Nos. 05-380, 05-1382

In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
Petitioner,

v.

LEROY CARHART, ET AL.,
Respondents.

ALBERTO R. GONZALES, ATTORNEY GENERAL,
Petitioner,

v.

PLANNED PARENTHOOD FEDERATION OF AMERICA, INC., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH AND EIGHTH CIRCUITS

MOTION FOR LEAVE TO FILE OUT OF TIME IN CASE NO. 05-380 BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE FOR THE NATIONAL WOMEN'S LAW CENTER AND 31 OTHER ORGANIZATIONS COMMITTED TO THE SAFEST HEALTH CARE FOR WOMEN SUPPORTING RESPONDENT IN CASE NO. 05-1382

MARCIA D. GREENBERGER
DINA R. LASSOW
GRETCHEN BORCHELT
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle, NW, Suite 800
Washington, DC 20036
(202) 588-5180

ELIZABETH B. McCALLUM*
**Counsel of Record*
ANN MARIE PHILLIPS
ASHLEY BASS
HOWREY LLP
1299 Pennsylvania Avenue, NW
Washington, DC 20004-2402
(202) 783-0800

Attorneys for *Amici Curiae*

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* OUT-OF-TIME IN *GONZALES V. CARHART*, NO. 05-380

On February 21, 2006, this Court granted *certiorari* in *Gonzales v. Carhart*, No. 05-380, to review the judgment of the Court of Appeals for the Eighth Circuit striking down the Partial Birth Abortion Ban Act of 2003, Pub. L. No. 108-102, 117 Stat. 1201 (the "Act") (to be codified at 18 U.S.C. § 1531). The Court has granted *certiorari* in the instant case, *Gonzales v. Planned Parenthood Federation of America*, No. 05-1382, to review the judgment of the Court of Appeals for the Ninth Circuit also striking down the Act.

Amici curiae the National Women's Law Center and 31 other organizations committed to the safest health care for women have submitted this brief in *Gonzales v. Planned Parenthood Federation of America* with the consent of Petitioner and Respondents, in order to explain how the Act limits a woman's ability to secure the safest health care option for her – and the option that she may choose for personal, moral, and religious reasons as well – and to describe the variety of serious adverse consequences to women's health, financial security, and future well-being that can result from the Act.

Gonzales v. Carhart raises the same constitutional questions, concerns the same Act of Congress, involves the same Petitioner, and will be argued on the same day as *Gonzales v. Planned Parenthood Federation of America*. The information and arguments presented in this brief *amici curiae* are equally relevant to both cases.

Petitioner Gonzales has consented to the filing of this brief *amici curiae* in *Gonzales v. Carhart* as well as in *Gonzales v. Planned Parenthood Federation of America*. Petitioner will not be prejudiced in any way by the granting of this Motion, because he will have the opportunity to respond to this brief in his Reply Brief.

For these reasons, *amici* request that the Court grant them leave to file this jointly-captioned brief in support of Respondents in *Gonzales v. Carhart* as well as in support of Respondents in *Gonzales v. Planned Parenthood Federation of America*. *Amici* further respectfully request that the Court direct the Clerk to accept this brief out-of-time in *Gonzales v. Carhart* and to docket the brief in both cases.

Respectfully submitted,

MARCIA D. GREENBERGER
DINA R. LASSOW
GRETCHEN BORCHELT
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle, NW
Suite 800
Washington, DC 20036
(202) 588-5180

ELIZABETH B. McCALLUM*
**Counsel of Record*
ANN MARIE PHILLIPS
ASHLEY BASS
HOWREY LLP
1299 Pennsylvania Avenue, NW
Washington, DC 20004-2402
(202) 783-0800

Attorneys for Amici Curiae

September 20, 2006

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF THE *AMICI CURIAE*

Amici curiae are organizations committed to obtaining full legal and social equality for women, including access to the full range of the safest, medically-approved health care. *Amici* write to highlight the ways in which the Partial Birth Abortion Ban Act of 2003, Pub. L. No. 108-102, 117 Stat. 1201 (the "Act") (to be codified at 18 U.S.C. § 1531), limits a woman's ability to secure the safest health care option for her – the option that she may choose for personal, moral, and religious reasons as well. *Amici* also write to describe the variety of serious adverse consequences to women's health, financial security, and future well-being that can result from the Act, which limit women's ability to participate fully and equally in society. The names and individual statements of interest of *amici* are contained in the appendix to this brief.[1]

SUMMARY OF ARGUMENT

1. The evidence presented by a host of respected physicians in the cases challenging the Act demonstrates that women may be virtually unable to obtain any safe abortion at all during and after the fourth month of pregnancy because of the Act's broad reach, and, even if narrowly construed, the Act can deny women access to the safest available procedure. In addition to being unconstitutional under *Stenberg v. Carhart,* 530 U.S. 914 (2000), and a long line of other decisions of this Court,

---

[1] Letters of consent have been filed with the Clerk reflecting consent for both *Gonzales v. Planned Parenthood Fed'n of Am.*, No. 05-1382, and *Gonzales v. Carhart*, No. 05-380. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici,* their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

this threat to women's health has serious potential adverse consequences that can continue throughout a woman's life and that perpetuate the historically unequal status and economic condition of women in our society. Adverse health consequences can include debilitating conditions requiring invasive and expensive medical procedures, problems with future pregnancies, permanent infertility, and other serious health impairments, and even death. These health consequences can lead to women's loss of jobs and wages, their inability to secure health insurance and adequate health care in the future, and can impair their ability to care for their families and themselves.

2. The Act violates due process because it represents an unwarranted intrusion into a woman's most personal choices for impermissible reasons. It not only denies women access to safe health care, but also improperly substitutes the government's view of morality for the strongly held personal, moral and religious beliefs of the woman. The Act bars a woman who may be facing grave risks to her own health and a tragic medical condition of her fetus from access to a procedure that she believes is the most humane, and which allows her to hold and grieve over her fetus in accord with her deepest personal desires and the moral and religious dictates of her conscience. Her beliefs, along with her determination to preserve her ability to bear children in the future and avoid other serious adverse health consequences, require respect under the Constitution.

As this Court recently affirmed in *Lawrence v. Texas*, 539 U.S. 558 (2003), the government may not intrude into individuals' most private choices based solely on its own moral judgment. "Our obligation is to define the liberty of all, not to mandate our own moral code." *Id.* at 571 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992)). *Accord* at 577 (fact that State views a practice as "immoral" is "not a sufficient

reason for upholding a law prohibiting the practice") (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)). The prohibition against government intrusion is especially strong when the government's imposition of its own moral code not only ignores the moral code of the woman involved, but also has serious adverse consequences for the well-being of the woman and her family.

The State's interference on "moral" grounds with women's most personal health care decisions and the implications that interference raises for women's equal participation in society echo the "personal dignity" and "equality" concerns that led the Court to find that the Texas sodomy law at issue in *Lawrence* was unconstitutional – the right of individuals to participate fully and fairly in society and their right to make personal choices "and still retain their dignity as free persons." *Id.* at 567, 575.

3. Denying women access to a medical procedure that represents the safest medical option, and one they might also choose for deeply personal, moral or religious reasons, further violates women's right to due process because it interferes with their basic bodily integrity. *See, e.g., Casey*, 505 U.S. at 849 ("It is settled now, as it was when the Court heard arguments in *Roe v. Wade*, that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood as well as bodily integrity.") (citations omitted); *id.* at 884 (abortion right "justified" by "the right to physical autonomy"). Just as the government may not force anti-psychotic drugs on a non-dangerous inmate, *Washington v. Harper,* 494 U.S. 210, 221-222, 227 (1990), or pump a suspect's stomach for evidence, *Rochin v. California*, 342 U.S. 165, 173-74 (1952), the government here may not force a woman to endure a more invasive and more dangerous procedure in order to obtain an abortion after the first trimester, or, because of the

breadth of the Act, to bar her access to virtually any procedure at all.

ARGUMENT

I. THE ACT'S UNCONSTITUTIONAL DENIAL OF WOMEN'S ACCESS TO THE BEST AND SAFEST HEALTH CARE CAN HAVE SERIOUS ADVERSE CONSEQUENCES

In *Stenberg*, 530 U.S. 914, this Court invalidated Nebraska's "partial birth abortion" ban because it lacked the constitutionally-required exception permitting the procedure when necessary to preserve a woman's health. *See Ayotte v. Planned Parenthood of N. New England*, 126 S. Ct. 961, 967 (2006) ("[O]ur precedents hold[] that a State may not restrict access to abortions that are 'necessary, in appropriate medical judgment, for preservation of the life or health of the mother.'") (citing numerous authorities). This Court held, based on the "highly plausible" evidence before the trial court, that a health exception was necessary because "significant medical authority supports the proposition that in some circumstances, D&X [or intact D&E] would be the safest procedure." *Stenberg,* 530 U.S. at 932. In the six years since the Court decided *Stenberg*, an even stronger medical consensus has developed on the safety advantages of intact D&E. Brief of the American College of Obstetricians and Gynecologists as *Amicus Curiae* Supporting Respondent (hereinafter "ACOG *Amicus* Br.) at 2, 27-28.[2]

---

[2] The *only* other context found in which Congress has criminalized a specific medical procedure is the statutory ban on female genital mutilation. *See* 18 U.S.C. § 116 (1996). But, even in the case of female genital mutilation, that statute – unlike the Act – has a health exception. *See id.* § 116(b).

The Court in *Stenberg* also struck down the statute because the definition of the banned procedure was so broad that it applied to what the Court found to be the most common procedure performed in the second trimester. 530 U.S. at 924, 938-946. The vague and broad definition at issue in *Stenberg* is similar in the key respects to the definition in the Act,[3] and the Act therefore creates an undue burden to women seeking abortion in the second trimester under *Stenberg*. *See* ACOG *Amicus* Br. at 21-26. Evidence below demonstrated that doctors fearing criminal liability will be reluctant to perform *any* D&E under the Act's broad language.[4] Indeed, even a Government expert conceded

---

[3] Although the government attempted to defend the Act by arguing that there were meaningful differences between the Nebraska law at issue in *Stenberg* and the Act, the Ninth Circuit found that the Act is similar to the state statute in its vague and broad definition. *Planned Parenthood Fed'n v. Gonzales,* 435 F.3d 1163, 1178, 1179 (9th Cir.), *cert. granted,* 126 S. Ct. 2901 (2006) ("despite containing some provisions that are different in form from those in the Nebraska statute, the Act is sufficiently broad to cause those who perform non-intact D&E procedures to 'fear prosecution, conviction, and imprisonment,'" thus unduly burdening women's constitutional rights).

[4] Joint Appendix, *Gonzales v. Planned Parenthood Fed'n of Am.* (hereinafter "PPFA J. App.") 235-36 ("[a]t this point I am currently going to stop doing D&Es"); PPFA J.App. 78-79 ("if I continue to practice … second trimester abortion, in the way I believe is safest for women, … I could be in prison"); PPFA J.App. 161-62 ("any D&E that we do could end up falling under that definition [in the Act]"); *see also* PPFA J.App. 137-38, 139-40, 256, 307-08, 445, 451, 525-26); Joint Appendix, *Carhart v. Gonzales* (hereinafter "Carhart J.App.") 201-02, 611-12, 643-47, 733-34, 851-58.

that, in light of its ambiguities, the Act could well be construed to "outlaw all D&Es." Carhart Eighth Circuit Pl.App. 489.[5]

Adverse health and other consequences to women that may result from the Act are described below. These consequences are premised on the government's incorrect argument that the Act's ban is limited to the intact D&E procedure. However, the risks are magnified many times over when the true reach of the Act to virtually all second trimester abortions is considered.[6]

---

[5] Moreover, in practice a physician may not be able to determine before the abortion begins whether an intact or non-intact D&E procedure will actually be performed. PPFA J.App. 143, 220, 281, 306, 438, 440, 413. *Accord* ACOG *Amicus* Br. at 4-7, 23-24.

[6] *Planned Parenthood Fed'n,* 435 F.3d at 1166 (D&E "accounts for 85 to 95 percent of" post-first trimester abortions). If all D&E procedures are banned, the alternative procedure for most women would be an "induction abortion" – essentially a simulated labor. But the Act could cover inductions as well. If complications or health issues develop during the course of an induction, the doctor would be required to complete the procedure with instruments, violating the Act for the same reasons as a D&E. Similarly, if the fetus' head lodges in the vaginal canal, the doctor would typically reduce the size of the skull, also violating the Act. *See Planned Parenthood Fed'n of Am. v. Ashcroft*, 320 F. Supp. 2d 957, 977 (N.D. Cal. 2004) (Act "may be interpreted to comprise many acts performed ... in the course of ... an induction."). *Accord* ACOG *Amicus* Br. at 25-26; PPFA J.App. 526-27. Even if the woman is able to obtain the induction procedure, induction abortions typically require a hospital stay, take many hours, present increased risk in some circumstances and are medically inappropriate in others. PPFA J.App. 85-86, 131, 224, 266-68, 375-76, 389-92, 514-15, 571-72, 721-22; ACOG *Amicus* Br. at 7.

A. Substantial Evidence Demonstrates That an Intact D&E Can Be The Safest and Best Option for Women's Health

Substantial record evidence shows the intact D&E procedure that the Act forbids is essential if women and their doctors are to have access to the safest means of terminating a pregnancy after the first trimester. Testimony from a variety of respected physicians shows that the intact D&E procedure is part of accepted medical practice, and as such is taught at leading teaching hospitals across the country,[7] that it presents important safety advantages for all women,[8] and that it is medically necessary for some.[9] This evidence is recounted in full in the Respondents' Briefs in these cases, in the ACOG *amicus* brief, and in the *amicus* brief submitted by the National Abortion Federation in *Carhart* recounting the evidence in the New York district court proceeding. It is evidence that builds on, updates, and reinforces the "highly plausible" evidence that this Court recognized in *Stenberg* when it held that a health exception was necessary because "significant medical authority supports the proposition that in some circumstances D&X [or intact D&E] would be the safest procedure." 530 U.S. at 932. And, it is evidence that has been found convincing by the two district courts whose decisions were affirmed

---

[7] PPFA J.App. 450-51 (intact D&E taught at Columbia University, New York University, Cornell, Albert Einstein College of Medicine, Northwestern University, and others); App. to Petit. For Cert, *Carhart v. Gonzales* (hereinafter "Carhart P.App.") 217a, 219a (government witness conceding he planned to permit intact procedures at Yale University School of Medicine); Carhart J. App. 137, 402, 459-60, 570, 728-29, 743-44, 788-89, 872.

[8] *See infra* notes 11, 12, 15.

[9] *See infra* notes 13, 14.

in the Eighth and Ninth Circuit decisions before the Court.[10]

For all women, the intact D&E procedure provides certain health and safety benefits. Among other advantages, it minimizes the risk of perforation of the uterus, laceration of the cervix, infection, and hemorrhage.[11] As detailed in Respondents' briefs, a peer-reviewed study supports the conclusion that intact procedures offer lower risk of complications and other safety advantages.[12] When a woman has certain underlying medical conditions, the medical benefits of the

---

[10] *Planned Parenthood Fed'n,* 435 F.3d at 1167-68 (district court found that "intact D&E is in fact the safest medical option for some women in some circumstances" and that "intact D&E may be significantly safer than other D&E procedures"); *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 1016 (D. Neb. 2004) ("the trial evidence establishes that a large and eminent body of medical opinion believes that partial-birth abortions provide women with significant health benefits in certain circumstances"); *Carhart v. Gonzales*, 413 F.3d 791, 801-02 (8th Cir. 2005), *cert. granted*, 126 S. Ct. 1314 (2006). *Accord National Abortion Fed'n v. Gonzales*, 437 F.3d 278, 281-82 (2d Cir. 2006) ("substantial medical authority indisputably exists" that "banning [the intact D&E procedure] could endanger women's health").

[11] PPFA J.App. 74-76, 116-19, 127-29, 131, 214, 220-21, 277-79, 371, 374, 423-27, 430, 438, 483-84, 497-98, 499-501; Carhart P.App. 47a, 69a, 78a, 83a-85a, 88a, 90a, 99a-100a, 107a, 118a-20a; 123a, 132a, 145a, 149a-50a, 155a-60a, 166a, 169a-72a, 174a, 179a, 182a, 189a, 193a, 195a-265a-66a, 279a-88a, 358a-59a, 400-01a, 473a-74a, 434a-35a.; App. in Opp. to Cert., *Carhart v. Gonzales* (hereinafter "Carhart R.App.") 81-87; Carhart J.App. 45-46, 137-39, 225-27, 532-35, 604, 634-35, 695, 696, 757-60, 848-51, 892. *Accord* ACOG *Amicus* Br. at 2, 11-12.

[12] PPFA J.App. 497-98, 1055 (Stephen T. Chasen, et al., *Dilation and Evacuation at >20 Weeks; Comparison of Operative Techniques*, 190 Am. J. Obstet. & Gynecol. 1180 (2004)).

intact D&E are even more significant. Among these conditions are placenta previa or accreta, liver disease, and certain infections, including chorioamnionitis (an infection of the fetal membranes that spreads to the fetus, placenta, and uterine lining), and sepsis (a severe systemic infection). Each of these conditions can increase the possibility of hemorrhage, meaning that a procedure with less risk of perforation or laceration and a shorter duration is indicated.[13] Other women for whom the intact D&E can be medically indicated are women with toxemia, heart problems, cancer of the placenta, pulmonary hypertension, and vascular disease.[14] Indeed, even the Government's witnesses conceded that the intact D&E procedure could minimize risk and be the safest alternative in some circumstances.[15]

---

[13] PPFA J.App. 289, 291, 299-300, 375, 506-07, 509-10; Carhart P.App. 288a-91a; Carhart J.App. 711-13, 770-71. *Accord* ACOG *Amicus* Br. at 2, 13-16.

[14] PPFA J.App. 294, 503, 506-07; Carhart P.App. 99a-100a, 110a-13a, 290a-91a, 434a-35a, 448a, 481a; Carhart J.App. 768-74; Carhart PX 120, 537-38, 540-42; Carhart PX 121, 1600-01.

[15] *E.g.,* PPFA J.App. 720 (testimony of Dr. Shadigan agreeing that "there is always a risk of damage to the uterus" when instruments are passed into it, and that "removal of the fetus intact during a surgical procedure" would "reduce" the risk of "fetal bones puncturing or lacerating the uterus"); PPFA J.App. 727 (testimony of Dr. Shadigan agreeing that "intact D&E may minimize trauma to the woman's uterus, cervix and other vital organs"); PPFA J.App. 780-82 (testimony of Dr. Cook that "at comparable gestational ages ... it would make sense that anything that involves less instrumentation would reduce the risk of laceration or perforation"); PPFA J.App. 570-71 (testimony of Dr. Bowes agreeing that a "technique that reduces the number of insertions into the uterus might offer some safety advantages"); Respondent's Eighth Circuit Ct. of Appeals App., *Carhart v. Gonzales*, 403 (Testimony of Dr. Cook that intact D&E "may be preferable procedure at the same gestational age

Evidence before Congress as it considered the Act demonstrates that many women undergo the intact D&E procedure, based on the advice of their doctors, because they believe it is the best procedure to address their particular health needs. For example:

Vikki Stella, a diabetic, discovered during her 32nd week of pregnancy that the fetus she was carrying suffered from "at least nine major anomalies, including a fluid-filled cranium with no brain tissue at all" and that consequently it "would never have survived outside [her] womb." *See The Partial Birth Abortion Ban Act of 1995:* Hearing Before the Senate Comm. on the Judiciary, 104th Cong., 1st Sess. 280 (1995) (hereinafter, the "1995 Senate Hearing"). Because of potential complications related to her diabetes, Ms. Stella's doctor determined an intact D&E was the safest procedure for her. *See id.* at 281 That procedure not only protected her from immediate medical risks, but also ensured that she would be able to have more children. *See id.* The procedure was effective and safe, and Ms. Stella was nearly eight months into a new pregnancy when she testified. *See id.* at 280.

Claudia Crown Ades discovered in her second trimester that her fetus had a genetic disorder known as trisomy 13, which caused the fetus to have "a fluid filled non-functional brain" and a "malformed heart with a large hole between the chambers that was preventing normal blood flow." *Id.* at 283. As Ms. Ades reported, her doctor and two specialists (a perinatologist and a geneticist) advised her and her husband Richard that an

---

than a D&E, if you are able to have less need for instrumentation inside the uterus"); Carhart J.App. 474, 424-25, 433 (testimony of Dr. Lockwood agreeing that for women with chorioamnionitis or placenta previa who also had viral infection, intact D&E may be best alternative and safe alternatives are not always available); *see also* Carhart J.App. 280-81, 418-19, 466, 545-47; Carhart P.App. 325a-88a, 394a, 470a, 502a-03a.

intact D&E "would be the safest [course of action] for me, my baby, and for my future children." *Id.* at 284. Mr. Ades further explained to Congress: "I don't know what I would have done without this medical option.... I knew, after all the discussions, deliberations and questioning that both Claudia and I did, that an Intact D&E was the safest, most humane procedure available to our family. For that, I am grateful." *Id.* at 286.

Coreen Costello, a self-identified conservative, testified that during the seventh month of her third pregnancy she began having premature contractions. Her doctors determined that her fetus was suffering from a lethal neurological disorder. *See Effects of Anesthesia During a Partial Birth Abortion:* Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 104th Cong., 2d Sess. 320 (1996) (hereinafter, the "1996 House Hearing"). Because of their deeply-held religious beliefs, the Costellos wanted to deliver their baby naturally, but during the weeks waiting for a natural birth, Ms. Costello's health worsened. *See id.* at 320-22. After much anguish, Ms. Costello accepted her physician's recommendation that she have an intact D& E abortion as the most appropriate option for her. *See id.* Ms. Costello concluded her testimony: "If you outlaw this procedure, other women like me ... may lose their ability to have more children. They may lose their health. They may lose their lives." *Id.* at 323.

Viki Wilson, a registered nurse, learned that two-thirds of the brain of her fetus "had formed on the outside of her skull" and she and her husband faced the possibility of a birthing process in which Ms. Wilson's cervix likely would be ruptured. *See* 1995 Senate Hearing at 160-61. Her doctor also determined that "a C section in [Ms. Wilson's] condition [was] too dangerous," and that he could not "justify those risks." *Id.* at 161. As she recounted, after much prayer and deliberation, Ms. Wilson and her husband reached the conclusion that the intact D&E procedure was the safest solution for her and

a humane solution for the fetus. *See id.* In her words, the procedure now criminalized by the Act was their "salvation." *Id.* at 161-62.

Mary-Dorothy Line and her husband learned that their fetus had advanced hydrocephaly and an undeveloped stomach. *See* 1996 House Hearing at 328. Her doctors told her that an intact D&E was "the best and safest procedure" to "preserve [her] body for future pregnancies." *Id.* She testified that the procedure "gave us hope" for future pregnancies and asked Congress, "Please don't take that away from the families who will need it after us." *Id.* at 329. Ms. Line was expecting another baby when she testified. *Id.*

Tammy Watts testified before the House concerning her experience with the devastating trisomy-13 syndrome. *See Partial-Birth Abortion*: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 104th Cong., 1st Sess. 71 (1995) (hereinafter, the "1995 House Hearing"). After her doctor and an additional specialist confirmed that the fetus had "no eyes," "enlarged kidneys [that were] already failing," and a "mass on the outside of her stomach involv[ing] her bowel and bladder," Ms. Watts and her husband recognized that their much-wanted child would never survive. *See id.* at 72. In addition, the continuation of Ms. Watts' pregnancy posed grave risks to her health, including stroke, paralysis, infertility or even death.[16] In consultation with a genetic counselor, she and her husband opted to terminate the pregnancy:

> I had a choice. I could have carried this pregnancy to term, knowing that everything

---

[16] *See* Remarks by the President on House Resolution 1833, *available at* http://www.pbs.org/newshour/bb/white_house/abortion_veto_4-10.html; Molly M. Ginty, Late-Term Abortion Saved these Women's Lives, Women's eNews, Oct. 28, 2004, *available at* http://womensenews.org/article.cfm/dyn/aid/2046.

> was wrong. I could have gone on for 2 more months doing everything that an expectant mother does, but knowing my baby was going to die, and would probably suffer a great deal before dying. My husband and I would have to endure that knowledge and watch that suffering. We could never have survived that, and so we made the choice together, my husband and I, to terminate this pregnancy.

Id. at 72. Concluding her testimony, Ms. Watts implored Congress not to ban the procedure that had spared her, her fetus, and her family so much pain: "[Y]ou can't take this away from women and families. You can't. It is so important that we be able to make these decisions, because we are the only ones who can." *Id.* at 73.

B. Denying Women Access to the Safest Medical Procedures Can Cause Permanent Damage to their Health and Harm Their Ability to Work, Care for Their Families, and Secure Their Economic Future

Precluding women from obtaining intact D&E's endangers their health and intrudes on their most personal family decisions, with life-long adverse consequences.[17] For example, a woman who suffers from hemorrhage or infection from a perforated uterus or lacerated cervix – because the intact procedure most likely to avoid those complications was outlawed – could face hospitalization and surgery, including a possible hysterectomy.[18] Additional severe adverse health

---

[17] Those consequences are even more widespread and devastating given the true reach of the Act.

[18] *See* F. Gary Cunningham, M.D. et al., *Williams Obstetrics,* 598, 769-70 (20th ed. 1997); *see also* Gary A. Dildy, III, M.D. et

consequences that could arise from hemorrhage or infection include stroke, renal failure, organ failure, and even death.[19]

These potentially serious health consequences, and even the less severe complications that could result from a less safe procedure, can have a devastating impact on a woman's life. Maintaining one's health is often critically important to maintaining employment.[20] National studies show that non-elderly adults in poor health are "less than half as likely to work [compared to someone in excellent health], and if they did work, their hourly wage was about 23% lower."[21] A woman's inability to work, or a serious reduction in her wages, can be catastrophic to her and her family's economic security. Nearly one-fourth of women live in female-headed households and are the sole breadwinner.[22] In married-couple households,

---

al., *Critical Care Obstetrics* 307 (4th ed. 2004). *Accord* ACOG *Amicus* Br. at 10-13; PPFA J. App. 265; Carhart P.App. 481a, 497a; Carhart Resp. App. in Opp. to Cert. 81-87 (uterine perforation can result in "catastrophic hemorrhage" requiring hysterectomy).

[19] *See* Cunningham, *supra* note 18, at 547, 558-60, 745-46, 763, 794, 1069-70 and 1140; see also Critical Care Obstetrics, *supra* note 18, at 298, 329-30, and 555. *Accord* ACOG *Amicus* Br. at 10-12.

[20] Cathy Schoen, Lisa Duchon, & Elisabeth Simantov, *The Link Between Health and Economic Security for Working-Age Women* (The Commonwealth Fund, New York, N.Y.), May 1999, *available at* http://www.cmwf.org/usr_doc/healtheconomic_brief.pdf.

[21] Hadley, Jack, *Sicker and Poorer – The Consequences of Being Uninsured: A Review of the Research on the Relationship between Health Insurance, Medical Care Use, Health, Work, and Income*, Medical Care Research and Review, at 85, 60(2) Supp. June 2003.

[22] U.S. Census Bureau 2004 Current Population Survey.

women's earnings constitute a median of more than one-third (35%) of the family's income,[23] and in about one-fifth of all married couple families, women are the primary wage earner.[24] The median earnings of all women in the workforce are low and have stagnated while poverty among women has increased and deepened in the last five years.[25] A lack or reduction of wages could push more women and their families closer to poverty and others deeper into the poverty they endure.

Even when a woman plagued with health complications is able to keep a job, the costs to her, her family and her future prospects can be great. Increased hospitalization and debilitation, for example, can mean at a minimum time off from work that women can ill-afford. Over 42 percent of all private-sector workers do not have any paid sick leave at all.[26] Women, as compared to men,

---

[23] U.S. Department of Labor, Bureau of Labor Statistics, Table 24, "Contribution of wives' earnings to family income, 1970-2003," Women in the Labor Force: A Databook, *available at* http://www.bls.gov/cps/wlf-table24-2005.pdf (May 2005),

[24] U.S. Census Bureau, Table F-22, "Married-Couple Families with Wives' Earnings Greater Than Husbands' Earnings: 1981 to 2004 (selected years)," Historical Income Tables – Families, *available at* http://www.census.gov/hhes/www/income/histinc/f22.html; U.S. Department of Labor, Bureau of Labor Statistics, Table 25, "Wives Who Earn More Than Their Husbands, 1987-2003," Women in the Labor Force: A Databook, *available at* www.bls.gov/cps/wlf-table25-2005.pdf (May 2005).

[25] Losing Ground: An Overview of Poverty, Income and Health Insurance Trends Among Women, 2000-2005 (National Women's Law Center, Washington, D.C.), Sept. 2006, *available at* http://www.nwlc.org/pdf/IncomePoverty3.pdf.

[26] U.S. Bureau of Labor Statistics, U.S. Dep't of Labor, Women in the Labor Force: A Databook 2 (May 2005), *available at* http://www.bls.gov/cps/wlf-databook-2005.pdf.

represent larger proportions of minimum wage and part-time workers,[27] who are most likely to lack paid sick leave. Other types of paid leave often cannot be used as an alternative, since from approximately one-quarter to two-thirds of workers lack paid annual or personal leave.[28] Even unpaid leave is not an option for a great number of Americans. Forty percent of American workers are not eligible for the job-protected, unpaid leave guaranteed by the Family and Medical Leave Act.[29] For women workers facing health complications this lack of leave means not only a loss of wages, but can even mean the loss of a job. [30]

Beyond lost jobs and wages, women in poor health may be unable to care for their children and families. It

---

[27] U.S. Bureau of Labor Statistics, U.S. Dep't of Labor, Women in the Labor force: A Databook 2 & tbls. 20 & 26 (May 2005), available at http://www.bls.gov/cps/wlf-databook-2005.pdf

[28] U.S. Bureau of Labor Statistics, U.S. Dep't of Labor, National Compensation Survey: Employee Benefits in Private Industry, March 2005, at 22 tbl. 18 (Aug. 2005), *available at* http://www.bls.gov/ncs/ebs/sp/ebsm0003.pdf.

[29] Cantor, David et al., "Balancing the Needs of Families and Employers: Family and Medical Leave Surveys," Report submitted to the U.S. Department of Labor. Washington, DC: Westat (2001).

[30] Employees who are terminated for taking unapproved time off face the problem of lost wages during the entire period of their job search, a problem that can be significant when average unemployment periods last 20 weeks. And women fired for taking unapproved time off may not qualify for unemployment insurance since in most states, the reason for their job termination will not meet qualifying tests. Vicki Lovell, Institute for Women's Policy Research, *No Time to be Sick: Why Everyone Suffers When Workers Don't Have Paid Sick Leave* 5 (2004).

is women who are the primary care givers for family members. Women are an estimated 72 percent of the estimated 15 percent of Americans who are informal care givers, and many of those women are caring both for an ailing relative and caring for their own children.[31] Not only could a woman's disability cause serious dislocation in her family, but it may also have severe economic consequences if paid child or family care must be secured to substitute for care previously given by the disabled woman.

The reduction in income of women left to cope with a serious health condition is exacerbated by the increased health costs and difficulty in obtaining comprehensive, affordable health insurance that she will face. Over one-fifth of women in fair or poor health lack insurance, and one-third of such women delayed or went without care over the course of a year because they could not afford it.[32] Even women with some insurance face problems in securing comprehensive coverage and affording care. Many of these women suffering complications from being unable to obtain the safest second-trimester abortion procedure would now have "pre-existing conditions," which, coupled with rising health care costs and increasing numbers of employers scaling back on health

---

[31] Office on Women's Health, Dep't of Health and Human Services, Women's Health Issues: An Overview, May 2000, available at http://www.4woman. gov/owh/pub/womhealth%20issues/index.htm (citing "Majority of Women Control Health Care Decisions", based on a survey conducted by EDK Associates, Merck Media Minutes, Summer 1997).

[32] Kaiser Family Foundation, *Women and Health Care: A National Profile* vi (July 2005), *available at* http://www.kff.org/womenshealth/upload/Women-and-Health-Care-A-National-Profile-Key-Findings-from-the-Kaiser-Women-s-Health-Survey.pdf.

benefits for their employees,[33] only will increase the difficulties they confront. For mounting numbers of women, financial difficulties caused by increased health costs are severe enough to cause bankruptcy.[34]

The Act's disregard for women's health needs and the economic and other consequences that flow from that disdain reinforce the disadvantage and discrimination that this Court has recognized women have historically faced in all aspects of their lives. *See, e.g., Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) ("[O]ur Nation has had a long and unfortunate history of sex discrimination."); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135 (1994) ("Since *Reed v. Reed,* 404 U.S. 71 (1971), this Court consistently has [recognized] ... the real danger that government policies that professedly are based on reasonable considerations in fact may be reflective of 'archaic and overbroad' generalizations about gender"); *United States v. Virginia,* 518 U.S. 515, 534 (1996) ([Sex]

---

[33] According to the 2005 Annual Employer Benefits Survey released by the Kaiser Family Foundation and Health Research and Educational Trust, the percentage of businesses offering health insurance to their workers has declined steadily over the last five years as the costs of providing coverage continues to outpace inflation and wage growth. The Kaiser Family Foundation & Health Research and Educational Trust, *Employer Health Benefits: 2005 Annual Survey* (2005), *available at* http://www.kff.org/insurance/7315/upload/7315.pdf.

[34] Almost half of all personal bankruptcy claims are due to illness and unpaid medical bills. David U. Himmelstein, Elizabeth Warren, Deborah Thorne, & Steffie Woolhandler, *MarketWatch: Illness And Injury As Contributors To Bankruptcy*, Health Affairs, Feb. 2, 2005, *available at* http://content.healthaffairs.org/cgi/content/full/hlthaff.w5.63/DC1. Women are the largest group in bankruptcy. Elizabeth Warren, *What Is a Women's Issue? Bankruptcy, Commercial Law, and Other Gender-Neutral Topics*, 25 Harvard Women's Law Journal 19, 28 (2002).

classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.") (citation omitted); *Nevada Dep't of Human Res. v. Hibbs,* 538 U.S. 745 (2003) ("All would agree that women historically have been subjected to conditions in which their employment opportunities are more limited than those available to men.") (Kennedy, J., dissenting). Women's legal, social and economic inferiority repeatedly recognized by the Court is reinforced by the Act's adverse effects on women through the absence of a health exception and the undue burden it causes.

II. THE ACT IMPERMISSIBLY IMPOSES ONE MORAL VIEWPOINT ON WOMEN, DENYING THEM PERSONAL DIGNITY AND EQUALITY

Denying women the right to have the best medical care for themselves not only injures their health, it also violates their constitutional due process right to make choices about their personal lives and families free from unwarranted governmental interference. A long line of this Court's precedents, most recently reaffirmed in *Lawrence*, establish that the Government cannot impose restrictions on such decisions based solely on one view of the moral considerations at issue. Women terminating a pregnancy after the first trimester are often faced with very painful and difficult circumstances. As shown above, some women discover that their fetus has a grave health condition; others face serious health issues of their own; others face both concerns.

Some women choose the intact D&E procedure because it enables them to cope with their devastating loss by seeing, holding, and grieving over an intact fetus. Tammy Watts, for instance, who terminated her pregnancy after learning that her fetus had a fatal anomaly, *supra* at 12-13, testified: "Thanks to the type of procedure that Dr. McMahon uses in terminating these

pregnancies, we got to hold her and be with her and love her and have pictures for a couple of hours, which was wonderful and heartbreaking all at once.... We spent some time with her, said our goodbyes." *See* 1995 House Hearing at 72. Ms. Watts also was able to donate the fetal remains for research on the causes of trisomy-13, the fetal anomaly that led to her abortion. *See id.* at 73. "Because Dr. McMahon does the procedure the way he does, it made the testing possible." *Id.*[35] Ms. Watts explained it gave more meaning to her devastating ordeal to know that her fetus could help prevent other women from going through the same experience. *See id.*

Eileen Sullivan, expecting her first child after nearly three years of trying to conceive, learned during her 26th week of pregnancy that her fetus was improperly formed with a number of ailments, including a malformed, failing heart and a malfunctioning liver. *See Partial-Birth Abortion: The Truth*: Joint Hearing Before the Comm. on the Judiciary and the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 105th Cong. 1st Sess. 125 (1997) (hereinafter, the "1997 Joint Hearing"). Ms. Sullivan's doctors explained that the fetus could not survive. When considering her options, Ms. Sullivan emphasized that "[f]or my husband and I, the opportunity to see and touch and hold our child was extremely important." *Id.* at 126. Ms. Sullivan and her husband elected an intact D&E procedure. *Id.* "We were able to say goodbye," she testified. *Id.*

The *amicus* brief filed on behalf of the Institute for Reproductive Health Access and Fifty-Two Clinics and Organizations recounts the story of "Gina," a married, self-described Christian woman who desperately wanted a child, who was pregnant with twins who were

---

35 PPFA J. App. 296-97 (testimony of Dr. Broekhuizen) (patient in case of rare fetal anomaly requested intact D&E so that testing and autopsy could be performed).

diagnosed with several fetal anomalies. She prayed, consulted with her pastor, and finally made the decision to undergo an intact D&E – saying that if God could not save her in utero twins, "I wanted to be able to hold them and say goodbye before I lost them forever."[36] *Accord* PPFA J.App. 427 (Dr. Westhoff's testimony that intact procedure allowed woman to hold fetal twins "with clergy and her family present").

Other women choose an intact procedure because they believe it is the humane or compassionate choice for the fetus. *See* 1995 Senate Hearing at 282 (Viki Stella testifying "I did the kindest thing, the most loving thing I knew to do"); *id.* at 286 (Mr. Ades testifying that "[i]ntact D&E was the safest, most humane procedure available to our family"); 1997 Joint Hearing at 159 (Coreen Costello testifying that "the procedure [is] humane [and] dignified"); 1996 House Hearing at 328 (Mary-Dorothy Line testifying that procedure was "safe and very compassionate").[37]

These kinds of intensely personal decisions are protected by the Due Process Clause. This Court in *Lawrence*, striking down Texas's criminal sodomy law,

---

[36] If the intact D&E procedure were not available, the only option for women who wish to be able to hold the fetus or allow for genetic testing would be an induction abortion, which simulates labor. As set forth above, however, that procedure also is limited by the Act and, even if available, generally requires hospitalization, takes far longer, and may present greater safety risks or even be contra-indicated in certain circumstances. *See supra* note 6.

[37] S*ee supra* at 10-13. The *amicus* brief filed by the Institute for Reproductive Health Access and Fifty-Two Clinics and Organizations contains numerous additional descriptions of the agonizing choices women must make, and further shows the deeply personal, moral, and religious concerns, as well as medical consequences, that accompany those decisions.

confirmed the importance of individuals' due process right to be free from unwarranted governmental intrusions in their private lives in the strongest possible terms:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.

539 U.S. at 562.

In this statement, the Court reaffirmed what earlier cases in the abortion context, including *Casey*, have established: that a vital part of liberty consists of being able to make private decisions – about relationships, about family, about reproduction, about contraception – free of government interference, so that individuals may be free to "control their destiny" by making their own decisions about how to conduct their private lives. *Id.* at 578; *accord id.* at 574 (quoting *Casey*, 505 U.S. at 857: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.")

Lawrence makes plain that considerations of personal dignity and equality among all members of society are critical to determining whether a law impermissibly interferes with personal liberty. *E.g., id.* at 567 (confirming "that adults may choose to enter upon [a homosexual] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons"); *id.* at 575 ("Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point

advances both interests.").[38] The Court described, for instance, the ways in which a criminal prohibition on same-sex sexual conduct "in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres," describing the "collateral consequences" to future employment, among other areas, from a criminal conviction. *Id.*

The Act presents similar considerations of equality and personal dignity. When a woman already facing what is often an extremely difficult decision is denied access to a medical procedure that is best able to preserve her health or comport with her deeply held personal, moral, or religious beliefs, her "dignity as a free person" is severely compromised. As discussed above, women also face substantial "collateral consequences" from the Act's ban, including potentially serious health issues and adverse effects on financial security and ability to care for family, consequences which undermine women's full and equal participation in society. The fact that the Act effectively precludes virtually all second trimester procedures leads to an even more substantial adverse effect on women's full and equal participation in society. *Casey*, 505 U.S. at 856 ("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 lives.").

---

[38] *See generally* Pamela Karlan, *Colloquium: The Boundaries of Liberty After Lawrence v. Texas*, 102 Mich. L. Rev. 1447, 1450, 1453 (2004) ("At its core, the liberty interest at issue in *Lawrence* is the right of gay people to equal respect for their life choices"; "The real problems with prohibitions on same-sex intimacy ... come from the collateral consequences of such laws: the way in which they undergird 'discrimination both in the public and in the private spheres' and tell gay people that their choices about how to live their lives are unworthy of respect").

Lawrence also shows that restrictions on personal liberty cannot be justified solely because a governing majority believes that a particular practice is immoral. Overruling *Bowers v. Hardwick*, the Court cited Justice Stevens's dissent in that case, in which he described a proposition made "abundantly clear" by prior decisions:

> [T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack.

539 U.S. at 577-78.

The Court confirmed (quoting *Casey*) that the obligation of the Court is to "define the liberty of all, not to mandate our own moral code." *Id.* at 571. As fully stated in *Casey*:

> Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy.... Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code.

505 U.S. at 850. *Accord id.* at 851 (although it is "conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other," that is not the case where the government choice "intrude[s] upon a protected liberty").

The Act does what *Lawrence*, *Casey*, and their many precedents forbid. It interferes in one of the most personal choices a woman can make based on one view of morality. *See* Act § 2(1) (claiming a "moral, medical, and

ethical consensus" for the Act). In doing so, it violates the "'promise of the Constitution that there is a realm of personal liberty into which the government may not enter.'" *Lawrence*, 539 U.S. at 578 (quoting *Casey*, 505 U.S. at 847).

Just as there is no "medical ... consensus" supporting a ban on the intact D & E procedure[39] (and even if there were, the Act still would unduly burden women's abortion rights because of its broad definition of the procedure), there is also no "moral ... and ethical consensus" behind the Act.[40] While a majority of those in Congress (over the strong opposition of others) may believe that the intact D&E procedure is inhumane and immoral, many women, including those whose tragic stories are told above, believe the opposite – that it is more humane and moral. *See supra* at 20-21. These women and their families chose an intact D&E abortion procedure based on their own intensely felt moral, and

---

[39] Section I.A., the Respondents' briefs, and the *amicus* briefs submitted by ACOG and the National Abortion Federation all demonstrate that Congress' conclusion that there is "medical consensus" with respect to the intact D&E procedure is incorrect.

[40] Moreover, to the extent that the Act's proponents believe it would serve additional purposes, such as enforcing medical standards or promoting respect for life, these purposes in fact would be served only because the Act would express the legislative majority's moral opposition to the intact D&E procedure. Similar purposes were asserted for the Texas sodomy law – for example, that it would promote marriage, see, e.g., Brief of Amici Curiae Texas Legislators in Support of Respondent, 2002 U.S. Briefs 102, at 15-25 (Feb. 18, 2003) – yet the Court recognized that such purposes ultimately depended on the statute's expression of moral disapproval of homosexuality, and found them insufficient to overcome the liberty interests at stake.

sometimes religious, convictions. They thought the procedure was humane, and they wanted the opportunity to hold the fetus and grieve with their families over the lost pregnancy.

Moreover, many religious organizations believe that choosing the intact D&E procedure may be moral. As the *amicus* brief submitted on behalf of the Religious Coalition for Reproductive Choice and Thirty-Four Other Religious and Religiously Affiliated Organizations and Individual Clergy and Theologians demonstrates, many mainstream religious groups oppose the Act:

> Because protecting the health of women is a core expression of the religious values of *amici*, *amici* agree that all women whose health is at risk should be free to seek the safest medical treatment, without governmental coercion or constraint, in making the difficult decision to terminate a pregnancy. Other religious traditions and organizations also give primacy to women's health and conscience...."

Brief of *Amici Curiae* Religious Coalition for Reproductive Choice and Thirty-Four Other Religious and Religiously Affiliated Organizations and Individual Clergy and Theologians in Support of Respondents at 1-2.

In such circumstances, as *Lawrence* recognized, it is the task of the courts not to "mandate our own moral code" but to "define the liberty of all." As *Stenberg* explained, when the Court has been faced with the "virtually irreconcilable points of view" that exist in the abortion debate, it has "consider[ed] the matter in light of the Constitution's guarantees of fundamental individual liberty," and has "redetermined that the Constitution offers basic protection to the woman's right to choose." 530 U.S. at 920-21. The Constitution requires that protection be extended to women in these cases as well.

III. THE ACT UNCONSTITUTIONALLY VIOLATES WOMEN'S BODILY INTEGRITY

Another aspect of the constitutionally-protected liberty to make intensely personal decisions without governmental interference is the due process right to be free of unwarranted intrusions into one's own "bodily integrity": "It is settled now, as it was when the Court heard arguments in *Roe v. Wade*, that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood, as well as bodily integrity." *Casey*, 505 U.S. at 849 (citations omitted). It follows that women having abortions, like all individuals, have a constitutional right to choose the medical treatment they deem most appropriate for themselves. *See id.* at 857 (a woman's right to choose may be seen as a rule "of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection").

Under these principles, the Act impermissibly interferes with women's bodily integrity. It effectively denies women the right to choose abortion at all after the first trimester, because the broad and vague definition of the ban reaches virtually all second trimester procedures. And, even if the Act banned only the intact D&E procedure, it would force women to undergo a procedure that is riskier and less safe for them, may contravene the recommendation of their doctors, and may be contrary to their moral, personal, and religious beliefs. *See supra* at 7-13, 20-21. These constraints severely violate the woman's bodily integrity.

A number of analogous cases recognize that the Due Process Clause protects individuals' right to bodily integrity, and that the government may not, for instance, pump suspects' stomachs for evidence or force them to

undergo medical care they do not desire. *See Rochin*, 342 U.S. at 173-74 (it violates due process to pump a suspect's stomach for evidence); *Washington,* 494 U.S. at 221-222, 227 (the Due Process Clause provides protection against unwanted administration of antipsychotic drugs; an inmate may be given such medications against his will only if he is dangerous and a doctor determines such treatment is in his medical interest); *Cruzan v. Director, Missouri Dep't. of Health,* 497 U.S. 261, 279 (1990) (assuming that the Due Process clause guarantees a competent person the right to refuse life-saving hydration and nutrition). Surely, if a criminal suspect need not suffer the temporary discomfort of having his stomach pumped, a woman who is not accused of any crime should not have to increase her risk of uterine perforation, cervical laceration, infection, and hemorrhage.

Therefore the Act violates women's due process rights by impermissibly interfering with their ability to make their own medical and moral choices about their bodies. The government should not, and cannot, preclude women from obtaining the best and safest medical care available – and force them to jeopardize their health and their future ability to bear children, to care for themselves and their families, and to violate their own moral and religious principles.

CONCLUSION

For the reasons stated above, *amici* respectfully request that this Court affirm the decisions of the Courts of Appeals for the Eighth and Ninth Circuits.

Respectfully submitted,

MARCIA D. GREENBERGER
DINA R. LASSOW
GRETCHEN BORCHELT
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle, NW
Suite 800
Washington, DC 20036
(202) 588-5180

ELIZABETH B. McCALLUM*
*Counsel of Record
ANN MARIE PHILLIPS
ASHLEY BASS
HOWREY LLP
1299 Pennsylvania Avenue, NW
Washington, DC 20004-2402
(202) 783-0800

Attorneys for Amici Curiae

September 20, 2006

THE AMICI ORGANIZATIONS

The National Women's Law Center is a non-profit legal advocacy organization that has been working since 1972 to advance and protect women's legal rights. The fundamental right to abortion recognized in Roe v. Wade is of profound importance to the lives, health, and futures of women throughout the country. Because of the tremendous significance to women of the freedom to choose whether to bear children, the National Women's Law Center seeks to preserve women's right to a safe abortion, and has filed or participated in numerous amicus briefs in this Court in cases that affect this right.

Americans for Democratic Action (ADA) is the nation's most experienced independent liberal political organization, dedicated to individual liberty and building economic and social justice at home and abroad. Since 1947, we have led public opinion and coalitions by taking early, principled stands on a broad range of issues including the reproductive rights of women everywhere.

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, political and religious rights of American Jews and all Americans. For almost half a century, it has opposed laws which restrict the choices of women with regard to procreation. Whether abortion or a particular abortive technique is morally acceptable is hotly debated by Americans. We neither endorse nor reject any particular resolution of that debate when we say that such contested matters are assigned by the Constitution to the individual conscience of citizens, rather than government.

The Asian American Justice Center (AAJC) is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Americans. Collectively, AAJC and its affiliates the Asian Law Caucus, the Asian Pacific American Legal Center of Southern California, and the Asian American Institute have over 50 years experience in

providing legal public policy, advocacy, and community education on discrimination issues. The question presented by this case is of great interest to AAJC because it implicates the availability of civil rights protections for Asian Americans in this country.

California Women Lawyers (CWL) is a non-profit, umbrella organization for women's bar associations throughout the state of California. Chartered in 1974, CWL serves as a network that permits California's women attorneys, judges, law professors and law students to work together to achieve common goals, including the protection of civil rights of all individuals. CWL actively engages in the public policy debate concerning the rights of women and prepares or joins others in presenting amicus briefs in cases affecting constitutional rights, especially those that have a special impact on women.

The California Women's Law Center (CWLC) is a non-profit specializing in the civil rights of women and girls. Established in 1989, it is the first law center in California solely dedicated to addressing the comprehensive and unique legal needs of women and girls. Since its inception, CWLC has worked to ensure that all women have full and complete access to all reproductive health services, including abortions. To further this effort, CWLC recently established the Reproductive Rights Enforcement Center to collaborate with grassroots community based organizations to develop and disseminate culturally and linguistically appropriate reproductive health and rights information to diverse communities of women. CWLC has also authored numerous amicus briefs, articles, and legal education materials on abortion rights.

The Center for Women Policy Studies was founded in 1972 with a mission to shape public policy to improve women's lives. A hallmark of our work is the multiethnic feminist lens through which we view all issues affecting women and girls. In all of our work, we look at the combined impact of gender, race, ethnicity, class, age, disability, and sexual orientation. We struggle for women's human rights—justice and equality for

women on such issues as equal credit opportunity, educational equity, violence against women and girls, welfare reform, work/family balancing and workplace diversity policies, reproductive rights and health, the women's HIV/AIDS epidemic, access to health care for low-income women, and much more.

The Coalition of Labor Union Women (CLUW) is an AFL-CIO affiliate with over 20,000 members, a majority of whom are women. For more than 20 years, CLUW has advocated to strengthen the role and impact of women in every aspect of their lives. CLUW focuses on key public policy issues such as equality in educational and employment opportunities, affirmative action, pay equity, national health care, labor law reform, family and medical leave, reproductive freedom and increased participation of women in unions and in politics. Through its 75 chapters across the United States, CLUW members work to end discriminatory laws, and policies and practices adversely affecting women through a broad range of educational, political and advocacy activities. CLUW has frequently participated as amicus curiae in numerous legal cases involving issues of gender discrimination and reproductive freedom. CLUW has provided educational and training programs for many years to educate and inform workers, union leaders and employers about issues of reproductive freedom and gender equality in the workplace.

Concerned Citizens for Medical Freedom is a non-profit organization of health care and legal professionals dedicated to the concept that the limits on medicine should be determined by sound scientific investigation and reasoning. This does not discount the importance of law and ethics. However, because modern science is always evolving, the importance of medicine having the freedom to readily adjust to new discoveries and technology is paramount.

The Connecticut Women's Education and Legal Fund (CWEALF) is a non-profit women's rights organization dedicated to empowering women, girls, and their families to achieve equal opportunities in their personal and professional

lives. CWEALF defends the rights of individuals in the courts, educational institutions, workplaces and in their private lives. Since its founding in 1973, CWEALF has provided legal information and conducted public policy and advocacy to advance women's rights. Throughout our history, we have defended women's access to full reproductive health services.

Equal Rights Advocates (ERA) is a San Francisco-based women's rights organization whose mission is to secure and protect equal rights and economic opportunities for women and girls through litigation and advocacy. Founded in 1974, ERA litigates important gender-based discrimination cases, sponsors public policy initiatives and counsels hundreds of individual women each year on their legal rights.

The Guttmacher Institute is an independent, nonprofit corporation that advances sexual and reproductive health in the United States and around the world through an interrelated program of research, policy analysis and public education. The Institute works to protect, expand and equalize access to information, services and rights that will enable women and men to avoid unplanned pregnancies, prevent and treat sexually transmitted infections, including HIV, exercise the right to choose abortion, achieve healthy pregnancies and births and have healthy, satisfying sexual relationships.

The Idaho Women's Network is a non-profit education and advocacy organization located in Boise, Idaho. Founded in 1988, and representing 28 organizational and 400 individual members, the Idaho Women's Network is the only statewide, non-partisan women's coalition in Idaho. The Idaho Women's Network serves as a voice for women and their families in the development of public policy, including women's reproductive rights.

Law Students for Choice represents over 1500 law students and lawyers who are working to increase curricula in

reproductive rights law and to augment professional training in reproductive justice work. Law Students for Choice works on a grassroots basis at law schools in both the United States and Canada, promotes activism, sponsors national and regional educational events, provides internships in reproductive rights law, maintains a website, and publishes a quarterly newsletter. Law Students for Choice is committed to educating, organizing, and supporting law students to ensure that a new generation of advocates will be prepared to protect and expand reproductive rights as basic civil and human rights.

Legal Momentum advances the rights of women and girls by using the power of the law and creating innovative public policy. Legal Momentum views reproductive rights as central to women's equality. For that reason, Legal Momentum has litigated numerous cases involving reproductive health services, including *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997), and *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993), and has submitted amicus briefs on behalf of organizations that support women's equality in abortion cases including *Ayotte v. Planned Parenthood*, 126 S. Ct. 961 (2006), and *Stenberg v. Carhart*, 530 U.S. 914 (2000).

The Ms. Foundation for Women supports the efforts of women and girls to govern their own lives and influence the world around them. Through its leadership, expertise and financial support, the Foundation champions an equitable society by effecting change in public consciousness, law, philanthropy and social policy. Our work is guided by our vision of a just and safe world where power and possibility are not limited by gender, race, class, sexual orientation, disability or age. We believe that equity and inclusion are the cornerstones of a true democracy in which the worth and dignity of every person are valued. We founded the Reproductive Rights Coalition and Organizing Fund in 1989 to support state- and local-level organizations working on the wide range of reproductive rights issues, from abortion to contraceptive coverage to sexuality education. We believe that all women are entitled to the best possible health care.

The National Asian Pacific American Women's Forum (NAPAWF) is a membership based organization dedicated to forging a grassroots progressive movement for social and economic justice and the political empowerment of Asian Pacific American women and girls. Ensuring that all women have access to safe and timely sexual and reproductive health care services is one of the central issues that forms the basis of NAPAWF's advocacy at the national and chapter levels. NAPAWF supports policies and practices that will increase health care coverage for all women and men, educate health care providers about culturally competent and linguistically appropriate services, and ensure that all women, regardless of socioeconomic or immigrant status, have the financial ability and freedom to access the full range of sexual and reproductive health services, including abortions.

The National Center for Lesbian Rights (NCLR) is a national legal resource center with a primary commitment to advancing the rights and safety of lesbians and their families through a program of litigation, public policy advocacy, and public education. Since its inception in 1977, NCLR has had a particular interest in defending reproductive freedom for all women, regardless of sexual orientation.

The National Center for Youth Law (NCYL) is a non-profit organization located in Oakland, California. Since 1970, NCYL has worked to improve the lives of poor children nationwide. NCYL provides representation to children and adolescents in class action litigation and other cases which have broad impact. The Center also engages in legislative and administrative advocacy at the national and state levels. NCYL provides support for the advocacy efforts of others through its legal journal and training programs, and by providing technical assistance to other advocates for youth nationwide. One of NCYL's particular concerns is access to critical health care for adolescents. Beginning in 1987 and continuing for ten years, NCYL was counsel in *American Academy of Pediatrics v. Lungren*, 66 Cal. Rptr. 2d 210 (1997). In that landmark case, the

California Supreme Court determined that a legislatively-enacted requirement that minors get the permission of a parent or a judge before exercising their right to an abortion violated the California State Constitution.

The National Coalition of Abortion Providers (NCAP) is a 501(c)(4) organization founded in 1990 to provide advocacy and networking opportunities to independent abortion providers. Currently, NCAP has 150 member clinics located throughout the United States providing abortion and other reproductive health care services to women and their families.

The National Council of Women's Organizations (NCWO) is a nonpartisan, non-profit umbrella organization of over 200 groups that collectively represent some ten million women across the United States. NCWO members collaborate through substantive policy work and grassroots activism to address issues of concern to women, including women's reproductive rights and justice.

Founded in 1973, **the National Gay and Lesbian Task Force** was the first national lesbian, gay, bisexual and transgender (LGBT) civil rights and advocacy organization and remains the movement's leading voice for freedom, justice and equality. We work to build the grassroots political strength of our community by training state and local activists and leaders, working to strengthen the infrastructure of state and local allies, and organizing broad-based campaigns to build public support for complete equality for LGBT people. As part of a broader social justice movement, the Task Force works to create a world that respects and makes visible the diversity of human expression and identity where all people may fully participate in society. Headquartered in Washington, D.C., we also have offices in New York, Los Angeles, Cambridge Massachusetts, and Miami.

The National Lawyers Guild (NLG) is a national association of progressive lawyers, law students, legal workers and jailhouse lawyers. Since its founding in 1937, the Guild has

been concerned with reproductive freedom and women's rights. Most recently, the NLG has spoken out against efforts in the federal government and some states to test whether the current political climate on this Court can be exploited to undermine women's rights under settled precedent. The NLG also frequently represents activists working for reproductive rights.

The National Organization for Women Foundation is the education, litigation and advocacy arm of the National Organization for Women, the nation's largest organization of feminist activists. Since its founding in 1986, the primary mission of the NOW Foundation has been to achieve full equality for women, including bodily integrity and the right to make their own reproductive decisions, and has engaged in litigation throughout that time in support of that mission.

The National Partnership for Women & Families is a non-partisan, non-profit advocacy groups founded in 1971 that uses public education and advocacy to promote fairness in the workplace, quality health care, and policies that help women and men meet the dual demands of work and family. The National Partnership firmly believes that quality health care must include access to the full range of women's reproductive health services. As a result, the National Partnership has a long history of promoting and defending a woman's right to choose by filing amicus curiae briefs in major reproductive rights and health cases.

The Northwest Women's Law Center (Law Center) is a regional non-profit public interest organization based in Seattle, Washington, that works to advance the legal rights of all women through public impact litigation, legislation and legal rights education. Since its founding in 1978, the Law Center has been dedicated to protecting and expanding women's reproductive rights, and has long focused on the threats to women's access to safe and legal abortion. Toward that end, the Law Center has participated as counsel and as amicus curiae in cases throughout the Northwest and the country to help ensure

that women have the right to self-determination and bodily autonomy. The Law Center obtained the first injunction in the country that applied to all women's health clinics in the state and effectively stopped blockades by bringing contempt actions against blockaders who refused to obey the court's injunction. Similarly, the Law Center was a leader in successfully defeating a Washington citizen initiative that would have banned certain abortion procedures. The Law Center remains involved in legislative and litigation efforts that seek to protect women's reproductive rights, and serves as a regional expert and leading advocate for reproductive freedom.

Our Bodies Ourselves (OBOS) provides clear, evidence-based information about health, sexuality and reproduction from a feminist and consumer perspective. OBOS advocates for women's health by challenging the institutions and systems that block women's ability to obtain essential resources and support to ensure optimal health and well-being. We serve in the public interest, do not accept funds from the pharmaceutical industry, and collaborate frequently with other organizations also committed to improving the lives of women and their families.

The Sexuality Information and Education Council of the United States (SIECUS) has served as a leading national voice for sexuality education, sexual health, and sexual rights for over 40 years. SIECUS affirms that sexuality is a fundamental part of being human, one that is worthy of dignity and respect. SIECUS advocates for the right of all people to accurate information, comprehensive education about sexuality, and sexual health services.

The Southwest Women's Law Center is a non-profit public interest organization based in Albuquerque, New Mexico. Its mission is to create the opportunity for women to realize their full economic and personal potential. The Southwest Women's Law Center seeks to promote access to comprehensive reproductive health care information and services and to

eliminate discrimination and disparities in access to such services and information based on gender.

The Women's Law Center of Maryland, Inc., is a non-profit membership organization with a mission of improving and protecting the legal rights of women, particularly regarding gender discrimination, workplace issues, family law and reproductive rights. Established in 1971, the Women's Law Center achieves its mission through direct legal services, hotlines, research, policy analysis, legislative initiatives, education and implementation of innovative legal services programs to facilitate systemic change.

Founded in 1974, the **Women's Law Project (WLP)** is a non-profit feminist legal advocacy organization with offices in Philadelphia and Pittsburgh, Pennsylvania. WLP works to advance the legal and economic status of women and their families through litigation, public policy development, education, and one-on-one counseling. Throughout the past thirty-two years, WLP has played a leading role in the struggle to protect women's reproductive liberty and autonomy. WLP has represented reproductive health care providers and/or their patients before this Court in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); and *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).

WOMENS WAY is the nation's oldest and largest women's funding federation. Founded in 1977, WOMENS WAY's proud mission is to fight for and achieve women's equality, safety, self-sufficiency, and reproductive freedom through women-centered funding, advocacy and education.