940.01 (defined by id. § 939.75(1)) (conception); Wyoming, W.S. §§ 6-2-101,-104 (defined by id. § 6-1-104(a)(xviii)) (conception).

the mother and her unborn child, and the physician has a professional and legal duty to both. ACOG Comm. on Ethics (2003-04), Am. Coll. Of Obstetrics and Gynecologists, *Patient Choice in the Maternal-Fetal Relationship*, *in* Ethics in Obstetrics and Gynecology 34-36 (ACOG, 2nd ed., 2004) ("The maternal-fetal relationship is unique in medicine … because both the fetus and the woman are regarded as patients of the obstetrician"); Harrison, M.R., Golbus, M.S., Filly, R.A. (Eds); The Unborn Patient: Prenatal Diagnosis and Treatment (Michael R. Harrison, MD et al. eds. 2nd ed. 1991).

Even the plaintiff abortion doctor in the current South Dakota Anti-Coercion Statute litigation admits that a physician who has a pregnant mother as a patient, has two separate patients, the mother and her child, and has a duty to both. See, *P.P. v. Noem,* testimony of Dr. Carol Ball, Planned Parenthood Medical Director and member of the Board of NAF., ECF 266-5; see also, Ridder, M.D., ECF 246, ¶15; Hartmann, M.D., ECF 269, ¶¶30-31. Dr. Ball admits that the physician has a duty to disclose the risks of a proposed procedure to the child by disclosing them to the mother who makes a decision for both patients. *Id.,* Ball, ECF 266-20; Ridder, ECF 246, ¶¶14-18; Hartmann, ECF 269, ¶32. This dual duty is imposed by medical standards and by law.[7] Ridder, *Id.*; Hartmann, *Id.*, ¶31.

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7. *Hughson v. St. Francis Hospital*, 92 A.D.2d 131, 459 N.Y.S.2d 814 (1983) ("both the mother and child *in utero* . . . are each owed a duty, independent of the other"). The doctor has a duty to provide the mother with information regarding the risks the proposed treatment would have for the child. *Id.* If the physician fails to make proper disclosure, the child born alive has a negligence claim against the physician for injuries causally related to the negligence of defendants. *Harrison v. United States*,

Therefore, the physician who proposes to perform an abortion proposes to terminate the life of one of her patients.

It is a criminal homicide in South Dakota, Mississippi, and 28 other jurisdictions to intentionally kill a human being in utero any time after conception. SDCL § 22-16-1.1. See, footnote 6 above. Planned Parenthood's Medical Director, Dr. Ball, admitted that killing the child in utero, at any age of gestation, is a criminal homicide, and the only thing that immunizes her from prosecution is the signed "consent." *P.P. v. Noem*, Ball, ECF 266-7; see, SDCL § 22-16-1.1 (doctor's immunity depends on obtaining consent). In states like South Dakota and Mississippi, the killing of the child in utero is punishable by life imprisonment. SDCL § 22-16.1-1 (fetal homicide is a Class B felony); SDCL § 22-6-1 (Class B felony punishable by mandatory life term without parole). In Mississippi, killing a child in utero at any age after conception is a first degree murder.

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284 F.3d 293 (1st Cir. 2002); *Roberts v. Patel*, 620 F.Supp. 323 (N.D. Ill. 1985); *Walker v. Mart*, 164 Ariz. 37, 790 P.2d 735 (1990) (*en banc*); *Nold v. Pinyon*, 272 Kan. 87, 31 P.3d 274 (2001); *Draper v. Jasionowski*, 372 N.J.Super. 368, 858 A.2d 1141 (App. Div. 2004); *Ledford v. Martin*, 87 N.C.App. 88, 359 S.E.2d 505 (1987); *Miller ex rel. Miller v. Dacus*, 231 S.W.3d 903, 910-11 (Tenn. 2007); *Jones v. MetroHealth Med. Ctr*, 89 N.E.3d 633, 662-663 (Ohio Ct.App. 2017); *Randall v. United States*, 859 F.Supp. 22, 31-33 (D.C. 1994); *In re A.C.*, 573 A.2d 1235, 1239, 1246 n.13 (D.C. 1990). This two-patient concept is recognized in other malpractice contexts. See, e.g., *Burgess v. the Superior Court of Los Angeles*, 2 Cal.4th 1064, 831 P.2d 1197, 9 Cal.Rptr.2d 615 (1992); *Ob-Gyn Associates of Albany v. Littleton*, 259 Ga. 663, 386 S.E.2d 146 (1989); *In re Certification of Question of Law from U.S. District Court (Farley)*, 387 N.W.2d 42 (S.D. 1986) (a wrongful death malpractice action for the death of a stillborn child).

Miss. Code Ann. § 97-3-19; 37(1). It is punishable by life imprisonment. Miss. Code Ann. § 97-3-21(1).

In short, the consent for an abortion: (1) authorizes the physician to terminate the pregnant mother's constitutionally protected relationship with her child; (2) authorizes the termination of the life of one of the physician's patients; and (3) immunizes the physician from criminal prosecution for what is otherwise a criminal homicide. *P.P. v. Noem;* Ridder, ECF 246, ¶¶14-18; Hartmann, ECF 269, ¶29.

Thus, 48 years after *Roe* and 29 years after *Casey,* this Court has yet to carefully define the conduct that *Roe* asserted was protected as a Due Process liberty interest. The Court must now acknowledge that an abortion is the employment of a medical procedure to achieve a non-medical objective: the termination of a pregnant mother's relationship with her child by terminating the life of the mother's child, a whole, separate, unique, living human being, one of the doctor's patients. The only reason the physician who terminates the life of that child is not criminally prosecuted is because this Court forced the states to create an exception to their homicide statutes.

This Court forced that exception on the states without carefully defining the conduct it declared protected, and without understanding the incredible harm it would inflict upon the true intrinsic rights of the mothers.

II. An Abortion is Not the Exercise of a Right; It is the Waiver, Surrender and Termination of One of the Most Important Fundamental Intrinsic Rights a Mother Has in All of Life; *Roe* and *Casey* Have Operated to Destroy that Right

Planned Parenthood v. Casey, 505 U.S. 833 (1992), to justify continuing *Roe's* regime, made numerous statements which have proven incorrect.

Three such statements are pertinent here: (1) that the "error" of *Roe* does not go "to the recognition afforded by the constitution to the woman's liberty," *Casey* at 858; (2) that without *Roe*, the state could force a pregnant mother to have an abortion, *Id.* at 859; and (3) that there has been "no development of constitutional law since" *Roe* that has "implicitly or explicitly left *Roe* behind" as "obsolete constitutional thinking." *Id.* at 857.

Roe and *Casey* have proven destructive to one of the most basic intrinsic rights of pregnant mothers.

A. The Pregnant Mother has a Fundamental, Intrinsic Right to Maintain Her Relationship with Her Child

A pregnant mother has a fundamental liberty interest in maintaining her existing relationship with her child, and her personal interest in her child's life and well-being.

1.

It is axiomatic that the term "liberty" extends beyond mere freedom from physical restraint. *Board of Regents,*

et al. v. Roth, 408 U.S. 564, 572 (1972); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

To determine whether an "interest" is one protected by Due Process, the Court must first describe the conduct asserted to be a liberty. *Glucksberg*, 521 U.S. at 722-23; *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972); *Graham v. Richardson*, 403 U.S. 365, 374 (1971). Protected are interests "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). The Court has insisted upon respect for the teaching of history [and] solid recognitions of the basic values that underlie our society. *Michael H. v. Gerald D.*, 491 U.S. 110, 122-123 (1989) (quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965).

Employing these criteria – "tradition and history," "the conscience of our people," and "recognition of the basic values that underlie society," the Court has recognized as interests protected by Due Process those fundamental to bringing up children and those "essential to the orderly pursuit of happiness by free men." *Meyer*, 262 U.S. at 399. There has been significant debate over the precise definition of "deeply rooted traditions." See, *Moore v. East Cleveland*, 431 U.S. 494, 502 (1977); compare Justice Scalia, *Michael H.*, 491 U.S. 110, with dissents of Justices Brennan, *Id.* at 136, and White, *Id.* at 157.

Regardless of the criteria employed, a mother's interest in her relationship with her child is protected as a fundamental liberty *(Santosky v. Kramer*, 455 U.S. 745, 753, 759), and that fundamental liberty is protected throughout pregnancy. *Lehr v. Robertson*, 463 U.S. 248, 260 n.16 (1983). That liberty interest in parental

relationships is derived from "intrinsic human rights." *Smith v. Org. of Foster Families,* 431 U.S. 816, 845 (1972). That the mother's relationship is a protected fundamental liberty is supported by all applicable criteria, "tradition and history;" the dictates of the natural and inalienable rights of both mother and child; "the conscience of our people," and the "recognition of the basic values that underlie society."

Although closely related, a mother has three identifiable interests protected throughout pregnancy: (1) her interest in her existing relationship with her child; (2) her personal interest in her child's life and welfare; and (3) her interest in her family as a unit. See, *Santosky*, 455 U.S. 745; *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Smith*, 431 U.S. 816 (1977); *Prince v. Mass.*, 321 U.S. 158 (1944); *Stanley v. Ill.*, 405 U.S. 645, 651-652 (1972); *Pierce v. Soc. of Sisters*, 268 U.S. 510, 534-535 (1925). The relationship of mother and child, especially during pregnancy, is one traditionally cherished and protected, and one which embodies some of the most basic values upon which our entire society is built. Nothing would shock the conscience of our people more than a declaration that the most important, most intimate, most unique, and most vulnerable of all familial relationships would go unprotected by a Constitution which holds these relationships as the touchstone and core of civilized society. See, *P.P. v. Noem,* Concurrent Resolution, ECF 266-28, ID 4735. "Respect for human life finds ultimate expression in the bond of love the mother has for her child." *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007).

2.

The relationship between a parent and child is protected as a fundamental liberty. *Santosky*, 455 U.S. at 753, 758-759. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) observed that it is perhaps the oldest recognized liberty, first recognized in *Meyer*, 262 U.S. at 399 (1923), and *Pierce*, 268 U.S. at 534-535 (1925). This liberty has its source "in intrinsic human rights, as understood in 'this Nation's history and tradition.'" *Smith*, 431 U.S. at 845 (quoting *Moore*, 431 U.S. at 503).

The interest protected is the interest in the relationship itself, as demonstrated by cases addressing the circumstances in which the relationship of a biological father is recognized as protected. Compare, *Stanley*, 405 U.S. 645, and *Caban v. Mohammed*, 441 U.S. 380, 389 n.7 (1979) (making the point explicitly and finding father's interests protected) *with Quilloin*, 434 U.S. at 248, and *Lehr*, 463 U.S. at 261 (father's interest not protected).

In contrast, the pregnant mother's interest in her relationship with her child is always protected as a fundamental liberty. "The mother carries and bears the child, and in this sense her parental relationship is clear." *Caban*, 441 U.S. at 397 (Stewart, J., dissenting)).[8] "Fathers and mothers are not similarly situated with regard to the

8. Interrelated with the pregnant mother's right to maintain her relationship with her child is her fundamental right to procreate. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). If it can be said that her right to procreate is satisfied upon conception, that right, being "one of the basic rights of man" (*Id.*), is rendered meaningless if the mother's resulting relationship with her child in utero is left unprotected.

proof of biological parenthood." *Nguyen v. I.N.S.*, 533 U.S. 53, 63 (2001) (citing *Lehr*).

Because the parents' rights are fundamental, substantive Due Process forbids a state to terminate a parent's relationship with her child unless it can prove by clear and convincing evidence the parent is unfit. *Santosky*, 455 U.S. at 757-759.

While *Santosky* arises in the context of an "involuntary" termination, the state cannot circumvent requirements of Due Process by statutorily authorizing terminations it labels "voluntary," without ensuring that the mother's consent to terminate is truly voluntary and informed.

A mother's relationship with her child during pregnancy is so intimate that the unique bond between them creates a human relationship which may be the most rewarding in all of human experience. *P.P. v. Noem*; Task Force Report, ECF 267-51, ID 5147-50, 5160.

> "If there are any self-evident and universal truths that can act for the human race as a guide or light in which social and human justice can be grounded, they are these: . . . that the cherished role of a mother and her relationship with her child, at every moment of life, has intrinsic worth and beauty; that the intrinsic beauty of motherhood is inseparable from the beauty of womanhood; and that this relationship, its unselfish nature and its role in the survival of the race is the touchstone and core of all civilized society. Its denigration is the denigration of the human race." *P.P. v. Noem*; *Concurrent Resolution*, ECF 266-28, ID 4735.

South Dakota's 2005 Informed Consent Statute required a physician to disclose, prior to taking a consent, "that the pregnant woman has an existing relationship with that unborn human being and that the relationship enjoys protection under the United States Constitution." SDCL § 34-23A-10.1(c). In the *Rounds* case, Planned Parenthood claimed that that disclosure was unconstitutional as a false statement of fact and law. *Planned Parenthood Minn., N.D., S.D., et al. v. Rounds, et al.*, 4:05-c-04077-KES, ECF145, p.12-13. The district court granted Plaintiffs summary judgment and, on appeal, Plaintiffs again argued that the disclosure was false. *Rounds*, Docket No. 09-3233, ID 3652535 (Plaintiffs' Brief, p.29-47).

The Eighth Circuit reversed, upholding the provision as a true statement. *Planned Parenthood et al., v. Rounds, et al.*, 653 F.3d 662 (8th Cir. 2011).

It is absurd to suggest that if *Roe* had not found a "right to an abortion" that a state could force a pregnant mother to submit to an abortion. The pregnant mother's relationship with her child is protected as a fundamental intrinsic right and no state can force a pre-birth termination of any kind, no less by mandatory killing of her child.

B. Because *Roe* and *Casey* have Prohibited the States from Providing Meaningful Protections for the Pregnant Mother's Right to Her Relationship, Mothers are Losing Their Children Against Their Will

1. The Primary Decision

It is widely recognized, and Planned Parenthood's Medical Director admitted, that "the right that a mother has to keep her relationship with her child is one of the greatest rights that a mother would have in her lifetime," and that relationship "can give great joy and benefit to the mother." See, also, SDCL § 34-23A-85; *P.P. v. Noem,* Ball, ECF 266-1, ID 4605; Task Force Report, ECF 267-51, ID 5160-62; Grossman, ECF 256,¶16, ID 4166-67; Casey, ECF 255,¶34, ID 4085-86; Coleman, ECF 257,¶17, ID 4192-93.

The primary critical decision a pregnant mother faces is whether she should keep her relationship with her child. *Id.,* Ridder, M.D.,ECF 246,¶¶6,7,ID 3733-35; Hartmann, M.D., ECF 269,¶¶34-40, ID 5283-86; Casey, ECF 255,¶¶ 2, 56-59, ID 4069-70; Coleman, ECF 257, ¶17, ID 4192-93; Grossman, ECF 256,¶¶13,16, ID 4164-65.

Planned Parenthood's Medical Director admitted that the pregnant mother' decision, whether to keep or terminate her relationship with her child, is one of the greatest, most difficult and consequential decisions she will face in all of life. Ball, ECF 266-2, ¶¶49:23-50:17, ID 4608-09; Ridder, ECF 247,¶¶12-15, ID 3917-19,; Casey, ECF 255, ¶¶34;63, ID 4084-5; 4106-7; Hartmann, ECF 269, ¶¶124-127, ID 5333-34; Coleman,ECF257,¶17,ID4192-93;*id.,* Grossman, ECF 256, ¶¶8-17, ID 4163-67; Abby Johnson, ECF 211, ¶14, ID 3325.

Planned Parenthood's Medical Director acknowledged that the mother's decision whether or not to keep her relationship with her child is not a medical decision. *Id.* Ball, ECF 266-3,ID 4612, Moore, ECF 266-4,ID 4615-16; Ridder, ECF 246, ¶¶7, 8, ID 3734-35; Hartmann, ECF 269 ¶¶34-40, ID 5283-86; Casey, ¶¶34-35;54;56, ID 4084-85, 4096-98.

Thus, the primary question faced by the pregnant mother is not a medical question.

2. Pregnant Mothers are Routinely Coerced and Pressured into Abortions, and the Derelict Practices of Abortion Clinics Exacerbate the Coercion

(a)

Pregnant mothers are routinely coerced or pressured into abortions they do not want. *P.P. v. Noem,* Declarations of B.H., ECF 206; Weston, ECF 207; Alyssa Carlson, ECF 209; S.C., 208; Amrutha Bindu Mekala, ECF 217; Ayers, ECF 218; Deere, ECF 353; Roden, ECF 219; Corbett, ECF 220; Watson, ECF 221; Miller, ECF 222; Bowlin, ECF 223; McAdams, ECF 224; Steen, ECF 225; Cota, ECF 226; Hurguy, ECF 227; Szmeit, ECF 228; Kiefer, ECF 239; and Florczak-Seeman, ECF 238.

Pregnant mothers are routinely coerced into abortions at abortion clinics, *P.P. v. Noem;* Bindu Mekala, ECF 217; Ayers, ECF 218; Roden, ECF 219; Corbett, ECF 220; Watson, ECF 221; Miller, ECF 222. Pregnant mothers are routinely pressured into abortions by the abortion clinic staff. *P.P. v. Noem;* Huffstetler, ECF 229; Holcomb Misely,

ECF 268; Bowlin, ECF 223; McAdams, ECF 224; Ruch, ECF 230; Steen, ECF 225; Cota, ECF 226; Hartman ECF 231; Hurguy, ECF 227; Szmeit, ECF 228; Coleman, ECF 257, ¶32 ID 4203; Hartmann, ECF 269 ¶79, ID 5306.

Some pregnant mothers coerced into abortions are so traumatized they commit suicide. *P.P. v. Noem,* Declaration of George Zallie (who found his 21-year-old daughter hanging from her bedroom fan at the family's home), ECF 233. Women pressured to have an abortion after a forcible rape, testify that the abortion was like a second rape, only far worse than the first. *Id.* Lisa Hartman, ECF 231, ¶10, ID 3504.

Studies show a leading cause of death among pregnant mothers is murder, and most of those murders are performed by their male partners. *P.P. v. Noem,* Coleman, ECF 257, ¶35, ID 4204-5; see, 79 documented cases of pregnant mothers murdered because they refused to have an abortion, Coleman, Exhibit D.

In an exhaustive survey of 987 post-abortive women, over half stated their abortions were coerced or pressured, 34% stated that abortion clinic personnel pressured them to have an abortion, and 84.6% wished that just one person offered the support they needed to carry to term. *P.P. v. Noem,* Coleman, ECF 257 ¶61, ID 4218.

In 2013, the American College of Obstetricians and Gynecologists issued Committee Opinion 554, "Reproductive and Sexual Coercion," stating that "pregnancy coercion" is a serious cultural problem which includes threats or acts of violence to compel women to terminate a pregnancy. Declarations of Coleman, ECF 257,¶38, ID 4205-6; Hartmann, ECF 321, ¶114, ID 5326-7.

Coerced abortions are so widespread that in 2009 the Center Against Forced Abortions ("CAFA") was created, and CAFA's national network of attorneys provide *pro bono* legal services for pregnant mothers who seek help because they are being coerced into an abortion. CAFA has saved between 10,000 to 20,000 pregnant mothers from coerced abortions. *Id.,* Parker, ECF 248, ¶¶2-12, ID 3922-3927.

Pregnancy help centers throughout the nation counsel large numbers of women victimized by coerced abortions. *Id.,* Declarations of Florczak-Seeman, ECF 238; Kiefer, ECF 239; Corbett, ECF 220; Cota, ECF 226; Collins, ECF 240; Hjemfelt, ECF 242; Martinez, ECF 241; Wollman, ECF 243; Unruh, 5/1/2020, ECF 264; Unruh, 7/1/2011, ECF 263; Erica Miller, ECF 237; Travis Lasseter, ECF 265.

Good Counsel, Inc., which provides free maternity housing, has counseled thousands of post-abortive women, a significant percentage of whom were coerced or pressured into abortions. Almost all of the mothers Good Counsel houses are homeless because they were forced out of their homes for refusing to have an abortion. *Id.* Bell, ECF 261,¶4, ID 4537-8. Many other shelters provide living arrangements for pregnant mothers because they are being coerced to have abortions. *Id.,* Sandra Ramos, ECF 259.

Dorothy Wallis has worked with many hundreds of pregnancy help centers, where post-abortive women report that: they were coerced by threats of violence; abortion clinic personnel pressured them into an abortion; or no one would help them keep their babies. *Id.,* Wallis, ECF 258, Ex. A, p.10-11, ID 4505-6.

(b)

In addition to the testimony of the women, former abortion clinic doctors and clinic managers have verified the negligence and dereliction of abortion clinics. *Id.*, Declarations of Giebink, M.D., ECF 232; Thayer, ECF 210; Johnson, ECF 211; Lancaster, ECF 212;, Trevino, ECF 213; Padilla, ECF 214; Everett, ECF 215; Behrhorst, ECF 216. Surgery is scheduled over the phone, it is assumed that the mother decided to have an abortion before she arrives, consent is taken for surgery, payment is made without any counseling and no regard is given to the mother's interest in her relationship with her child. *Id.*, Declarations of Giebink, M.D., ECF 232; Thayer ECF 210; Johnson, ECF 211; Lancaster, ECF 212; Trevino, ECF 213; Padilla, ECF 214; Everett ECF 215;Behrhorst ECF 216.

Thus there is no physician-patient relationship at abortion clinics (*Id.* Thayer, ECF 201, ¶14, ID 3305; *Id.* Giebink, M.D., ECF 232 ¶28, ID 3517) and clinics perform unethical itinerant surgery. *Id.* Ridder, M.D., ECF 246, ¶¶35-38, ID 3747-3749; *Id.* Hartmann, M.D., ECF 269, ¶66, ID 5298-9.

Planned Parenthood and other clinics pressure their staffs to "sell" abortions, and steer, mislead, and pressure ambivalent pregnant mothers to have abortions. *Id.* Giebink, M.D., ECF 232 ¶¶22,23, ID 3515-16; Thayer ECF 210 ¶¶11-16, ID 3303-3306; Johnson, ECF 211 ¶¶16-24, ID 3326-3330; Lancaster, ECF 212, ¶¶12-16, ID 3336-38; Trevino, ECF 213, ¶¶5-15, ID 3341-46; Padilla, ECF 214, ¶¶16-19, ID 3352-32; Everett, ECF 215, ¶¶3-9, ID 3357-3373; Behrhorst, ECF 216, ¶¶7-11, ID 3411-3412.

B.H., ECF 206; Weston, ECF 207; Ayers, ECF 218; S.C., ECF 208.

It is so common for abortion clinics to perform abortions on mothers who are ambivalent that pregnant mothers seek help to stop medical abortions after they are started. A national network of physicians arose to help these women stop medical abortions and to give birth to children they want. *Id.,* Davenport, MD, ECF 260.

Even when it is obvious that a pregnant mother is being pressured or coerced into an abortion, the clinics still push her to an abortion. *Id.,* Declarations of Thayer, ECF 201, ¶24, ID 3309; Johnson, ECF 211, ¶¶16-22, ID 3326-3329; Lancaster, ECF 212 ¶¶13-15, ID 3336-3337;Weston, ECF 207; B.H, ECF 206.; Vixie Miller, ECF 222.

III. Because *Roe* and *Casey* are Used to Prohibit the States from Providing any Meaningful Protection of the Pregnant Mothers' Interests, the Mothers' Due Process and Equal Protection Rights Are Being Violated

A. General Considerations

Roe and *Casey* have operated to prohibit states from imposing protections of the pregnant mother's intrinsic right to maintain her relationship with her child. By way of example, South Dakota passed an Anti-Coercion Statute intended to protect the mother's fundamental interest in her relationship with her child by requiring mandatory counseling at a registered pregnancy help center such as *Amicus Curiae* Alpha Center. SDCL 32-23A-56(3). The registered pregnancy center is highly regulated, their

counseling can only be provided by a licensed professional and the counseling is limited to matters pertaining to the "preliminary question" of whether or not the pregnant mother should keep or terminate her relationship with her child. They are prohibited from discussing the abortion procedure, its risks, and engaging in a discussion about religion. SDCL §§ 32-23A-58, 58.1; SDCL 32-23A-59.

That statute was expressly intended to protect the rights of the pregnant mother against coercion and pressure. SDCL 32-23A-54 (1) to (5).

South Dakota found that:

> "It is a *necessary* and proper exercise of the State's authority *to give precedence to the mother's fundamental interest in her relationship with her child over the irrevocable method of termination of that relationship* by induced abortion."SDCL § 32-23A-54(5) (emphasis added).

That well-thought-out statute was preliminarily enjoined based on *Roe* and *Casey.*[9] As a result of that injunction, based on this Court's decisions in *Roe* and *Casey,* pregnant mothers in South Dakota have lost the benefit of the law's protection, and they continue to be coerced into abortions resulting in the loss of the children they want. See, *P.P. v. Noem,* Declarations of B.H., ECF 206; and L.M., ECF 302.

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9. The motion to dissolve that preliminary injunction is currently pending and it is expected that the case involving South Dakota's Anti-Coercion Statute will be in the Eighth Circuit this fall.

B. *Roe* and *Casey* Have Operated to Prohibit Reasonable and Necessary Exercise of the State's Authority to Protect the Fundamental Rights of Pregnant Mothers Resulting in the Violation of Their Due Process and Equal Protection Rights

Because of the holdings in *Roe* and *Casey*, every state has been compelled to expressly authorize a physician to terminate a pregnant mother's constitutionally protected relationship by an abortion. See, *e.g.*, SDCL § 34-23A-2-5.

1. The Tension and Conflict Between Two Distinct Liberty Interests

There is a natural tension and conflict between two distinctly different interests identified by the Supreme Court: the pregnant mother's fundamental intrinsic right to maintain her relationship with her child; and the "liberty" fashioned by *Roe.*

The "liberty" announced in *Roe* involves the irrevocable termination of the fundamental intrinsic right referenced in the *Santosky, Stanley,* and *Lehr* line of cases. That "liberty" and that right are in conflict; one protects the relationship, the other is employed to terminate it.

The mother's fundamental intrinsic right to her relationship and the natural conflict between the two distinct liberty interests has never been raised and discussed in a case challenging a statute regulating abortion. Until South Dakota passed its 2005 Informed Consent Statute and its 2011 Anti-Coercion Statute, no

state had identified the mother's fundamental intrinsic right to maintain her relationship as an interest that the state sought to protect by regulating abortions. Abortion providers only raised the interest they wanted to promote, an interest to "have an abortion."

Thus, while the pregnant mothers' fundamental intrinsic right to maintain their relationship with their children has always been recognized by the Supreme Court – *Troxel v. Granville*, 530 U.S. 57, 65 (2000) states it is perhaps the oldest recognized Due Process liberty interest – and the interest in "terminating a pregnancy" has been recognized since 1973, until now, no court has been asked to reconcile the inherent conflict between the two liberty interests.

Under proper application of constitutional principles, no state can legitimately authorize such termination without providing minimum Due Process protections and Equal Protection of the law. South Dakota's Informed Consent and Anti-Coercion Statutes impose the minimum safeguards necessary to protect the mothers' Due Process and Equal Protection Rights.

2. Due Process

An abortion is the employment of a medical procedure to achieve a non-medical objective: the termination of the pregnant mother's relationship with her child. See. Pt. I, *supra.* The intentional killing of a human being in utero, at any age, is a criminal homicide,[10] but states are compelled by *Roe* and *Casey* to immunize a physician who performs

10. See Footnote 6, *supra*.

an abortion on the condition that he obtains a voluntary consent. See, *e.g.,* SDCL § 22-16-1.1.

Such a consent constitutes a waiver of one of the most important fundamental rights a mother has in all of life.

No state can expressly authorize an uninformed or involuntary termination of a fundamental right. The state is obligated to ensure that a consent to terminate or waive such a right is informed and voluntary, especially where the state authorizes what would otherwise be a criminal homicide to achieve that waiver.

> "It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.'" *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938) (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937)).

For example, without voluntary informed consent, a state cannot terminate or authorize the termination of a parent's relationship with her child on the basis of the child's best interest, but must establish unfitness by clear and convincing evidence. *Santosky*, 455 U.S., at 753. Those Due Process requirements apply even if the state is not the party seeking the termination. *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996). Few acts authorized or performed by the state are "so severe and so irreversible" as the termination of a mother's relationship with her child. *Id.*, at 118 (citing *Santosky*, at 758-759).

A state cannot circumvent the obligation to protect the mother's fundamental right to her relationship by

merely labeling a termination "voluntary" – thereby circumventing the obligation to provide protections required in "involuntary" terminations – without imposing protections to ensure the terminations are voluntary.

A state that fails to provide such protections violates the mother's substantive Due Process rights. Yet, *Roe* and *Casey* require them to do so.

3. Equal Protection

"Equal protection" is "a pledge of the protection of equal laws." *Yick Wo v. Hopkins,* 118 U.S. 356, 369 (1886). Those who are similarly situated must be similarly treated. *Plyer v. Doe*, 457 U.S. 202, 216 (1982); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). Where fundamental personal rights are involved, the classification must be justified by a compelling state interest. *Weber v. Aetna*, 406 U.S. 164, 175 (1972); *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

(a) "Voluntary" Termination

States uniformly impose strict protections for a pregnant mother's fundamental right to maintain her relationship with her child, by ensuring that "voluntary" terminations of that right, in the context of adoption, are truly voluntary.

A pregnant mother considering termination of her rights has the same rights and interests at stake, whether termination is achieved by abortion or adoption. But states, as South Dakota has found, are prohibited by *Roe* and *Casey* to provide equal protection of the mother's rights in the context of abortion.

(b) The Criminal Homicide Exception

Thirty-eight states (see, Footnote 6) protect the relationship of all pregnant mothers with their children by making it a criminal homicide to kill the child in utero. See, *e.g.*, SDCL § 22-16.1;§ 22-16-1.1; Miss. Code Ann. § 97-3-19; § 97-3-37(1). However, all states are compelled by *Roe* and *Casey* to create a class of mothers who are denied the protection of those statutes which protect the mother's fundamental right. The states are forced to expressly authorize the physician to terminate the life of the mother's child.

CONCLUSION

It is time for this Court to carefully define the conduct which *Roe* declared protected, and rectify the errors of *Roe* and *Casey.*

Respectfully submitted,

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