Case No. 14-2128
Civil

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MKB MANAGEMENT CORP, d/b/a RED RIVER WOMEN'S CLINIC, and KATHRYN L. EGGELSTON, M.D., *Plaintiffs - Appellees,*

vs.

WAYNE STENEHJEM, in his official capacity as Attorney General for the State of North Dakota, et al., *Defendants – Appellants,*
BIRCH BURDICK, in his official capacity as State Attorney for Cass County, *Defendant*.

On Appeal from the United States District Court for the District of North Dakota, Southwestern Division
Case No. 1:13-CV-071

IN SUPPORT OF DEFENDANTS/APPELLANTS FOR REVERSAL OF THE DISTRICT COURT OF NORTH DAKOTA

HONORABLE DANIEL L. HOVLAND

BRIEF OF *AMICI CURIAE* WOMEN INJURED BY ABORTION,* AN ABORTION SURVIVOR - DAWN MILBERGER, AND SANDRA CANO, THE FORMER "MARY DOE" OF *DOE V. BOLTON*

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

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

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

INTEREST OF *AMICI CURIAE*

A. North Dakota Women Hurt By Abortion
B. Other Women Hurt By Abortion
C. Abortion Survivor, Dawn Milberger
D. Sandra Cano, the former "Mary Doe" of *Doe v. Bolton*, 410 U.S. 179 (1973)

A. *Amici Curiae* North Dakota Women Hurt by Abortion are North Dakota residents who were injured by their own 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.[1] 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 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," a

[1] Attached as Tab 1 is the list of the initials, first names, or full names of the *Amicus Curiae* North Dakota residents listed first, then the other Women Hurt by Abortion. In order to protect their identities, some of the women have requested that we use initials 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.

member of the species homo sapiens, with a heartbeat.[2] *Amici* Women Hurt by Abortion know from their personal experience that declaring HB 1456 unconstitutional and allowing unlimited access to abortion after a human heartbeat can be detected by sonogram will mean countless North Dakota 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 North Dakota statute from the perspective of women who personally have experienced abortion. Since they were injured by the actions of the abortion industry, Plaintiffs-Appellees ("Abortionists"[3]) do not adequately represent *Amici's* interest and should not be allowed to speak for all women, especially them. The abortion industry does not speak for all women. *Amici* agree with the unrefuted testimony in the record of women hurt by their own abortions who answered this question: "Why Do I Feel the Abortion Industry Does or Does Not Represent My Interests?"[4] For example:

1. Declaration of Myra Myers: "*Nothing wounds you like being*

[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).

[3] As was done by the Supreme Court itself in *Gonzales v. Carhart*, 550 U.S. 124 (2007).

[4] APP-1397-1419. Citation to 'APP" followed by a bates number refers to documents in the parties' joint appendix Citation to "ADD" followed by a bates number refers to documents in the State's brief addendum.

responsible for your child's death! One word describes the abortion industry: Deception. Abortion took the life of our unborn child and wounded me, my husband, the siblings – our family, including the loss of our child's descendants." APP-1529.

2. Declaration of Jody Clemens: "*The abortion industry is a money making industry that profits off women in vulnerable situations. They withhold valuable information that is essential for women to make well-informed decisions*." APP-1534. For other women's answers to this question, see APP-1514-1552.

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

C. *Amicus* 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.

D. *Amicus* Sandra Cano is the former "*Mary Doe,*" a pseudonym, of *Doe v. Bolton*[5] (hereafter "*Doe*"), the companion case to *Roe v. Wade*, 410 U.S. 113 (1973). She is also the real "Sandra Cano" whose *Amicus* Brief on the issue of **whether pre-viability abortions can be banned** (yes) was recently cited by the Supreme Court:

> "…*It is unexceptionable to conclude some women come to 'regret' their choice to abort the infant life they once created and sustained.*" *See* Brief of Sandra Cano, et al. [180 Women Hurt by Abortion] as *Amici Curiae* in no. 05-380, pp. 22-24. *Severe depression and loss of esteem can follow. Ibid.*

Gonzales v. Carhart 550 U.S. 124, at 159 (2007) (emphasis supplied).

As the Plaintiff, Sandra Cano, in one of the two cases that brought legalized abortion to America on a mass scale, she has a unique perspective on abortion. Cano is in complete agreement with the Supreme Court's decision in *Gonzales*,

[5] *Doe v. Bolton*, 410 U.S. 179 (1973)

infra and is hopeful that its majority opinion and Justice Ginsburg's dissent analysis as to its meaning will be followed by this Court. It was her case that created the health exception.

Since Cano's case established the "health exception," her viewpoint is uniquely relevant to the health aspects of abortion. She is deeply supportive of and in agreement with North Dakota's unrefuted expert witnesses and the declarations of women hurt by abortion (APP-1064-1560; APP-655-887) that abortion is psychologically damaging to the mental or social health of significant numbers of women.

SUMMARY OF THE ARGUMENT

The North Dakota Human Heartbeat Protection Act (hereafter HB 1456) should be upheld in its entirety under *Gonzales v. Carhart,* 550 U.S. 124 (2007) (hereafter *Gonzales*) because:

I. **North Dakota's New Safe Haven Law Eliminates The Need For Abortion After A Human Heartbeat Is Detected And Meets Women's Child Care Needs Without Injuring Women. Thus, HB 1456 Does Not Constitute An "Undue Burden," Since All "Burden" Of Child Care Has Been Transferred From Women To Society; Therefore, HB 1456 Is Constitutional Under *Gonzales*.**

II. **Abortion Severely Injures Significant Numbers Of Women, As Amici Can Show From Personal Experience And A Large Body Of Scientific Evidence; Therefore HB 1456 Advances The State's Legitimate Interest In Protecting Women's Health From The Outset of Pregnancy And Is Constitutional Under *Gonzales.***

III. **Abortion is the "taking of the life of a whole, unique, living, separate human being," (*see Planned Parenthood v. Rounds*, 530 F. 3rd 724 (8th Cir. 2008) (en banc)) as *Amici* Dawn Milberger and Sandra Cano, and science can attest, and thus constitutes a grave injustice, a denial of due process, equal protection and the right to life, especially when no longer needed to help women; therefore, HB 1456 is constitutional, under *Gonzales.***

. **ARGUMENT**

The North Dakota Heartbeat Bill (hereafter HB 1456) should be upheld in its entirety under *Gonzales v. Carhart,* 550 U.S. 124 (2007).

I.

North Dakota's New Safe Haven Law Eliminates The Need For Abortion After A Human Heartbeat Is Detected And Meets Women's Child Care Needs Without Injuring Women. Thus, HB 1456 Does Not Constitute An "Undue Burden," Since All "Burden" Of Child Care Has Been Transferred From Women To Society; Therefore, HB 1456 Is Constitutional Under *Gonzales*.

North Dakota's new Safe Haven Law eliminates the need for abortion after a human heartbeat is detected and meets women's child care needs without injuring women or destroying human life; therefore HB 1456 is constitutional under *Gonzales*. It gives women the result of abortion: no child – without the pain and injury of abortion.

A. *Gonzales v. Carhart* Is The Controlling Precedent For Evaluating The Constitutionality Of State Restrictions On Abortion.

Gonzales v. Carhart, 550 U.S. 124 (2007) is the proper standard of review

and the most recent and controlling decision for determining when access to pre-viability abortion can be restricted or banned completely. While the lower court and the Abortionists focused on *Roe v. Wade*[6] (hereafter *Roe*) and *Planned Parenthood v. Casey,*[7] ("*Casey"*) they have either ignored or misinterpreted the holding, rationale and historical sweep of the most recent Supreme Court jurisprudence on abortion, *Gonzales v. Carhart*, 550 U.S. 124 (2007). *Gonzales* is the most recent decision allowing major pre-viability restriction on abortion, including a complete ban on some pre-viability abortions. It is the controlling precedent and represents the current direction of Supreme Court jurisprudence, not its limit, as will be seen herein.

In *Gonzales*, the Supreme Court reversed two lower courts that appeared to apply the old strict scrutiny.[8] The Supreme Court rejected the lower court's "bright line viability rule"[9] analysis that focused excessively or solely on the right to abortion and gives too little weight to the state and society's interest in protecting

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[6] *Roe v. Wade*, 410 U.S. 113 (1973)

[7] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). It appears the District Court ignored *Gonzales* completely, citing only *Roe* and *Casey*. ADD of State's Brief at 40, p. 23 of Order Granting Summary Judgment.

[8] Reversing *Carhart v. Ashcroft*, 413 F. 3d 791 (8th Cir. 2005) and *Planned Parenthood v. Ashcroft*, 435 F. 3rd 1163 (9th Cir. 2006). The Court also disagreed with the Second Circuit in *National Abortion Federation v. Gonzales*, 437 F. 3rd 278 (2nd Cir. 2006) (holding the Act unconstitutional).

[9] Order Granting Plaintiff's Motion for Summary Judgment, p. 22, State Brief, ADD-39.

women from the "**devastating psychological consequences of abortion**." *Casey* at 882.

Justice Ginsburg's dissent actually contains the best analysis of what *Gonzales* means to abortion jurisprudence and how it should be applied to future cases, if it is correctly followed. Her analysis correctly analyzes the effect and the rationale of the decision. Justice Ginsburg understands 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.
>
> Some lower court cases have taken neither the *Gonzales* majority opinion

nor Justice Ginsburg's dissent seriously, instead relying on *Roe* and *Casey*, as if that was all the law.[10] *Gonzales* is a further major step after *Casey* away from the early days of *Roe* as a "fundamental" right in which abortion could not be restricted in any way before viability. Of course, because of the incredibly fundamental duty of government to protect human life, it was possible even under *Roe* itself for a State to completely ban abortion after the child in the womb is viable (usually about 24 weeks).

In *Casey*, the Court rejected "per se" rules or strict scrutiny and dramatically, permanently and consistently reduced the abortion "right" it had created in *Roe* from a "fundamental" right to a non-fundamental right. *Casey, supra*. *Casey* gave new prominence to a third principle:

> "That the State has legitimate interests **from the outset of the pregnancy** in protecting the health of the woman and the life of the fetus that may become a child." (Emphasis supplied.)

Casey, 505 U.S. at 846.

This was the principle "that require[d] the most extended discussion," in *Gonzales* at 145, in determining **whether the State can ban all abortions of a certain type, including pre-viability abortions.** According to *Gonzales, Casey*

[10] See e.g. *Planned Parenthood v. Bentley*, 951 F. Supp. 2d 1280 (M.D. Ala. 2013); *Jackson Women's Health Org. v. Currier*, 940 F. Supp. 2d 416 (S.D. Miss. 2013); *Edwards v. Beck*, 946 F. Supp. 2d 843 (E.D. Ark 2013). *Isaacson v. Horne*, 716 F. 3d 1213 (9th Cir. 2013) (cert. denied), cited by the lower court.

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, although still cited by the lower court, p. 16, ADD-33 though admitting it was overruled. 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 the Abortionists' argument that HB 1456 violates a "per se" or "bright line" rule before viability 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," "bright line" 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. The lower court erred in placing too much emphasis on viability, especially in light of *Gonzales*.

In *Gonzales*, the Court again clearly and strongly rejected the lower court's rule against **pre-viability abortions** when it upheld a federal ban on a particular

method of abortion **whether pre- or post- viability**.[11] 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. Similarly, HB 1456 is constitutional because other options exist, especially the option of safely transferring all burden of child care to the state. Women can now achieve the result of abortion at no financial cost to them and without danger. Money otherwise spent on abortion can be spent on care of their current children, education, or lifestyle.

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 "per se" rules, the lower court's "bright line viability rule," or strict standard of review and upheld the Texas statute under rational basis analysis. *Planned Parenthood v. Abbott*, 748 F. 3rd 583 (5th Cir. 2014).

North Dakota is certainly rational, nor does it create an undue burden, to restrict abortions after a human heartbeat is detected, and to offer women a safer, free, and more compassionate and humane way to be relieved of all of the burden of child care. Early abortions, and abortions to protect the life or health of the

[11] *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.

mother, are still available.

B. The Creation of "Baby Moses" or "Safe Haven" Laws has Eliminated the 18-Year Burden of Child-Rearing for Women, Thereby Tilting the Scales in Favor of HB 1456.

"Baby Moses" or "Safe Haven" laws eliminate the need for any pregnant woman to care for a child she does not want. Under North Dakota's Baby Moses or Safe Haven law, a woman can, immediately after the child's birth, leave her child with the hospital; or she can take up to a year to decide if she cannot handle the burdens of child care and return the child to a hospital and transfer all legal child care responsibility to the state. If she voluntarily chooses to do so, North Dakota will care for that child for at least 18 years.[12] In a remarkable but little noticed social evolution, dramatically changing the law of criminal child endangerment or abandonment, every state now has such laws.[13] This evolution

[12] N.D. Cent. Code §§ 27-20-02, 50-25.1-15 (2013); (allows baby to be left, up to1 year, with any hospital. "2. **A parent of an infant may abandon the infant at any hospital."** An agent of the parent may leave an abandoned infant at a hospital with the parent's consent. "**Neither the parent nor the agent is subject to prosecution under sections 14-07-15 and 14-09-22 for leaving the abandoned infant at a hospital."** (Emphasis added.) (*See* also www.nationalsafehavenalliance.org)

[13] 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

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

In addition, this new legal reality transferring child care responsibility from mother to state means there is no "undue burden" since there is no longer any legal need for abortion to relieve oneself from unwanted child care obligations. Every child in America is legally "wanted" and abortion of "unwanted" children is no longer necessary. Every woman who feels trapped and alone, desperate for help but finding no strength to deliver her child, can now transfer that burden to

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

North Dakota as a matter of right.

After all, no woman wants an abortion just to experience abortion. North Dakota 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. *Amici* women hurt by abortion know and understand the circumstances that can seem to say abortion is the only answer. What women seek is relief from parental obligations; now North Dakota provides that in a more just, compassionate and safe way than 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 child care. The modern view removes the burden of child care from women rather than placing it solely on the parent of an unwanted child.

1. The Question Of Whether North Dakota Can Prohibit The Majority Of Abortions, But Not All, When It Is Willing To Shift All Responsibility For The Care Of The Resulting Children From The Mother To Society Is An Open Question The Supreme Court Has Not Considered

The question of whether North Dakota can ban the majority of abortions, but not all, when it is willing to shift all responsibility for the care of the resulting born children from the mother 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 for the protection of the specifically unknown in advance of each abortion, but significant numbers of patients 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.[14] One of North Dakota's experts, Dr. Priscilla Coleman, is one of the world's leading experts on the effects of abortion on women. She has published extensively in peer reviewed journals.[15] Her evidence and professional opinion are unrefuted in the record below. Hers, and the other unrefuted evidence, clearly establishes as a matter of law that the final injunction should be reversed.

2. Why Women Seek Abortion

The justification for abortion as a necessary legal right for women involves the difficulties of taking care of an unwanted child. The purpose of abortion for most women is to eliminate the burden of care for the child in the womb, not to purposely kill a human being. This is the heart of the Abortionists equal

[14] *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." APP-449. *See* also Declaration and Expert Report of Priscilla Coleman, Ph. D., APP-370-414.

[15] "… Over 50 peer reviewed scientific articles, of which 37 are on the psychology of abortion." Coleman Declaration, APP-371 ¶ 3.

protection and due process argument: "relieve us of this child – let us be free."

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 partner." [16]

In 1992, seven years before the first Baby Moses law ever passed, the Supreme Court in *Casey* 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). Justice Ginsburg, dissenting, cited this need again in explaining why she would compel corporations to cover all forms of contraception including abortion causing methods, in their insurance plans. *Burwell, et al, v. Hobby Lobby Stores, Inc., et al*., No. 13–354. Argued March 25,

[16] 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.

2014—Decided June 30, 2014[17]. Some women feel they need help; the question is how can society help them without injuring huge numbers of them?

Each of these reasons for abortion after a human heartbeat is detected is now eliminated by North Dakota's willingness to **totally remove the burden of child care after the baby is born**. Any woman afraid that a child would interfere with her life in any way, for any reason whatsoever, can simply give the child to North Dakota at birth (or within one year after) and she will not have any impediment to her future education, lifestyle or career plans. North Dakota has made this argument as a matter of law in its Brief as well.[18]

Patients of MKB Management Corp., a for-profit corporation which is the lead plaintiff, indicate similar reasons for getting an abortion.[19] Some women feel they do not have enough money to take care of a child. For example: "*I am*

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[17] Together with No. 13–356, *Conestoga Wood Specialties Corp. et al. v. Burwell, Secretary of Health and Human Services, et al.*, on certiorari to the United States Court of Appeals for the Third Circuit.

[18] **North Dakota argues: "Moreover, the notion there is an undue burden placed upon women who have to care for what they may deem an unwanted unborn child, whose heartbeat has been detected, is without merit because infants up to one year of age may be abandoned without question and without consequences to the woman." N.D. Cent. Code. §§ 27-20-02 (2) and 50-25.1-15 (2013). Appellant's Brief, p. 43.**

[19] "*… I have also reviewed and considered statements assumed to be patients (also a partner and some family members) of the Red River Women's Clinic, which were disclosed in the discovery of this case by the Plaintiffs.* At pages 55-57 of the deposition transcript of Tammi Kromenaker, (conducted on November 26, 2013), she stated that these statements came from "patient journals at our clinic." Shuping Declaration, APP-488, ¶14.

currently going through a divorce, and have been struggling not only financially, but emotionally." APP-898. North Dakota is now completely willing to give these women 18 years of free child care and relieve these women of all parental and financial obligation. Another woman says, "*... abusive marriage ... barely scrape by ... father in jail ...*" APP-902. Again, North Dakota will care for this child. "*... right now in this time in my life it just isn't something I am ready for.*" APP-904. The North Dakota Safe Haven law would particularly help women who are not ready for children. They could reconnect with their children at a later time. "*This is the most difficult decision in my life. I have three beautiful and amazing kids. I want to be a successful mother for my kids and succeed in life. Now I am struggling to keep them. My boyfriend and I feel we are not ready to have another baby. I do want more kids later, but not now. I never pictured myself ever making a decision like this.*" APP-906. Such women with conflicted feelings are very common and especially at risk for adverse psychological consequences, but receive no such counselling or warning from the abortionists. "*I am a single mother of two beautiful children that I have no support with so it's hard getting by some days. I knew that bringing another child would make things more difficult. This (financial support) shows a little can go far."* APP-911. "*Me, I'm only 19 with my whole life ahead of me. I just know in my heart that this isn't a good time to move to the next step in life, that is*

start a family." APP-912.

3. HB 1456 Removes the Burden of Child Care, Thus Removing All Barriers to Economic and Social Freedom

North Dakota shifts the entire economic and parental burdens of child care to the state, if any 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 North Dakota. **Equal protection is legally achieved as a matter of law by these new Baby Moses' laws which eliminate any burden on women to care for their children.** The entire burden of care, feeding, education, medicine: every financial and social obligation of parenting can now be 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 legal impact on women. But now, all North Dakota women can have full liberty from all maternal responsibility immediately after birth. Those citizens in North Dakota who feel abortion is murder will be satisfied with justice and life, and yet will participate in the shared burden of child care 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. The state is constitutionally entitled to further "the legitimate interest of the Government in protecting the life of the fetus that may become a child," *Gonzales* at 146, especially when it now removes the burden of responsibility from women.

If a woman's mind or circumstances change in a few years, as might happen to some of the Abortionists' patients who wanted more children quoted above, she can re-establish maternity through DNA testing of her child in foster care, if not already adopted, with benefits for mother and child. The Safe Haven law creates a procedure for reunification later, if desired. N.D. Cent. Code §§ 27-20-02, and 50-25.1-15 (2013). *Amici* Women Hurt by Abortion can attest that their lives would have been immeasurably improved if they could have been reunited with their irrevocably deceased child. Transfer of responsibility is now reversible if the child has not yet been adopted by someone else.

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 six weeks and not "*terminate the life of a whole, separate, unique, living human being*."[20] 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

[20] *See Planned Parenthood v. Rounds*, 530 F. 3d 724 (8th Cir. 2008) (en banc) (upholding statutory definition as scientifically "rational," not false or misleading).

853, 856. **Even if a North Dakota woman may not legally receive an abortion under HB 1456, she can obtain the desired result of an abortion – no child; at no cost to her and with no obligation.**

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 child care. With the balance of child care heavily weighted toward 18 years of state responsibility, this is fair, "rational" and "reasonable." It is not an "undue" burden to carry the child to term and then transfer responsibility to North Dakota which helps the mother avoid the long term physical and psychological effects of terminating her child.[21] As stated below, women are already required by law to bear three months of child care after viability.

The Supreme Court itself ever since the beginning of *Roe* and to this day has consistently held that requiring a mother to bear even a large part of the normal burden of pregnancy (almost three months) of the last harder parts of pregnancy is not an "undue burden" by allowing bans on abortion **after viability**.[22] The Abortionists do not argue that North Dakota's ban on abortion after viability is unconstitutional. Thus, after viability at 24 weeks, even under early *Roe* and

[21] N.D. Cent. Code §§ 27-20-02, and 50-25.1-15 (2013)
[22] *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 163-165

Casey jurisprudence, women are already required by law to bear the last 12 weeks (3 months) burden of pregnancy because of the "profound respect" for the human life of the child in her womb. See *Gonzales* at 146. At the first moment that the state can actually remove all her responsibility without killing the child, i.e. birth, North Dakota 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 North Dakota.

II.

Abortion Severely Injures Significant Numbers Of Women, As Amici Can Show From Personal Experience And A Large Body Of Scientific Evidence; Therefore HB 1456 Advances The State's Legitimate Interest In Protecting Women's Health From The Outset of Pregnancy And Is Constitutional Under *Gonzales*

Abortion severely injures significant numbers of women, as the record below and *Amici* know from painful personal experience and a large body of scientific evidence. Such evidence of injury to women must not be ignored. It is highly relevant to the State's legitimate interest in "**protecting women's health**" from **"the outset of pregnancy."** *Gonzales* at 145, citing *Casey* at 505 U.S. at 846. (Emphasis supplied) HB 1456 enhances women's health, unlike abortion. Substantial, overwhelming and unrefuted testimony about women hurt by abortion was presented in the record below directly by 298 individual women's declarations (APP 1064-1560; APP 655-887) and *en masse* through the

uncontested and unrefuted Declaration of Defendant's expert psychiatrist, Martha W. Shuping, M.D., District Court Document # 72-77, who

> "…reviewed and considered testimony of approximately 4,500 women who had abortions. These testimonials include both declarations under penalty of perjury and affidavits of women who have experienced abortions, and these also form a part of the basis of my expert opinion. It is customary, in the field of psychiatry, to utilize patient accounts in forming professional opinion, in addition to considering the published research. Patient accounts are used in diagnosis, of course, but are also sometimes quoted in published research for illustrative purposes. In addition, because these are sworn testimonies, they actually have a higher value for accuracy and reliability than some of the patient history, anecdotal data and opinion surveys of women suffering from mental trauma that are customarily used by professionals in the field of psychiatry." APP-484-485 ¶ 12.

Based on a review of this massive amount of evidence, the largest ever presented to any court considering abortion; her extensive knowledge of the scientific literature; and her own practice as a psychiatrist treating women for the psychological problems caused by an abortion; Dr. Shuping concluded:

> "the provisions of HB 1456 are necessary to protect women from the well-substantiated increased risk of mental health, emotional and psychological problems and disorders associated with and caused by abortion." APP-483, ¶ 8.

The Abortionists ask this Court to simply ignore, as they do, a massive amount of unrefuted evidence in this case and in the scientific literature, of the harm of abortion to women. Why should such evidence be ignored by courts and legislatures in considering what is an "undue burden"? The Supreme Court has

not held that legislatures cannot react to advances in science and human knowledge. The law is not trapped in the knowledge of 1973, it is free to evolve, and the Supreme Court has done so, as this Court and North Dakota should.

The actual abortion experiences of women hurt by abortion in the record include: 180 Affidavits from Supreme Court Brief in *Gonzales v. Carhart*; 6 North Dakota Women; 96 Women from the surrounding region - North and South Dakota, Minnesota, Montana; 16 Women from Other States; APP-1064-1560; AP-655-887; 4,200 Reviewed by State's expert, Martha Shuping, Psychiatrist; for a total of 4,500 total testimonies (minus 2). APP-484-485 ¶ 12.

In light of such unrefuted evidence, a final injunction should not have issued in this case, and should be reversed, because such unrefuted evidence actually establishes as a matter of law that the statute is constitutional. Relying on outmoded pre-*Gonzales* analysis, "bright lines" against pre-viability bans and overruled cases such as *Akron*, or *Casey* alone, The Abortionists felt no need to refute such evidence, nor could they in truth. They could ignore it, but not refute it. Dr. Shuping also testified "*There is no available evidence that abortion has therapeutic effects in reducing the mental health risks of unwanted or unintended pregnancy*." citing *Ferguson*, et al, 2013. APP-491, Shuping Declaration, ¶ 22.

A. The Evolution Of Supreme Court Jurisprudence On The Constitutionality Of State Restrictions On Abortion Has Taken Into Account The Evidence That Abortion Harms Women With Devastating Consequences, Per

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

Similar amicus briefing to this was presented to and cited by the United States Supreme Court in *Gonzales*. Citing the brief on behalf of *Amicus* 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. The Act recognizes this reality as well. 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.* [180 Women Hurt by Abortion] as *Amici Curiae* in No. 05-380, pp 22-24. **Severe depression and loss of esteem can follow. See *ibid.*[23]**

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

The Supreme Court's conclusion above was based on extensive quotes from women who had an abortion like the quotes from women hurt by abortion from the record on the following pages.[24] The Supreme Court has clearly demonstrated

[23] The exact quotes cited by the Supreme Court on p. 22-24 of the *Gonzales Amicus* Brief are at APP-1064-1067. The complete declarations under penalty of perjury from which the *Gonzales Amicus* Brief quotes were taken are now in the record and part of the evidence in this case. APP-1070-1170.

[24] *See* more declarations of women hurt by abortion at APP-1064-1560; AP-655-887.

the appropriateness to this Court of relying on such women's perspective in fashioning abortion jurisprudence. *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. (Citations omitted.)

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

The newest and most applicable Supreme Court jurisprudence based on 40 years' evolving experience understands that abortion is a painfully difficult moral decision. It is morally difficult because society is dealing with a human life, yet it wants to help women as well, some of whom are desperate. This Court may never fully understand the degree of pain experienced by women which is directly attributable to abortion. For example, Jennifer Kraft, whose abortion was performed by the abortionists at MKB Management Corp.'s at Red River Clinic, explains that even though she had a history of known mental health problems, (Declaration ¶ 4, Bates p. 1794, which is known to increase the risk of adverse consequences and she disclosed her psychiatric medications, she received no individual counseling from the Plaintiffs, Id. ¶ 22, Bates p. 1797). She testified (APP-1554-60) about her abortion experience at Red River Clinic:

> "*Throughout my life, I have had mental health problems starting when I was just a child."* ¶ 4.

"*I do not remember the Red River Women's Clinic asking me about any medications I was taking. I brought them in my purse and showed them the medications I was taking for my mental health problems. When they saw my medications they didn't say anything about that they thought I needed to see a counselor – before the procedure or that they would contact my doctors or would send me to someone for counseling after the procedure.*" ¶ 22.

"I was shaking and bawling during the entire abortion procedure. This was because before I went to the clinic I could feel my baby move around – it felt like butterflies in my stomach – those were wonderful feelings. ... As I was sitting in the clinic waiting for the abortion doctor to show up I could feel those butterfly like movements of my baby again. Then when the doctor went inside of me with that vacuum device he used, I could then feel my baby kicking me – it wasn't the butterfly feeling any more but was a kick because I could feel that my baby was trying to move away from the vacuum device that was used by the abortion doctor to kill my baby. I just could not take it – I was bawling and shaking because I knew I was killing my baby but my baby was trying not to die. That was so traumatic to feel my baby trying to stay alive. I was crying so hard because as the procedure was going on, I did not want to do this. The nurse just told me, "you're okay – you are making the right decision for you, for your situation – you're fine." The doctor who performed the abortion said nothing to me. ¶ 25.

"... I knew I had just killed my baby ... I was the worst person in the world, I hated myself – I knew it was wrong and I was being selfish." ¶ 26.

"*I felt really guilty I was killing someone's baby because I did not tell him* [the father] *about this one.*"

"*I really don't remember anything until the morning I decided to kill myself. I remember that day vividly – that was the 11th – so about 5 days or 6 days after the abortion at the Red River Women's Clinic.* ¶ 28.

"I hated myself so much for what I had done in aborting my child at the Red River Women's Clinic that I decided to kill myself. I had planned my suicide so that my children wouldn't find me but my husband would. I planned to kill myself on a Thursday because my husband only worked half a day so he would be the first person to find me – before my kids got home from school. I waited until they all left for the day and then I took every pill in the house – I was on a lot of stuff. I had barbiturates and narcotics – I'd gone through viral meningitis so had a bunch of those. I took over 300 pills with a bottle of wine in 30 minutes and just laid down to die. ... I was very angry when I woke up that I wasn't dead." ¶ 29.

"... I now think why they didn't they have more help or counseling for me, especially since I had a long history of mental health problems. I mean if you go in for a routine procedure or some surgery, there is counseling... When I have a gynecology appointment they ask if there has been any sexual trauma so they approach you different when they do the exam. I am blown away now that I've thought about it that none of that was given or even offered to me, even though I had all of those mental health and emotional problems. I just can't imagine anyone having an abortion and not freaking out." ¶ 32.

"*My abortions have been so negative and bad for me. I have had mental health and emotional problems but the abortions really compounded these problems and my trauma. ... I wanted to die and tried to kill myself. ... the abortions felt like just another violation. ..."* ¶ 33.

HB 1456, if allowed to go in effect, would prevent this type of pain for other women, while relieving them of all legal, financial and social obligations of child care. The Abortionists are asking this Court to rule that the North Dakota legislature and this Court may not consider such harm to women when the Supreme Court in *Gonzales* has said they can.

B. Instead Of Being Helped By Abortion, Amici's Experience And Unrefuted Evidence Below Shows Abortion Damages Women's Ability To Participate Fully In The Economic And Social Life Of The Nation.

Whereas *Casey* was premised on the desire to help women participate fully in the economic and social life of the nation, the unrefuted evidence in this case from women who actually had abortions is uniformly negative. In other words, removing the burden of child care by abortion did not help – economically and socially. Why can't North Dakota try a better way? Justice Kennedy, dissenting in *Stenberg v. Carhart*, 530 U.S. 914 (2000) while in the minority then, now represents the Court's majority view in *Gonzales*. In *Stenberg*, he states:

> "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. *Casey 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." … at 956.
>
> "States may take sides in the abortion debate and come down on the side of life, even life in the unborn:" … at 961.
>
> "States also have an interest in forbidding medical procedures which, in the State's reasonable determination, might cause the medical profession or society as a whole to become insensitive, even disdainful, to life, including life in the human fetus. Abortion, *Casey* held, has consequences beyond the woman and her fetus." … *Id.*
>
> "*Casey* recognized that abortion is "fraught with consequences for . . . the persons who perform and assist in the procedure [and for] society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against

innocent human life." *Id*., at 852 (majority opinion)." … at 962.

> "Those who oppose abortion would agree, indeed would insist, that both procedures are subject to the most severe moral condemnation, condemnation reserved for the most repulsive human conduct." …
>
> "The Court's holding [in Stenberg] (striking down pre-viability ban) contradicts *Casey's* assurance that the State's constitutional position in the realm of promoting respect for life is more than marginal." … at 963.

Toni McKinley declared in response to the question: "How did my abortion or abortions impact me economically and socially: Did it help or hurt me to participate fully in the economic and social life of the nation?

> *"I made minimum wage and used work as a coping mechanism to mask my depression. I struggled with alcohol and drugs during this time too. Much of my money went to alcohol. I drank to feel happy. If I was happy then I was okay. …"* APP-1403-1404, ¶ 5.

Another witness, Luana Stoltenberg, when asked how abortion affected her life and whether it helped her economically stated:

> "2. *The abortions had a negative effect on my life. I hated myself for what I had done. So to numb the pain I began to drink excessive amounts. I started doing drugs. I never took drugs before the abortions, I was depressed. Attempted suicide 3 different times. … It harmed me in every way.* 5. *It harmed me economically and socially. Economically, I did not go to college and instead got on a very destructive path of drugs and alcohol. I could barely function much less be a positive influence for my nation. Socially, I was inept. I didn't care about what was happening around me. I was so depressed...*" APP-1397, ¶ 2.

Nona Ellington answered the same question as follows:

"*My abortion hurt me socially in that I turned to drugs, alcohol and a very abusive relationship, which resulted in 18 years of abusive marriage, then divorce. My abortion hurt me economically in that after I started my career in the hair industry, I had to take a leave of absence and ultimately quit my job for a whole year due to the severe depression. Socially, for me, it is still very difficult for me to attend baby showers and walk through the baby departments in the stores since I was never able to have children as a result of the abortion. …"* APP-1400, ¶ 5.

Susan Swander's response to whether abortion helped her economically:

"*… I was unable to practice law after passing the bar … My drinking was so bad that I could not keep a job as an attorney. The abortions definitely harmed my income earning abilities."* APP-1406, ¶ 5.

Nurse Lorraine D. Agold-Rich declared her answer:

"Socially it took me years to have a healthy sexual relationship and marriage. Also, due to shame I kept it a secret. Also, I continue to have anxiety (even worse during pelvic exams) and sleep disorder. APP-1409, ¶ 5.

Betty Underwood in describing how abortion affected her ability to participate in the economic and social life of the nation stated:

"*The abortion hurt me for the rest of my life. Being an alcoholic and single woman for the next 30 years was a tremendous financial handicap. By the grace of God, I was able to get sober in 2006. I am all alone. I have no children, never remarried and my parents are deceased. My nephews and nieces do not have cousins just to start with and all my friends are enjoying their grandchildren. Killing my own children was like destroying my life.* APP-1416, ¶ 5.

Adina Eve Smith answered Question 5 as follows:

"The abortion impacted me economically in that due to post traumatic stress and mental illness I have been unable to be fully employed … I

> *have had to quit or allow myself to be fired from many jobs because I was afraid I was going to be "found out". Socially I feel like I have to be constantly running from my conscience and from other people."* APP-1419, ¶ 5.

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

> "… a woman may elect an abortion, only to discover later, **with devastating psychological consequences**, that her decision was not fully informed."[25]

So even in 1992, while the woman's burden of 18 years of child care was high, the Court began to get a glimpse of these kind of unintended, devastating consequences. Below are more illustrative examples from the record of the serious and personal consequences of abortion, from the Arkansas women injured by abortion. The declarations of Micki, Lisa, Linda, A.H., Carol, Morgan, P.O., Dickie, Darlene, Roxanne, Maria, Denise, C.S., Adrean, Brooklyn, Rita, Paulette, Barbara, Kellie, L.G., Kristi, Crystal, Kari, Sandra, J.H., Shatina, Susan, L.S., Lisa, I.A., D.S., Melissa, are in the record between APP-1452-1512.

In answer to the question: "*How has abortion affected you?*" women hurt

[25] *Casey*, 1992, supra at 882. (emphasis added).

by abortion stated:

Linda

"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." APP-1457.

A.H.

"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."* (Emphasis added.) APP-1459.

Dickie

"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." APP-1469.

Darlene

"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." APP-1471

Maria

*"****Depression, alcohol abuse, guilt, pain, insecurity, fear, isolation****. I felt like I committed murder but it was legal."* (Emphasis added.) APP-1475.

Denise

"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****."* (Emphasis added.) APP-1477.

Adrean

"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." APP-1479.

See also the longer declarations of similar devastation of Diane Heynen, APP-849-853; Theresa Bonapartis, APP-854-855; Linda Ann Huffstetler, APP-856-859; Golda Sharon Ross Dunn, APP-860-862; Myra Jean Myers, APP-863-865; Paula Rambo, APP-866-867. The following women hurt by abortion are all from North Dakota: Jody Clements, APP-868-871; Ruth Ruch, APP-872-874; Terry Melby, APP-875-877; Erin Hill, APP-878-881; Rhonda Nygaard, APP-882-883; Kay Kiefer, APP-884-887.

The *Amici* women have all recorded abortion experiences similar to these women with varying consequences in written, legally admissible affidavits or declarations under penalty of perjury. 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*, (Ginsburg, dissent) at 183, FN 7. Should

anyone be surprised when the uniformly admitted **pain** and **difficulty** in the decision and procedure produces severe emotional trauma? Now that North Dakota is willing to provide 18 years of child care, it should be allowed to protect its citizens from these severe and persistent psychological injuries.

C. Science And The Abortion Industry's Own Admissions Prove Abortion Hurts Women

The "reasonableness" and "rationality" of HB 1456 is also supported by the abortion industry's own admission that abortions have risks of adverse emotional consequences. An abortion textbook endorsed by the National Abortion Federation, "Management of Unintended and Abnormal Pregnancy," provides a list of "Risk Factors for Negative Emotional Sequelae."[26] *See* also "A Clinicians Guide to Medical and Surgical Abortion," listing 14 factors for mental health problems after abortion, Ch. 3, p. 28-29, 1999. Just because these problems happen to women, they should not be ignored by the abortion industry.

In her declaration, unrefuted expert witness Dr. Priscilla K. Coleman stated as follows:

> "*Therefore, in my opinion, women who have an abortion have a profound and significantly increased risk of adverse emotional, cognitive, behavior, mental and psychological outcomes when compared to women who do not undergo the procedure.* APP-386 ¶ 37, Coleman Declaration.

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

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 from the record of the women hurt by abortion demonstrate, and *Amici* Women Hurt by Abortion agree, 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. APP-1064-1560; APP-655-887 is a compendium of all the declarations in the record from women hurt by abortion that is the undisputed evidence that North Dakota is protecting women from decades of devastating psychological harm, and offering 18 years of relief from economic and parental burden instead.

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. There is more than enough science to justify HB 1456, and

> "medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other

contexts."

Gonzales, at 164. The Act is constitutional because abortion does not merit greater judicial scrutiny than "any other context."

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 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 North Dakota's decision to ban many pre-viability abortions, especially when the State is willing to bear all future child care responsibility. Dr. Shuping's unrefuted evidence concluded

> "*Abortion has a profound and significant adverse effect upon the mental health, emotional and psychological well-being of women. In my opinion, to a reasonable degree of medical and scientific certainty, the* ***overwhelming preponderance of scientific and medical evidence demonstrates abortion is a substantial contributing factor and cause of increasing the risk of mental health, emotional and psychological problems for women that have had an abortion, and in turn abortion has a profound and significant adverse effect on women's mental health, emotional and psychological well-being.*****"** (Emphasis supplied). APP-492, ¶ 24.

Based on Dr. Shuping and Professor Coleman's reports, every woman who has an abortion has a "heightened" risk for experiencing serious adverse psychological reactions to the loss, whether they in fact suffer the injury that many will. APP-374, Coleman, ¶ 4. Thus, all North Dakota women are at increased risk, so North Dakota is quite rational in seeking to reduce that risk for all of its citizens, and offer them instead total freedom from those burdens of child care, without risk, at state expense.

In addition to the risk itself, significant numbers of women will actually suffer severe adverse psychological reactions, and no one can know with certainty who that will be in advance; though some have higher risk than others due to pre-existing conditions. For example, research shows 92% of women feel attachment to their unborn child before birth, APP-374-375, Coleman, *Id*., ¶ 6, which is a risk factor in itself. That attachment is one reason abortion is such a difficult decision. It is only dire circumstances and fear of parental obligations or "burdens" which usually overcomes this attachment factor. Now, North Dakota will bear those burdens for the woman, including giving her up to one year to decide what she wants to do.[27] She can explore her options with no time pressure.

In addition, abortion increases the risk of depression, trauma, eating

[27] N.D. Cent. Code §§ 27-20-02, 50-25.1-15 (2013).

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.[28] Researchers on both sides of the abortion issue agree that some women have mental health problems after abortion.

> "*For example, in 1992, the Journal of Social Issues "There is now virtually no disagreement among researchers that some women experience negative psychological reactions post-abortion" [after abortion]*." Dr. Martha Shuping Declaration, APP-494-495 ¶ 36.

Another unrefuted expert declaration in the record is that of Millie Lace, a post-abortive woman herself, and a Licensed Professional Counselor who explains the harm of "disenfranchised grief:"

> "I have personally counseled women who have felt a great sense of loss after an abortion and cannot resolve it or accept the loss until they allow themselves to come out of the denial that it 'wasn't a baby" by seeing fetal development pictures, ultra sounds of a subsequent child, fetal models or The Thomas Aaron story on video, which is available at http://www.youtube.com/watch?v=GvQ3bwB9mg. These women then go through a "normal grief" process. One woman I counseled was 84, and she had had an abortion in her 20's. She experienced prolonged grief for 60 years. She said she just wanted to be able to tell her story. As a professional counselor, I call it "disenfranchised grief," meaning grief that is not allowed either by the culture or by the individual because it would be too painful if she allowed herself to grieve. Therefore the grief is unresolved, or else is "complicated grief', which occurs when the individual prolongs the acceptance of the loss. As Dr. Andreas Maercker, M.D., Ph.D. from the Division of Psychopathology and Clinical Intervention, University of Zurich,

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

> Switzerland when explaining considerations for Prolonged Grief Disorder (PGD) to be included in the DSM-IV (Diagnostic Statistical Manual for Mental Disorders) for publication in May of 2013, writes: "One easily accessible indicator is to listen to clients or patients. Self-statements such as 'I fear I will go crazy if I fully realize the death of my loved one' is very specific to "Complicated Grief. " APP-1429, Millie Lace Affidavit, ¶ 21.

Regardless of one's position regarding whether or not a child in the womb is a human being worthy of legal protection, clearly, anyone can empathize with the grief and sorrow of a mother, as shown, who comes to believe she has murdered her child.

The abortionists choose to ignore these psychological injuries by failing to disclose them to their patients, as *Amici* have experienced, and the record discloses,[29] so they also fail to address these injuries in this case by relying on a discredited, outdated and overruled strict scrutiny, "per se," "bright line" no pre-viability ban analysis. This ignores the *Gonzales* majority, and the Ginsburg dissent.

Clearly, not every woman needs to be injured as deeply and profoundly as these women for HB 1456 to be upheld, but the fact that a significant number of women are injured supports the Legislature's rational restriction on abortion. The *Gonzales* decision upholding a total ban on a certain type of pre-viability

[29] *See* answers to questions: "Were you adequately informed of the consequences of abortion? APP-1064-1560; APP-655-887.

abortion was 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).

III.

Abortion Is The Taking Of The Life Of A Whole, Separate, Unique, Living Human Being And Thus Constitutes A Grave Injustice, A Denial Of Equal Protection, Due Process And The Right To Life, Especially When It Is No Longer Needed To Remove The Burden Of Child Care From Women; Therefore; HB 1456 Is Constitutional Under *Gonzales*

Abortion is the "taking of the life of a separate, unique, living human being"[30] and thus constitutes a grave injustice; a denial of equal protection, due process and the right to life, especially when it is no longer needed to remove the burden of child care 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.

[30] *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. That is why the decision is so difficult. 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.

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

Since no consensus on abortion has arisen after forty years, perhaps consensus will be achieved by banning most abortions and sharing the burden of child care 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 human fetal life the Court rejected any "per se," "bright line" rules or strict or even middle level scrutiny like the lower courts had adopted, in striking down the partial birth abortion ban. 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 "bright line" rules on pre-viability. In fact, the Abortionists argue and some lower courts seem to act as if *Gonzales* is the outer limit on state power to protect women and life. Instead, as Justice Ginsburg fears, *Gonzales* is Supreme Court recognition that states can go farther.

The child in the womb is a "human being" in reality. Under North Dakota law, a child in the womb is a human being "from fertilization to full gestation,"[31] 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 six 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 judicially mandate an end to the political divisions about abortion, yet has not succeeded. Justice Kennedy recognizes this and seeks political consensus which can only be achieved through the political process. Perhaps this social evolution of transferred responsibility will heal the rifts; but regardless, North Dakota 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 for whatever reason.

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[31] N.D.C.C. § 14-02.1-02 (9) "Human being" means an individual living member of the species of homo sapiens, including the unborn human being during the entire embryonic and fetal ages from fertilization to full gestation." N.D.C.C. § 14-02.1-02 (1) "Abortion" means the act of using or prescribing any instrument, medicine, drug, or any other substances, device, or means with the intent to terminate the clinically diagnosable intrauterine pregnancy of a woman, including the elimination of one or more unborn children in a multi-fetal pregnancy, with known knowledge that the termination by those means will with reasonable likelihood cause the death of the unborn child.

CONCLUSION

Amici urge this Court to protect North Dakota 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 coincide with their financial interests and not the health of women seeking abortions.

In addition, as *Amici* Dawn Milberger and Sandra Cano can attest, justice requires equal protection of vulnerable human life, male and female: not its destruction. The evidence of the harm to the woman from killing a fellow human being, her own child, is now overwhelmingly established. Now North Dakota has compassionately removed the burden of child care from the mother-thus establishing absolute legal equality between male and female.

PRAYER

Amici respectfully pray this Court reverse the District Court's decision that HB 1456 is unconstitutional when North Dakota society provides better alternatives for women today.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 10, 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 system.

/s/ Allan E. Parker, Jr.
Allan E. Parker, Jr.
Lead Attorney 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. Add. P. 32(a)(7)(B) because:

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/s/ Allan E. Parker, Jr.
Allan E. Parker, Jr.