Case No. 14-1891

IN THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

LOUIS JERRY EDWARDS, M.D., et al., *Plaintiffs-Appellees,*
V.
JOSEPH M. BECK, M.D., et al.,
Defendants-Appellants,

On Appeal from the United States District Court for the
Eastern District of Arkansas, Western Division
Case No. 04:13cv0224 SWW

IN SUPPORT OF DEFENDANTS/APPELLANTS
FOR PARTIAL AFFIRMANCE AND PARTIAL REVERSAL
OF THE EASTERN DISTRICT COURT OF ARKANSAS

BRIEF OF *AMICI CURIAE* WOMEN INJURED BY ABORTION AND AN ABORTION SURVIVOR*

ALLAN E. PARKER, JR.
LEAD COUNSEL
THE JUSTICE FOUNDATION
7210 LOUIS PASTEUR DR.,
SUITE 200
SAN ANTONIO, TX 78229
TELEPHONE (210) 614-7157

KATHLEEN CASSIDY GOODMAN
LAW OFFICE OF KATHLEEN
CASSIDY GOODMAN
12274 BANDERA ROAD,
SUITE 228
HELOTES, TX 78023
TELEPHONE (210) 949-1000

**(Identities listed in Appendix, Tab 1)*

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No party's counsel authored this brief in whole or in part;

No party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and

No person – other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief.

/s/ Allan E. Parker
Allan E. Parker, Jr.,
Counsel of Record

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List of *Amici Curiae* Women Injured by Abortion. ……..…..…TAB 1

INTEREST OF *AMICI CURIAE*

A. Arkansas Women Hurt By Abortion
B. Other Women Hurt By Abortion
C. Abortion Survivor, Dawn Milberger

A. *Amici Curiae* Arkansas Women Hurt by Abortion are Arkansas residents[1] who were injured by their own abortions. One of the Arkansas Amici Women Hurt by Abortion, Brooklyn, was an actual patient of Dr. Tvedten, one of the Plaintiffs-Appellees in this case and is thus particularly well suited to say he did not protect her or help her; nor should he be allowed to speak for her in court, without her voice and interest being represented by her own attorneys. Some of *Amici's* abortions occurred in Arkansas and some occurred in other states where they were residing at the time of their abortions. Some of the Amici Women Hurt by Abortion also wish their names listed on behalf of or in memory of their aborted children and have supplied the names they have given to the children they aborted. Many feel it is important for their proper grieving and healing process to recognize the humanity of the child they, and those around them, undervalued and diminished by not treating them as human.

B. *Amici* Curiae Other Women Hurt by Abortion also suffered physical

[1] Attached as Appendix Tab 1 is the list of the initials, first names, or full names of the *Amicus Curiae* Arkansas residents listed first, then the other Women Hurt By Abortion and Abortion Survivor, Dawn Milberger. In order to protect their identities, some of the women have requested that we use initials only or first name only. Each of these women's sworn affidavits or declarations are on file at The Justice Foundation. Protecting the identity of women who have had abortions or seek abortions has been customary since *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973) with *Roe* and *Doe* both being pseudonyms.

and psychological injuries as a result of their abortions. *Amici's* psychological injuries are directly attributable to the true nature of abortion; namely, that abortion will "terminate the life of a whole, separate, unique, living human being,"[2] a member of the species Homo sapiens, with a heartbeat. *Amici* Women Hurt by Abortion know from their personal experience that declaring Act 301 unconstitutional and allowing unlimited access to abortion after twelve weeks will mean countless Arkansas women will suffer devastating psychological injuries which may last a lifetime.

Amici Women Hurt by Abortion have an interest in informing this Court regarding the Arkansas statute at issue from the perspective of women who personally have experienced abortion. Since they were injured by the actions of the abortion industry, the abortionists Plaintiffs-Appellees do not adequately represent their interest and should not be allowed to speak for all women, especially them. The abortion industry does not speak for all women. Listening to their unique and different perspective as women hurt by abortion will aid the Court in achieving justice.

A woman's abortion experience is often a deep, dark, and painful secret. The information being offered to this Court by *Amici* is crucial. For years, even

[2] Definition upheld as a rational and reasonable statement by a legislature based on science, which is not false or misleading in *Planned Parenthood v. Rounds*, 530 F. 3d 724 (8th Cir. 2008) (en banc).

decades following abortion, most women who have experienced an abortion are still not willing to speak publicly even when they are tormented by thoughts of suicide, guilt, shame, nightmares, sleeplessness, and depression. This unique perspective will assist this Court in making a just decision. Clearly, the best information regarding **the effect of abortion** is not from the doctors, but from their patients.

C. Finally, *Amici* Dawn Milberger is a survivor of abortion. As a child in the womb, her birth mother twice allowed a nurse to inject substances to terminate Dawn's life. She survived. Her birth father intentionally "played with" her mother's stomach as a "punching bag" to induce a miscarriage. She survived. She was born with physical ailments, but she is glad to be alive. She survived as a human being to raise her voice before this Court for the children in the womb who had a beating heart like hers, but who did not survive. Unlike the children of the other *Amici*, Dawn's heart is beating to this day to be a voice for their children and the others who did not survive.

SUMMARY OF THE ARGUMENT

The Arkansas "Human Heartbeat Protection Act" (hereafter Act 301) should be upheld in its entirety under *Gonzales v. Carhart,* 550 U.S. 124 (2007) (hereafter *Gonzales*) because:

I.

Arkansas's new Safe Haven law eliminates the legal need for abortion after 12 weeks and meets women's child care needs without injuring women. Thus, Act 301 does not constitute an "undue burden", since all "burden" of childcare has been transferred from women to society; therefore, Act 301 is constitutional.

II.

Abortion severely injures significant numbers of women, as *Amici* Women Hurt by Abortion can show from personal experience and a large body of scientific evidence; therefore, Act 301 is constitutional.

III.

Abortion is the "taking of the life of a unique, living, separate human being," (*see Planned Parenthood v. Rounds*, 530 F. 3rd 724 (8th Cir. 2008) (en banc)) as Amicus, Dawn Milberger, and science can attest, and thus constitutes a grave injustice, a denial of equal protection, and the right to life, especially when no longer needed to help women; therefore, Act 301 is constitutional.

. **ARGUMENT**

The Arkansas Heartbeat Bill should be upheld in its entirety under *Gonzales v. Carhart*, 550 U.S. 124 (2007).

I.

Arkansas' New Safe Haven Law Eliminates the Legal Need for Abortion After Twelve Weeks and Meets Women's Childcare Needs

Without Injuring Women or Destroying Human Life;
Therefore Act 301 is Constitutional Under
***Carhart v. Gonzales*, 550 U.S. 126 (2007)**

Since 1999 a new reality with respect to the perceived burdens of childcare and parental responsibility has been growing in America. In 1999, Texas passed the first "Baby Moses" or "Safe Haven" laws which eliminate the need for any pregnant woman to care for a child she does not want. Under Arkansas' Baby Moses or Safe Haven law, a woman can, after the child's birth, leave her child with no questions asked at any police station or hospital emergency room. Arkansas will care for that child for at least 18 years.[3] In a remarkable social evolution, dramatically changing the law of criminal child endangerment or abandonment, every state now has such laws.[4] This evolution completely

[3] Ark. Code Ann. § 9-34-201, 202, 203 (2013) (allows baby to be left, up to 30 days old, with an employee of any law enforcement agency or hospital emergency room). Voluntary delivery is a defense to child endangerment prosecution Ark. Code Ann. 5-27-205(c) 1. (*See* also www.nationalsafehavenalliance.org)

[4] Ala. Code §§ 26-25-1 to -5 (2013); Alaska Stat. §§ 47.10.013, .990 (2013); Ariz. Rev. Stat. Ann. § 13-3623.01 (2013); Ark. Code Ann. §§ 9-34-201, -202 (2013); Cal. Health & Safety Code § 1255.7 (West 2013); Cal. Penal Code § 271.5 (West 2013); Colo. Rev. Stat. § 19-3-304.5 (2013); Conn. Gen. Stat. §§ 17a-57, -58 (2012); Del. Code. Ann. tit. 16, §§ 902, 907-08 (2013); D.C. Code §§ 4-1451.01 to .08 (2013); Fla. Stat. § 383.50 (2013); Ga. Code Ann. §§ 19-10A-2 to -7 (2013) Hawaii Rev. Stat. §§ 587D-1 to -7 (2013); Idaho Code Ann. §§ 39-8201 to -8207 (2013); 325 Ill. Comp. Stat. 2/10, 2/15, 2/20, 2/27 (2013); Ind. Code § 31-34-2.5-1 (2013); Iowa Code §§ 233.1, .2 (2014); Kan. Stat. Ann. § 38-2282 (2012); Ky. Rev. Stat. Ann. §§ 216B.190, 405.075 (LexisNexis 2013); La. Child. Code Ann. arts. 1149-53 (2013); Me. Rev. Stat. tits. 17-A, § 553, 22 § 4018 (2013); Md. Code Ann. Cts. & Jud. Proc. § 5-641 (LexisNexis 2013); Mass. Gen. Laws Ch. 119, § 39 1/2 (2013); Mich. Comp. Laws §§ 712.1, .2, .3, .5, .20 (2013); Minn. Stat. §§ 145.902, 260C.139, 609.3785 (2013); Miss. Code Ann. §§ 43-15-201, - 203, -207, -209 (2013); Mo. Rev. Stat. § 210.950 (2013); Mont. Code Ann. §§ 40-6-402 to -405 (2013); Neb. Rev. Stat. § 29-121 (2012); Nev. Rev. Stat. §§ 432B.160, .630 (2013); N.H. Rev. Stat. Ann. §§ 132-A:1 to :4 (2013); N.J. Stat. Ann. §§ 30:4C-15.6 to -15.10 (West 2013); N.M. Stat. Ann. §§ 24-22-1.1, -2, -3, -8 (2013); N.Y. Penal Law §§ 260.00, .10 (McKinney 2013); N.Y. Soc. Serv. Law § 372-g (McKinney 2013); N.C. Gen. Stat. § 7B-500 (2012); N.D. Cent. Code §§ 27-20-02, 50-25.1-15 (2013); Ohio Rev. Code Ann. §§ 2151.3515, .3516, .3523 (LexisNexis 2013); Okla. Stat. tit. 10A, § 1-2-109 (2013) Or. Rev. Stat. § 418.017 (2011); 23 Pa. Cons. Stat. §§ 4306, 6502, 6504, 6507 (2013); R.I. Gen. Laws §§ 23-13.1-2, -3 (2012); S.C. Code Ann. § 63-7-40 (2012); S.D. Codified Laws §§ 25-5A-27, -31, -34 (2013); Tenn. Code Ann. §§ 36-1-142, 68-11-255 (2013); Tex. Fam. Code Ann. §§ 262.301, .302 (West 2013); Utah Code Ann. §§ 62A-4a-801, -802 (LexisNexis 2013); Vt. Stat. Ann. tit. 13, § 1303 (2013); Va. Code Ann. §§ 8.01-226.5:2, 18.2-371.1, 40.1-103 (2013); Wash. Rev. Code § 13.34.360 (2013); W. Va. Code §

eliminates any legal need in such states, including Arkansas, for actual abortion or abortion as a constitutional right.

The question of whether Arkansas can ban a small percentage of abortions in the second and third trimester when it is willing to shift all responsibility for the care of the children from the woman to society is an open question the Supreme Court has not considered. It is a question of first impression and should be answered in the affirmative by this Court for the protection of "infant life" *see Gonzales*, at 159, and of the specifically unknown in advance but significant numbers of women who would otherwise be hurt by abortion, including among other things by "severe depression" and "loss of esteem," *ibid*, as well as suicide, anxiety, depression, substance abuse, eating disorders, etc.[5]

The justification for abortion as a necessary legal right for women involves the difficulties of taking care of an unwanted child. For example, here are the reasons most commonly given by women:

> The reasons women give for having an abortion underscore their understanding of the responsibilities of parenthood and family life. Three-fourths of women cite concern for or responsibility to other individuals; three-fourths say they cannot afford a child; three-fourths say that having a baby would interfere with work, school or the ability to care for dependents; and half say they do not want to be a single parent or are having problems with their husband or

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49-6E-1 (2013); Wis. Stat. § 48.195 (2013); Wyo. Stat. Ann. §§ 14-11-101, -102, -103, - 108 (2013). (*See* also www.nationalsafehavenalliance.org.

[5] *See Coleman, The British Journal of Psychiatry (2011) 199, 180-186. DOI: 10.1192/bjp.bp.110.07723, "*Women who had undergone an abortion experienced an 81% increased risk of mental health problems, and nearly 10% of the incidence of mental health problems was shown to be attributable to abortion."

partner. [6]

In 1992, seven years before the first Baby Moses law ever passed, the Supreme Court accepted these reasons for maintaining a right to abortion in *Casey*:

> *. . . The ability of women to participate equally in the economic and social life of the nation has been facilitated by their ability to control their reproductive life.*

505 U.S. 833 at 856 (1992).

Each of these reasons for abortion after twelve weeks is now eliminated by Arkansas' willingness to **totally remove the burden of childcare after the baby is born**. Any woman afraid that a child would interfere with her life in any way, can simply give the child to Arkansas at birth and she will not have any impediment to her future education, lifestyle or career plans.

Some women feel they do not have enough money to take care of a child. Now the current law in Arkansas shifts the entire economic burden of childcare to the state, if the woman so desires. Total sexual freedom for her if she chooses; total state responsibility by current law if she chooses. *Amici* are not saying this is good or bad law, **it just is** the law in all 50 states, including Arkansas. Equal protection is legally achieved by these new Baby Moses' laws which eliminate

[6] Guttmacher Institute, www.guttmacher.org/pubs/fb_induced_abortion.html, citing Finer LB et al., "Reasons U.S. women have abortions: quantitative and qualitative perspectives", *Perspectives on Sexual and Reproductive Health*, 2005, 37(3):110–118.

any burden on women to care for the children that they co-create with men. The entire burden of care, feeding, education, medicine: every financial and social obligation of parenting is now being borne by the state.

This is quite an evolution for society and women. At the time of *Casey*, 1992, the states imposed by criminal law the responsibility of 18 years of child care on women. The Court was very concerned about this impact on women. But now, all Arkansas women can choose unlimited abortion in the first twelve weeks, when the vast majority occur already, and those pregnant beyond twelve weeks can have full liberty from maternal responsibility after birth. Those in Arkansas who feel abortion is murder will be satisfied with justice and life, and yet will participate in the shared burden of childcare through taxation. The freedom from career impediments, the lifestyle choices of sexual freedom and liberty are now fully available to any woman without injuring herself or killing the "*infant life she once created and sustained*." *See Gonzales* at 159. If a woman's mind or circumstances change in a few years, she can re-establish maternity through DNA testing of her child in foster care, if not already adopted, with benefits for mother and child.

In return for this 18 year complete release of all parental obligation, it is not an "undue burden" to ask the mother to carry the child to term after twelve weeks

and not "*terminate the life of a separate, unique, living human being*."[7] This can also work as an effective last resort method of birth control as the Supreme Court indicated abortion fulfills this function for some women. *Casey, supra* at 853, 856.

Of course, there is still the relatively much smaller, but obviously significant burden of childbirth itself. In return for some months of pregnancy, the State will bear 18 years of childcare. With the balance of childcare heavily weighted toward 18 years of state responsibility, it seems fair, "rational" and "reasonable"; it is not an "undue" burden to carry the child to term which would then help the mother avoid the long term physical and psychological effects of abortion.[8]

The Supreme Court ever since *Roe* has consistently held that requiring the woman to bear even a large part of the normal burden of pregnancy (almost three months) of the last harder parts of pregnancy by itself is not an "undue burden" by allowing bans on abortion **after viability**.[9] Thus, after viability at 24 weeks, even under *Roe* and *Casey* jurisprudence, women are already required by law to bear the last twelve weeks (three months) burden of pregnancy because of the "profound respect" for the human life of the child in her womb. *See Gonzales,* at

[7] *See Planned Parenthood v. Rounds*, 530 F. 3d 724 (8th Cir. 2008) (en banc) (upholding statutory definition as scientifically "rational," not false or misleading).
[8] *See* FN 13.
[9] *Roe v. Wade*, 410 U.S 113, "*If the state is interested in protecting fetal life after viability, it may go so far to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.*" At 163-65

146. At the first moment that the state can actually remove all her responsibility, without killing the child, i.e. birth, Arkansas now does so. This shifts all the responsibility that can be safely shifted from women to society. Regardless of one's view of the social utility of such a law; it is the law in Arkansas.

In *Casey*, the Court rejected "per se" rules and dramatically, permanently and irrevocably reduced the abortion "right" it had created in *Roe* from a "fundamental" right to a non-fundamental right. *Gonzales* at 146. *Casey* also

> specifically overruled the holdings in two cases because they undervalued the state's interest in potential life. (*See Casey* at 881-883, 112 S. Ct. 2791, 120 Li. Ed. 2d 674 (joint opinion) (overruling *Thornburg v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, (1986) and *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983). *Id*.

Akron is dead. This fundamental shift moved abortion jurisprudence away from "strict scrutiny", which basically wiped out all state laws on abortion to a more "rational" and "reasonable" approach, the "undue burden" standard. The lower court and Plaintiffs-Appellees' argument that Act 301 violates a "per se" rule after the first trimester is not like the Supreme Court's current jurisprudence, but more like the "strict scrutiny" standard the Supreme Court rejected in *Casey* and *Gonzales*. This type of "strict scrutiny" "per se" approach based on the original *Roe* and *Doe* decisions has been rejected consistently by the Court since 1992, over 20 years. It is not supported by current law.

In *Gonzales,* the Court again clearly and strongly rejected the plaintiffs proposed strict scrutiny style "per se" rule against **pre-viability abortions** when it upheld a federal ban on a particular method of abortion **whether pre- or post-viability.**[10] The most recent Supreme Court jurisprudence on the issue of whether particular later-term abortions may be banned is *Gonzales.* Completely banning partial birth abortion in second and third trimester was not an undue burden when there were other options available to women, including all first trimester abortions. Similarly, Act 301 is constitutional because other options exist.

In addition, this new legal reality transferring care from mother to state should result in a change in abortion law since there is no longer any legal need for abortion to relieve oneself from unwanted childcare obligations. Every child in America is legally "wanted" and abortion of "unwanted" children is no longer necessary, particularly when eighty to ninety percent of abortions can still occur in the first trimester.

No woman wants an abortion just to experience abortion. The state is not stopping her from participating in something intrinsically valuable; like a job, or school. No one, male or female, liberal or conservative, really wants to have an abortion for its own sake. What women legally seek is relief from obligations; now Arkansas provides that in a more just, compassionate and humane way than

[10] "*Casey rejected both Roe's rigid trimester framework and rejected the interpretation of Roe that considered all pre-viability regulations of abortion unwarranted*." *Gonzales* at 146.

allowing her to kill her child and suffer the consequences alone for decades.

Abortion may perhaps be remembered in the future as a crude way of removing the burden of childcare. The modern view shares the burden of childcare rather than placing it on the parent of an unwanted child alone.

The Fifth Circuit Court of Appeals in a recent decision upheld the constitutionality of a Texas statute banning abortions after twenty weeks and requiring abortionists to have hospital admitting privileges. The Fifth Circuit clearly rejected Plaintiffs-Appellees "per se" rules or strict standard of review and upheld the Texas statute under rational basis, *Planned Parenthood v. Abbott,* Slip Opinion, p. 7, 14, Section 3, March 27, 2014, U.S. App. Lexis 5696.

Justice Ginsburg, in her dissent, correctly argued that *Gonzales* has reduced the abortion right to that of other rights that can be regulated by the state as long as there is a rational basis, *Gonzales* at 171, "Instead of the heightened scrutiny we have previously applied, the Court determines that a "rational" ground is enough to uphold the Act." Arkansas is certainly rational to restrict most abortions to the first trimester.

II.

Abortion Severely Injures Significant Numbers of Women, as *Amici* Can Show from Personal Experience and a Large Body of Scientific Evidence; Therefore Act 301 is Constitutional Under *Gonzales* 550 U.S. 124 (2007)

Abortion severely injures significant numbers of women, as *Amici* can show from personal experience and a large body of scientific evidence. The abortion experiences of Amici Women Hurt by Abortion have been collected by a project of The Justice Foundation, called Operation Outcry, in the form of sworn affidavits and declarations under penalty of perjury. Testimony about women hurt by abortion was presented to the Arkansas Legislature to support Act 301. Similar amicus briefing to this was presented to and cited by the United States Supreme Court in *Gonzales*. Citing The Justice Foundation's lawyers brief on behalf of Sandra Cano, the former "*Doe*" of *Doe v. Bolton,* and 180 Women Hurt by Abortion, the Supreme Court recognized the significance of the women's own perspective and actual experience:

> Respect for human life finds an ultimate expression in the bond of love the mother has for her child. . . . Whether to have an abortion requires a difficult and painful moral decision. *Casey, supra, at 852-853, 112 S. Ct. 2791, 120 L. Ed. 2d 674* (opinion of the Court). **While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.** See Brief for Sandra Cano *et al.* as *Amici Curiae* in No. 05-380, pp 22-24. **Severe depression and loss of esteem can follow. See *ibid.***

Gonzales 550 U.S.124, at 159 (2007).

The Supreme Court's conclusion was based on extensive quotes from women who had an abortion like the quotes from Arkansas women on the following

pages. *Gonzales* was later cited by the Eighth Circuit Court en banc for the same proposition:

> [I]t seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.

Planned Parenthood v. Rounds, 530 F.3d 724 (8th Cir. 2008) (en banc).

The newest Supreme Court jurisprudence based on 40 years' evolving experience understands that abortion is a painfully difficult moral decision. This Court may never fully understand the degree of pain experienced by women which is directly attributable to abortion. For example, Brooklyn, whose abortion at fourteen weeks was performed by Dr. Tvedten, one of the *Plaintiff-Appellees* abortionists, explains she did not know the "*limbs of my baby would be ripped apart and out.*" She goes to say about the abortion effects: "*I live with this regret and guilt every single day of my life. My due date, holidays, special occasions, etc. have all been very hard for me to deal with. My babies [sic] 1 year birthday is coming up soon and I am already dreading that day. When I go to the OBGYN doctor I feel like I am going to have a panic attack because the sight of instruments and the exam table. Everything about going to the dr. brings back so many flashbacks."* Act 301, if allowed to go in effect, would prevent this type of pain for others.

Micki (14 weeks)

"I was forced to have this abortion by my ex-husband, an Army officer, who felt another child would adversely affect his military career. It not only broke my heart when I killed my unborn child, but it killed my love for my husband and eventually destroyed my marriage.

1 spent years struggling with grief, remorse and guilt. It took much counseling and finally a divorce before I could allow myself to receive God's merciful forgiveness for this horrific act."

Below are more illustrative examples of the serious and personal consequences of abortion, in the women's own words. These are all Arkansas women injured by abortion, some after twelve weeks, who represent the women who may have already been injured because Act 301 was declared unconstitutional below.

Since 1992, the United States Supreme Court has slowly become aware of, and has changed its abortion jurisprudence to protect women from the "devastating psychological consequences" of abortion decisions. The Court stated:

> "… a woman may elect an abortion, only to discover later, **with devastating psychological consequences**, that her decision was not fully informed."[11]

Arkansas Women who had abortions, some after twelve weeks, describe their unintended devastating consequences:

Lisa (14 weeks)

[11] *Casey*, supra at 882. (emphasis added).

"I was told it was a mass of tissue. I was NOT told that at the time of my abortion, all arteries are present, including the coronary vessels of the heart and that blood was fully circulating through these vessels to all body parts. I was NOT told that the "mass of tissue" had complete vocal chords and that the brain was fully formed and that the "mass of tissue" had organized muscles, could feel pain, suck its thumb, and had eye lids that protected its delicate optical nerve fibers. I was NOT told that the flutters I felt were actually kicks and movements of the "mass of tissue" ... of course, I did hear them say in the middle of the abortion "she is farther along than we thought" as I cried for them to stop... "It's too late, honey. You did the right thing. Now, you can go on with your life." I could hear the water running in the sink nearby. I then heard a big plop... "Did you just throw my baby in the trash?" I thought. ... Then they shuffled me out the back way.

They told me I would forget about the "mass of tissue' and be able to go on with my life, but I was having nightmares every night. For many years, a day did not go by that I did not contemplate suicide. Guilt, sorrow, loss of dignity and deep shame are the most felt responses after an abortion. I experienced deep despair and lonely scars of regret."

Linda (12 weeks)

"There is seldom a day that goes by I do not think of my son and what he could have accomplished in this world. The loss never goes away. As my children are having children there is the ever present realization that there is a generation forever lost."

A.H. (12 weeks)

"It has caused depression, anxiety, feelings of guilt and shame, the inability to forgive myself, the trauma of having to hide a painful secret from my family and problems sleeping."

Carol (13 weeks)

I have had bouts of depression and suicidal ideations throughout the years. The guilt never leaves me, although I know God has forgiven me, I can never forgive myself or excuse myself. I wish I had never made that decision. I wish abortion had never been an option for me. My baby's life was precious and I decided to murder her or him, this I'll never know, whether it was a boy or girl. ... I have over-dosed

on drugs at least 3 times. I have tried to hang myself once. Tried to cut my wrist once. Abused drugs and sex with many partners. I have hated myself."

Morgan (10 weeks)

"I suffered severe depression. l cried for no reason at all times. I was sleeping for 20 hours a day, unable to cope with others."

Dickie (6 weeks)

"I have trouble having a relationship with my husband. I don't like to be around babies and I do not want to hold one. I have numbness on my left side and I feel like it is a result of that. I have lower abdomen pain all the time and I feel like that is also a result. The mental effects seem as if they will never go away. I have had 2 abortions."

Darlene (8 weeks)

"As soon as the abortion began, I began to feel sick to my stomach. As it continued, I knew without a doubt that I was killing a child, that it was not a mere blob of tissue as they had said. At this point, I wanted to stop it, but I believed it was too late and that the damage was done. For years I had to carry the guilt of killing my own child. I later carried four children and with each child, for nine months, I was consumed with guilt over the murder of my first child. Make no mistake, abortion IS murder. Even after 30 years, the pain still lingers."

Maria (8 weeks)

"Depression, alcohol abuse, guilt, pain, insecurity, fear, isolation. I felt like I committed murder but it was legal."

Denise (Unable to remember how many weeks)

"The guilt, pain and periods of depression overwhelm me. I would like to think that I would have acted differently if abortion wasn't such an easy option. Women are overwhelmed with emotion when they discover an unexpected pregnancy. If we can change our laws and society to embrace women at this critical time, we can change lives."

Adrean (5 weeks)

"It has caused major depression and I turned to drugs and drinking to deal with the pain. I became very bitter and unhappy with life. The man was deeply hurt that he didn't have a say that it was his child. 8 years later I still think of that baby and what he or she might look like. My mother was very hurt by it also."

Paulette (6 Weeks)

"I was given something to calm me, my blood was drained, one of the aides asked if I was OK. No risks, side effects, or explanation of procedure occurred.

Turned to men for love acceptance, anger issues, depression, unforgiveness, nightmares."

All the *Amici* women relay abortion experiences similar to these Arkansas women with varying consequences. No one has ever said abortion was easy. Even as ardent a defender of abortion as Justice Ginsburg agrees that abortion is "painful and difficult." *Gonzales, supra* (Ginsburg, dissent at 183, FN 7). The "reasonableness" and "rationality" of Act 301 is also supported by the abortion industry's own admission that later term abortions have greater risks of adverse consequences. The risk is even higher after twelve weeks, as an abortion textbook endorsed by the National Abortion Federation, "Management of Unintended and Abnormal Pregnancy," lists "Advanced Stage of Pregnancy" on a list of "Risk Factors for Negative Emotional Sequelae."[12] *See* also "A Clinicians Guide to Medical and Surgical Abortion," listing 14 factors for mental health problems after

[12] By Maureen Paul, E. Steve Lichtenberg, Lynn Borgatta, David Grimes, Phillip Stubbelfield, and Mitchell D. Creinin. (UK 2009) Table 5.4, p. 57.

abortion, Ch. 3, p. 28-29, 1999. Second trimester abortions "pose more serious risks to women's physical health compared to first trimester abortions. The abortion complication rate is 3% to 6% at 12-13 weeks gestation and increases to 50% or higher as abortions are performed in the second trimester." Coleman, Coyle and Rue, "Late Term Elective Abortion and Susceptibility to Post-Traumatic Stress Symptoms", Journal of Pregnancy, Vol. 2010, Art. ID 130519, p.1.

Historically, the secrecy and shame involved in abortion has prevented public disclosure of many of the ill-effects suffered by women in the aftermath of abortion, and – most notably – the psychological effects. As the words of the Arkansas Women Hurt by Abortion detailed above demonstrate, many years– even decades – of silent suffering can occur after abortion. These women are often unable to share the horror of their experience with anyone and are tormented by their thoughts of suicide, guilt, shame, nightmares, sleeplessness, and depression.

There is no dispute that abortion also has higher mortality rates in the second and third trimesters. *See* Danish study, http://www.ncbi.nlm.nih.gov/pubmed/22936199. Abortionists often object to informed consent and cooling off periods which delay abortions precisely because they argue that later abortions pose more health risks. The most comprehensive bibliography of studies showing abortion risks is included in http://abortionrisks.org/index.php?title=Index. Though some of these studies provide background information, most include statistically significant

results linking one or more adverse effects to abortion. There are hundreds of studies worldwide documenting the harm to women of abortion; though some may disagree, there is more than enough science to justify Act 301, and consensus or complete medical certainty is not required. *Gonzales*, at 164.

As more and more women come out of the darkness, science has now documented extensively that abortion has serious adverse psychological consequences. For example, following *Gonzales*, this Circuit has already held that adequate scientific evidence exists, despite non-unanimity, to support the statutorily required disclosure that abortion increases a woman's risk for increased suicide and suicidal ideation. *See Planned Parenthood v. Rounds,* 686 F. 3d. 889 (8th Cir. 2012) (en banc). This Court rejected the abortion industry assertion that this statement was false. This Court's considered en banc decision supports Arkansas decision to regulate late-term abortions, especially when the State is willing to bear all future childcare responsibility, *see* Section I *infra.*

In addition, abortion increases the risk of depression, trauma, eating disorders and substance abuse, guilt, repressed grief, divorce and chronic relationship problems, unresolved trauma, repeat abortions, self-punishment, and child abuse of their other children.[13] Regardless of one's position regarding whether or not a child in the womb is a human being worthy of legal protection,

[13] Elliott Institute: www.afterabortion.org, "*Psychological Risks: Traumatic After Effects of Abortion,*" with many citations.

clearly, anyone can empathize with the grief and sorrow of a mother, as shown, who comes to believe she has murdered her child.

Clearly, not every woman needs to be injured as deeply and profoundly as these women for Act 301 to be upheld, but the fact that a significant number of women are injured supports the Legislature's rational requirement that abortion only be allowed in serious cases after twelve weeks. The *Gonzales* decision upholding a total ban on a certain type of pre-viability abortion is partially based on the grief of women.

> It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.

Gonzales, 550 U.S. 124, 159-160 (2007).

In addition, Justice Ginsburg, dissenting, clearly and correctly sees that "per se" strict scrutiny is dead after *Gonzales*; even a "close" scrutiny is rejected, and that a "rational basis" test may be applied:

> "Today's decision [*Gonzales*] is alarming. It refuses to take *Casey* and *Stenberg* seriously… **It blurs the line, firmly drawn in *Casey*, between pre-viability and post-viability abortions.** … **The Court upholds an Act that surely would not survive under the close scrutiny that previously attended state-decreed limitations on a woman's reproductive choices."** … *Gonzales* at 170-171.

> "The Court's hostility to the right *Roe* and *Casey* secured is not concealed."… *Id.* at 186.
>
> "**Instead of the heightened scrutiny we have previously applied, the Court determines that a "rational" ground is enough to uphold the Act."** … *Id.* at 187.
>
> "**And, most troubling, *Casey's* principles**, confirming the continuing vitality of "the essential holding of *Roe*, "**are merely "assume[d]**" for the moment, rather than "retained" or "reaffirmed," *Casey*, 505 U.S., at 486." … (Ginsburg dissenting) (Emphasis added). *Id.* at 187.

III.

Abortion is the Taking of the Life of a Separate, Unique, Living Human Being and Thus Constitutes a Grave Injustice, a Denial Of Equal Protection and the Right To Life, Especially When It Is No Longer Needed to Remove the Burden Of Childcare From Women; Therefore; Act 301 is Constitutional

Abortion is the "taking of the life of a separate, unique, living human being"[14] and thus constitutes a grave injustice; a denial of equal protection and the right to life, especially when it is no longer needed to remove the burden of childcare from women.

Gonzales upheld a ban on **second** and third trimester abortion stating:

> **The Act does apply both pre-viability** and post-viability because, according to the common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb.

[14] *Planned Parenthood v. Rounds*, 530 F. 3d 724 (8th Cir. 2012) (en banc) (upholding this S.D. definition of abortion against attack it was false and misleading.)

550 U.S. 124, 147 (Emphasis added.)

Clearly abortion is unique. No other "mass of tissue" removed from a woman has a heartbeat. A wart, tonsils, appendix – none have a heartbeat. The U.S. Supreme Court has moved from only describing a "fetus," in its early cases, to "unborn child," *Gonzales* at 134, and "infant life" in *Gonzales* at 159. A child is obviously a "rational" term for human beings, a member of the species, Homo Sapiens, as this Court has affirmed in *Planned Parenthood v. Rounds*, 530 F. 3rd 724 (8th Cir. 2007) (en banc). The *Gonzales* Court also cited a nurse's testimony extensively describing the effect of the late term abortion on the "baby". *Gonzales*, at 138-139. The Partial Birth Abortion Act upheld in *Gonzales*, like Act 301, did not do anything at all to prohibit abortions in the first trimester, when 85-90% of all abortions occur. *Gonzales*, at 134.

Finally, the *Stenberg* minority opinion of Justice Kennedy is critically important since he now writes for the Supreme Court majority. Dissenting in *Stenberg v. Carhart*, 530 U.S. 914 (2000), he stated:

> The political processes of the State are not to be foreclosed from enacting laws to **promote the life of the unborn and to ensure respect for all human life and its potential**. *Id.*, at 871 (plurality opinion). The State's constitutional authority is a vital means for citizens to address these grave and serious issues, as they must if we are to progress in knowledge and understanding and **in the attainment of some degree of consensus**. …

530 U.S. at 957.

> States may take sides in the abortion debate and come down on the side of life, even life in the unborn.

Id. at 961 (Emphasis added)

Since no consensus has arisen after forty years, perhaps consensus will be achieved by banning some abortions and sharing the burden of childcare in other cases.

In *Gonzales,* the Court held that the government's "**legitimate and substantial interest in preserving and promoting fetal life** – would be repudiated were the Court now to affirm the judgments of the Courts of Appeals." *Carhart,* at 145. In other words, to protect life the Court rejected any "per se" rules like the lower Court had adopted. Arkansas women still have the vast majority at least (80% or more) (perhaps 90% by *Gonzales'* count) of abortion options available to them. The *Gonzales* Court stated:

> **To implement its holding, *Casey* rejected both *Roe's* rigid trimester framework and the interpretation of *Roe* that considered all pre-viability regulations of abortion unwarranted**.

Id., at 146.

Thus, the Court continues to reject rigid trimester rules, pre- and post-viability rules, and "per se" rules on pre-viability.

The child in the womb is a "person" in reality. Under Arkansas law, a child in the womb is a person from the moment of conception,[15] male or female. *Amici* Dawn Milberger is a human being today and she was in the womb. She is the offspring of two human beings. She had a heartbeat at twelve weeks in the womb. Both of her parents tried to kill her as they later told her themselves. She has forgiven and been reconciled with them. She is glad to be alive today. We need national social reconciliation and "consensus" (per *Stenberg*, Kennedy, dissenting) on the life and death issue of abortion. *Casey* tried to put an end to the political divisions and did not succeed. Perhaps this social evolution of transferred responsibility will heal the rifts; but regardless, Arkansas has removed any "undue" burden from a woman's right to abortion by eliminating all burden of child care from the woman if she so voluntarily chooses.

CONCLUSION

Amici urge this Court to protect Arkansas women from experiencing the emotional trauma which *Amici* Women Hurt by Abortion have been forced to endure because of the nature and consequences of abortion. The stereotypical, one size fits all, paternalistic arguments of the abortionists and abortion providers coincide with their financial interests and not the health of women seeking abortions. In addition, as *Amici* Dawn Milberger can attest, justice requires equal

[15] Ark. Code Ann. § 5-1-102(13) Person includes "an unborn child in utero at any stage of development." In § 5-10-101-5-10-105 unborn child means "offspring from human beings from conception until birth."

protection of vulnerable human life, male and female: not its destruction.

PRAYER

Amici respectfully pray this Court reverse the District Court's decision that Act 301 is unconstitutional when so many better alternatives are available.

Respectfully submitted,

/s/Allan E. Parker, Jr.
Allan E. Parker
Texas Bar No. 15505500
Lead Attorney for *Amici Curiae*
R. Clayton Trotter
Texas State Bar No. 20240500
The Justice Foundation
7210 Louis Pasteur Dr., Suite 200 San Antonio, TX 78229
Telephone (210) 614-7157
Kathleen Cassidy Goodman Texas Bar No. 24000255 Law Office of Kathleen Cassidy Goodman
12274 Bandera Road, Suite 228
Helotes, TX 78023
Telephone (210) 949-1000

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users that service will be accomplished by the CM/ECF systems.

/s/ Allan E. Parker, Jr.
Allan E. Parker, Jr.
Lead Counsel for *Amici Curiae*

FORM 6. CERTIFICATE OF COMPLIANCE WITH RULE 32(A) AND WITH LOCAL RULE 28A

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type-Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

2. This brief contains 6,751 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)

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This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point, Times New Roman font.

/s/Allan E. Parker
Allan E. Parker, Jr.
Lead Attorney for *Amici Curiae*
Date: June 2, 2014