No. 09-3231, 09-3233

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PLANNED PARENTHOOD MINNESOTA, NORTH DAKOTA, SOUTH DAKOTA, et al.,

Plaintiffs-Appellees,

v.

MIKE ROUNDS, Governor, et al.,

Defendants-Appellants,

ALPHA CENTER, et al.,

Intervenors-Appellants.

On Appeal from the District of South Dakota, No. 05-04077

BRIEF OF *AMICI CURIAE* CHRISTIAN MEDICAL & DENTAL ASSOCIATIONS, AMERICAN ASSOCIATION OF PRO-LIFE OBSTETRICIANS & GYNECOLOGISTS, CATHOLIC MEDICAL ASSOCIATION, PHYSICIANS FOR LIFE, AND NATIONAL ASSOCIATION OF PRO-LIFE NURSES IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL OF THE DISTRICT OF SOUTH DAKOTA

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CORPORATE DISCLOSURE STATEMENT

Amici Curiae Christian Medical & Dental Associations, American Association of Pro-Life Obstetricians & Gynecologists, Catholic Medical Association, Physicians for Life, and National Association of Pro-Life Nurses have no parent corporations or stock of which a publicly held corporation can hold.

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STATEMENT OF INTEREST[1]

Amici Curiae are national medical organizations with member-physicians and nurses who believe that patients should be informed of all potential risks before undergoing any medical procedure, including abortion.

Specifically, *Amicus* Christian Medical & Dental Associations (CMDA) is a non-profit professional medical organization consisting of over 16,000 physicians. CMDA seeks to ensure that women are provided with all the information they need to make fully informed decisions about their health.

Amicus American Association of Pro-Life Obstetricians and Gynecologists (AAPLOG) is a non-profit professional medical organization consisting of over 2,000 obstetrician-gynecologist members and associates. The American College of Obstetricians and Gynecologists (ACOG) recognizes AAPLOG as one of its largest special interest groups. AAPLOG maintains that women who abort face grave physical and psychological risks and have a right to be informed of all of those risks.

Amicus Catholic Medical Association (CMA) consists of over 1,000 physician members and hundreds of allied health members nationwide. CMA members seek to uphold the principles of the Catholic faith in the science and

[1] According to Fed. R. App. P. 29, Counsel for *Amici* has contacted the parties and has obtained consent to file this brief.

practice of medicine—including not only the belief that human life begins at conception, but also that women are harmed by abortion.

Amicus Physicians for Life is a national nonprofit medical organization that seeks to encourage physicians to educate their patients not only regarding the innate value of human life at all stages of development, but also on the physical and psychological risks inherent in abortion.

Amicus National Association of Prolife Nurses (NAPN) is a national nurses' organization with members in every state. NAPN is committed to protecting women's health and ensuring that every woman has all the knowledge she needs to make the best health decisions.

As physicians and nurses, *Amici* have an interest in ensuring that women in South Dakota are presented with all the information they need when considering abortion—and not just that information deemed "relevant" by an abortion provider standing to gain financially from a woman's decision to abort. *Amici* seek to demonstrate that the district court's conclusion that the State presented no evidence demonstrating a link between abortion and suicide is misguided[2] and runs afoul of the U.S. Supreme Court's clear direction that "state and federal legislatures [are

[2] *See* Part II.B., *infra*. The district court cited no studies to support its conclusion and gave no deference to the studies and expert witness testimony presented by the State and Intervenors in this case.

given] wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007).

Amici urge this Court to reverse the decision of the District of South Dakota as it pertains to S.D. CODIFIED LAWS § 34-23A-10.1(1)(e)(ii).

SUMMARY OF ARGUMENT

Numerous peer-reviewed studies demonstrate an increased risk of suicide ideation and suicide following induced abortion. Unfortunately, the district court failed to consider any of them in rendering its opinion below. In addition to presenting peer-reviewed data demonstrating an increased risk of suicide ideation and suicide following induced abortion, *Amici* present peer-reviewed studies demonstrating a link between induced abortion and depression—a known risk factor of suicide.

This evidence simply cannot be ignored. However, the district court failed to utilize the proper standard outlined in *Gonzales v. Carhart*—that the U.S Supreme Court has given wide discretion to state and federal legislatures to pass legislation in areas where there is medical and scientific uncertainty—and ignored pertinent studies and expert testimony demonstrating that the consensus in the medical field is that 10 to 30 percent of women experience serious, prolonged negative psychological consequences following abortion. Rather, the court relied upon statements by a medical group with a pro-abortion agenda and a Task Force

report so flawed in its reporting that even a pro-abortion researcher in the field protested its findings.

Even if the district court disagreed with the plethora of peer-reviewed studies and expert testimony of the State and Intervenors, the fact of the matter is that this evidence demonstrates that the State acted within its wide discretion to enact a requirement that women who abort receive information that there is an increased risk of suicide ideation and suicide following induced abortion. For failing to follow the U.S. Supreme Court's explicit guidance and for failing to consider the weight of the evidence presented by the State and Intervenors, the district court's opinion must be reversed as it pertains to S.D. CODIFIED LAWS § 34-23A-10.1(1)(e)(ii).

ARGUMENT

I. PEER-REVIEWED STUDIES SUPPORT § 34-23A-10.1(1)(e)(ii)

The district court ignored numerous medical studies demonstrating an increased risk of suicide ideation and suicide following induced abortion. These studies must be given proper weight. Furthermore, it is important to note that depression and anxiety are recognized risk factors for suicide and suicide ideation. It is also necessary to note that the Plaintiffs are not challenging § 34-23A-10.1(1)(e)(i), which requires that women be informed that depression and related psychological distress can follow abortion. What follows basic logic: If abortion

can cause depression and anxiety, and depression and anxiety are known risk factors for suicide, then abortion itself can be linked to suicide.[3]

To that end, *Amici* present the following studies demonstrating 1) an increased risk of suicide ideation and suicide following induced abortion, and 2) a link between induced abortion and depression and/or anxiety.

A. Studies demonstrate an increased risk of suicide ideation and suicide following induced abortion

The State and Intervenors presented numerous studies and expert testimony delineating credible, peer-reviewed medical studies demonstrating an increased risk of suicide ideation and suicide following induced abortion. One of the leading studies examined a sample group of over 500 women from birth to the age of 25

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[3] In the Declaration submitted by Intervenors' expert witness Priscilla K. Coleman, Dr. Coleman stated:

> There is no way that one can neatly detach the testimony, evidence, proof and study concerning depression from that of suicide ideation and suicide. In order to discuss and analyze the risk of suicide ideation, and suicide, depression as an illness and the fact that abortion places a woman at risk for depression must be established and testified to as well. Suicide and suicide ideation are closely related to depression.

Declaration of Priscilla K. Coleman, Docket no. 121. Intervenors' expert witness Anne C. Speckhard made a similar declaration, stating that depression and suicide often go hand in hand. Declaration of Anne C. Speckhard, Docket no. 124. Not only does this connection between depression and suicide demonstrate the significance of evidence pointing toward depression after abortion, but it also demonstrates the Plaintiffs' illogical attempt to separate depression from suicide in this litigation.

[hereinafter "Fergusson Study"].[4] The study, led by a pro-abortion researcher, was controlled for all relevant factors, including prior history of depression and anxiety and prior history of suicide ideation.[5]

Significantly, the Fergusson Study found that **27 percent of women who aborted reported experiencing suicidal ideation, with as many as 50 percent of minors** experiencing suicide or suicidal ideation.[6] The **risk of suicide was three times greater** for women who aborted than for women who delivered. The researchers concluded that their research raised the possibility that, for some young women, exposure to abortion is a traumatic life event which increases longer-term susceptibility to common mental disorders.[7] Contrary to the Plaintiffs' claim, there was only a 1 in 1000th chance that the result was due to chance.

Further, the study—again, conducted by an unbiased, pro-abortion researcher—directly attacked the data used by the American Psychological Association (APA) in its faulty finding that abortion does not harm women, pointing out that the APA's finding was based on a relatively small number of

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[4] D.M. Fergusson et al., *Abortion in young women and subsequent mental health*, J. CHILD PSYCHOLOGY & PSYCHIATRY 47:16 (2006).

[5] *Id*.

[6] *Id*. at 19, Table 1.

[7] *Id*. at 22.

studies which had one or more of the following limitations: a) absence of comprehensive assessment of mental disorders; b) lack of comparison groups; and c) limited statistical controls.[8] The Fergusson Study noted that the APA's statement ignored the findings of a number of studies claiming to show that abortion has negative effects.[9] The district court below ignored those studies as well.

The Fergusson Study is not the first (nor the last) to demonstrate a connection between induced abortion and suicide. Ten years prior to the 2006 Fergusson Study, a team led by M. Gissler found that the **suicide rate was nearly 6 times greater among women who aborted** compared to women who gave birth.[10] In 2005, Gissler et al. once again found that **abortion was associated with a 6 times higher risk for suicide** compared to birth.[11]

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[8] *Id*. at 23.

[9] *Id*.

[10] M. Gissler et al., *Suicides after pregnancy in Finland, 1987-94: Register linkage study*, BRIT. MED. J. 313:1431 (1996). In a later study, Gissler et al. concluded that their finding was **consistent with previous studies showing that an undisturbed pregnancy is associated with a reduced risk of suicide**. *See* M. Gissler et al., *Pregnancy-associated deaths in Finland 1987-1994: Definition problems and benefits of record linkage*, ACTA OBSTETRICA ET GYNECOLOGICA SCANDINAVICA 76:651 (1997) (citing L. Appleby, *Suicide during pregnancy and in the first postnatal year*, BRIT. MED. J. 302:137 (1991); S.J. Drower & E.S. Nash, *Therapeutic abortion on psychiatric grounds: Part I. A local study*, S. AFRICAN MED. J. 54:604 (1978); B. Jansson, *Mental disorders after abortion*, ACTA PSYCHIATRICA SCANDINAVIA 41:87 (1965) (**in this study of women with a prior**

Other studies have found an even higher risk following abortion. In 1995, Gilchrist et al. reported that, among women with no history of psychiatric illness, **the rate of deliberate self-harm was 70 percent higher after abortion** than childbirth.[12] In a comparison study of American women and Russian women, V.M. Rue et al. reported that **36.4 percent** of the American women and 2.8 percent of the Russian women reported suicidal ideation.[13] And in a study reported by D.C. Reardon et al. and controlled for prior mental illness, **the suicide mortality rate was 3.1 times higher** among women who aborted compared to those who delivered.[14] The Reardon study, as well as others, also noted that a record-based

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history of psychiatric problems, none of those who carried to term subsequently committed suicide over an 8 to 13 year follow up, with 5 percent of those who aborted subsequently committing suicide); L. Appleby & G. Turnbull, *Parasuicide in the first postnatal year*, PSYCHOL. MED. 25:1087 (1995)).

[11] M. Gissler et al., *Injury deaths, suicides and homicides associated with pregnancy, Finland 1987-2000*, EUROPEAN J. PUBLIC HEALTH 15:459 (2005).

[12] A.C. Gilchrist et al., *Termination of pregnancy and psychiatric morbidity*, BRIT. J. PSYCHIATRY 167:243 (1995).

[13] V.M. Rue et al., *Induced abortion and traumatic stress: A preliminary comparison of American and Russian women*, MED. SCI. MONITOR 10:SR5 (2004).

[14] D.C. Reardon et al., *Deaths associated with delivery and abortion among California Medicaid patients: A record linkage study*, S. MED. J. 95:834 (2002). **Reardon et al. reported that their findings were consistent with a substantial body of literature demonstrating an association between abortion and suicide.** *Id*. at 838 (citing multiple studies). *See also* T.K. Burke, FORBIDDEN GRIEF: THE UNSPOKEN PAIN OF ABORTION 298 (2002) (**reporting that in a survey sample of 260 aborting women, 56 percent reported experiencing suicidal feelings, with**

measurement of suicide attempts before and after abortion has shown that the increase in suicide rates among aborting women is not related to previous suicidal behavior but is most likely related to adverse reactions to the (abortion) procedure.[15]

Two further factors bear consideration here. First is that the women experiencing the greatest psychological harm are the least likely to report their psychological distress. For example, a study by J.R. Cougle et al. reported that women who conceal their abortions from others are more likely to suppress thoughts of the abortion, experience more intrusive abortion-related thoughts, and feel greater psychological distress.[16] In other words, women who admit having abortions may be less likely to experience psychological distress than those who conceal their abortions[17]—meaning that the studies listed here as well as those

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28 percent actually attempting suicide one or more times); B. Garfinkel et al., *Stress, depression and suicide: A study of adolescents in Minnesota* (U. Minn. Extenstion Service 1986) (**reporting that the rate of attempted suicide in the six months prior to the study increased tenfold—from 0.4 percent for girls who had not aborted during that time period to 4 percent for teens who had aborted in the previous six months**).

[15] *See, e.g.*, Reardon et al., *supra*, at 838.

[16] J.R. Cougle et al., *Depression associated with abortion and childbirth: A long-term analysis of the NLSY cohort*, MED. SCI. MONITOR 9(4):CR157, CR158 (2003).

[17] *Id.*

presented by both parties likely reflect a smaller number of women who admit suicide or suicide ideation than actually experience it.

Second, according to the Guttmacher Institute, there are over 1 million induced abortions performed in the United States each year.[18] There have been over 45 million legal abortions performed since 1973.[19] Even if only one percent of aborting women face an increased risk of suicide, that is 10,000 women (and potential suicides) per year—and 450,000 since 1973.

And according to evidence presented here and by the State and Intervenors, the percentage is higher than that. In fact, Planned Parenthood uses a study by B. Major et al. in an attempt to claim that most women do not experience psychological problems or regrets after abortion.[20] However, that study revealed that two years after abortion, 28 percent of women reported more harm from abortion than benefit; 19 percent would not make the same decision under the same

[18] Guttmacher Institute, *In Brief: Facts on Induced Abortion in the United States* (July 2008), available at http://www.guttmacher.org/pubs/fb_induced_abortion.html (last visited Nov. 16, 2009).

[19] *Id.*

[20] Planned Parenthood, *The Emotional Effects of Induced Abortion* (Jan. 2007).

circumstances; 20 percent were depressed; and 1 percent had post-traumatic stress disorder.[21]

Furthermore, studies indicate that women want to know all of the potential risks of abortion before making their decisions. For example, one such study revealed that 95 percent of women facing elective medical procedures wished to be informed of all the risks of a procedure, with mental health complications ranked as very serious and only slightly below the risk of death or heart disease.[22] Similarly, a study done by J.M. Thorp et al. in 2002 found that abortion increased the risks for mood disorders substantial enough to cause self-harm, and that "any woman contemplating an induced abortion should be cautioned about the mental health correlates of an increased risk of suicide or self-harm attempts as well as depression…."[23]

The district court did not properly consider any of these studies—most if not all of which were discussed in the expert testimony of Dr. Priscilla K. Coleman—

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[21] B. Major et al., *Psychological responses of women after first-trimester abortion*, ARCHIVES GEN. PSYCHIATRY 57(8):777 (2000).

[22] *See* P.K. Coleman et al., *Women's preferences for information and complication seriousness ratings related to elective medical procedures*, J. MED. ETHICS 32:435 (2006).

[23] J.M. Thorp et al., *Long-term physical and psychological health consequences of induced abortion: Review of the evidence*, OBSTET. GYNECOL. SURVEY 58(1):67, 76 (2002).

in concluding there is no evidence that induced abortion is a known risk of suicide. This Court must correct that error and give these studies proper weight.

B. Studies demonstrate a link between induced abortion and depression and/or anxiety

Because depression and anxiety are risk factors for suicide, it is important to also examine those studies that have demonstrated an increased risk for mental health complications following abortion.

For example, a study performed by J.R. Cougle et al. found that women whose first pregnancies ended in abortion were **65 percent more likely to score in the "high risk" range for clinical depression** than women whose first pregnancies resulted in a birth—even after controlling for age, race, marital status, divorce history, education, income, and pre-pregnancy psychological state.[24] The study noted that most previous studies employed only short-term follow-up interviews at a small number of abortion clinics. Thus, data on post-abortion reactions was collected within hours or weeks of the event. This study, however, examined the long-term psychological effects of abortion on women, looking at depression scores an average of 8 years after the women's first pregnancy events.[25]

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[24] J.R. Cougle et al., *supra*.

[25] The NLSY is an interview-based cohort study which began in 1979 and continued to the time the Cougle study was published. Women aged 14 to 21 at the time of the 1979 interview annually answered questions related to reproductive history. *Id*. at CR158.

Importantly, Cougle et al. noted that because depression is a risk factor for suicide, their findings were consistent with other studies linking abortion to an increased risk of suicide.[26] Their conclusion was that "[a]t an average of eight years after their first delivery, women who aborted their first pregnancy have significantly higher likelihood of being at risk for clinical depression than childbearing women who do not report a history of abortion."[27]

Consider also the findings of the following studies:

- D.M. Fergusson et al.: 42 percent of women who aborted reported major depression by age 25, and 39 percent of post-abortive women suffered from anxiety disorders by age 25.[28]

- P.K. Coleman et al.: Across the four years studied, women who aborted had 40 percent more claims for neurotic depression than women who gave birth.[29]

- W.B. Miller et al.: Six to eight weeks post-abortion, 35.9 percent of women experienced some depression.[30]

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[26] *Id*. at CR1632 (citing multiple studies).

[27] *Id*.

[28] D.M. Fergusson et al., *supra*.

[29] *State-funded abortions vs. deliveries: A comparison of outpatient mental health claims over four years*, AMER. J. ORTHOPSYCHIATRY 72:141 (2002).

[30] *Testing a model of the psychological consequences of abortion*, in L.J. Beckman & S.M. Harvey, THE NEW CIVIL WAR: THE PSYCHOLOGY, CULTURE, AND POLITICS OF ABORTION (American Psychological Association 1998).

- G. Congleton & L. Calhoun: Depression was reported in 20 percent of women who aborted.[31]

- P.K. Coleman & E.S. Nelson: Depression increased after abortion to a rate of 56.7 percent.[32]

- H. Soderberg et al.: 50 to 60 percent of aborting women experienced emotional distress of some form, with 30 percent of cases classified as severe.[33]

- L.M. Pope et al.: 19 percent of women experienced moderate to severe levels of depression 4 weeks post-abortion.[34]

- W. Pedersen: Women with an abortion history were nearly 3 times as likely as their peers without an abortion to report significant depression.[35]

- D.I. Rees & J.J. Sabia: After adjusting for controls, abortion was associated with more than a two-fold increase in the likelihood of having depressive symptoms at a second follow-up.[36]

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[31] *Post-abortion perceptions: A comparison of self-identified distressed and non-distressed populations*, INT'L J. SOC. PSYCHIATRY 39:255 (1993).

[32] *The quality of abortion decisions and college students' reports of post-abortion emotional sequelae and abortion attitudes*, J. SOC. & CLINICAL PSYCHOLOGY 17:425 (1998).

[33] *Emotional distress following induced abortion: A study of its incidence and determinants among abortees in Malmo, Sweden*, EUROPEAN J. OBSTET. & GYNECOL. & REPROD. BIOLOGY 79:173 (1998).

[34] *Post-abortion psychological adjustment: Are minors at increased risk?*, J. ADOLESCENT HEALTH 29:2 (2001).

[35] *Abortion and depression: A population-based longitudinal study of young women*, SCANDINAVIAN J. PUB. HEALTH 36(4):424 (2008).

[36] *The relationship between abortion and depression: New evidence from the Fragile Families and Child Wellbeing Study*, MED. SCI. MONITOR 13(10):430 (2007).

- F.O. Fayote et al.: Previous abortion was significantly associated with depression and anxiety among pregnant women.[37]

These studies represent just a sampling of research demonstrating an increased risk of depression among aborting women. Numerous studies also link abortion with anxiety and other mental health problems. For example, in a study of government-funded medical programs in Canada, researchers found that women who had undergone an abortion in the previous year were treated for mental disorders 41 percent more often than postpartum women.[38] Similarly, a report of Medicaid payments in Virginia found that women who had state-funded abortions had 62 percent more mental health claims compared to a case-matched sample of women covered by Medicaid who had not had a state-funded abortion.[39]

The bottom line is that depression and anxiety are known risk factors for suicide, and it has been demonstrated repeatedly that severe depression and other mental issues occur after abortion—even when the aborting woman had no prior history of psychological issues. Women considering abortion have a right to know that other women have suffered greatly following their abortions, and the State has

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[37] *Emotional distress and its correlates*, J. OBSTET. & GYNECOL. 5:504 (2004).

[38] R.F. Badgley et al., REPORT OF THE COMMITTEE ON THE OPERATION OF THE ABORTION LAW 319 (Government of Canada, Ministry of Supply and Service 1997).

[39] Jeff Nelson, *Interagency Memorandum, Virginia Dep't of Medical Assistance Services regarding Data Request from Delegate Marshall* (Mar. 21, 1997).

a compelling interest in ensuring that women are informed of all potential risks before choosing abortion.[40]

II. PLAINTIFFS CANNOT MEET THE COURT-IMPOSED BURDEN OF PROVING THAT THERE IS NO LINK BETWEEN ABORTION AND SUICIDE

A. The U.S. Supreme Court "has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty"

In *Gonzales v. Carhart*, the U.S. Supreme Court explicitly held that state and federal legislatures are given **"wide discretion to pass legislation in areas where there is medical and scientific uncertainty**." *Gonzales*, 550 U.S. at 163 (emphasis added).

Moreover, the Court has repeatedly affirmed the states' interest in protecting women from the harms of abortion. *See generally, Carhart*, 550 U.S. 124; *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). "As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion." *Id*. at 878.

Of particular concern to the Court has been the psychological impact abortion has on women. In *Casey*, the Court stated, "Abortion is a unique act. It is an act fraught with consequences… for the woman who must live with the

[40] Amicus AAPPLOG submits with this brief an appendix list of 102 studies demonstrating an association between abortion and adverse mental health problems.

implications of her decision…." *Id*. at 852. As is seen in Part I, *supra*, many women decide that they cannot live with those implications.

Because of this concern for the psychological health of women, the Court stated,

> [I]t does not at all follow [the finding of a liberty interest] that the State is prohibited from taking steps to ensure that this choice [to abort] is thoughtful and informed. Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear…. It follows that States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning.

Id. at 872-73. The Court continued:

> It cannot be questioned that psychological well-being is a facet of health…. In attempting to ensure that a woman apprehend the *full consequences* of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.

Id. at 882 (emphasis added).

In *Gonzales*, the Court again explicitly acknowledged that abortion can have devastating psychological consequences, stating, "[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." *Gonzales*, 550 U.S. at 159 (citations omitted).

Armed with this explicit affirmation of the U.S. Supreme Court and a plethora of medical studies, discussed *supra*, the legislature in the state of South Dakota enacted § 34-23A-10.1(1)(e)(ii), requiring that women be told that women who abort face an increased risk of suicide ideation and suicide. Both Supreme Court precedent and medical studies demonstrate there is no question *whether* abortion presents a psychological impact.[41]

In sum, the Plaintiffs have a very high burden. They must demonstrate that there is no medical or scientific uncertainty regarding the increased risk of suicide ideation and suicide following induced abortion. In other words, they must claim and prove that there is zero evidence demonstrating a link between abortion and suicide. This they cannot do. Furthermore, the district court failed to use the proper standard as dictated by the U.S. Supreme Court, and ignored evidence unequivocally supporting the State and Intervenors.

[41] As stated by Gregory Wilmoth, the editor of the Journal of Social Issues, "**There is now virtually no disagreement among researchers that some women experience negative psychological reactions post-abortion**. Instead the disagreement concerns the following: (1) the prevalence of women who have these experiences…, (2) the severity of these negative reactions…, (3) the definition of what severity of negative reactions constitutes a public health or mental health problem…, [and] (4) the classification of severe reactions…." *See* G.H. Wilmoth, *Abortion, Public Health Policy, and Informed Consent Legislation*, J. SOC. ISSUES 48(3):1 (1992) (emphasis added).

B. The district court used an improper standard and ignored pertinent evidence

The strongest (albeit flawed) claim that Plaintiffs can present here is that there are conflicting studies regarding the link between abortion and suicide—and that line of reasoning has been firmly rejected by the U.S. Supreme Court. *Gonzales*, 550 U.S. 163. As Part I, *supra*, demonstrates, there are ample peer reviewed medical studies demonstrating an increased risk of suicide ideation and suicide following induced abortion, as well as an association between abortion and depression.

Furthermore, the district court wrongly concluded that "Defendants have produced no evidence… to show that it is generally recognized that having an abortion causes an increased risk of suicide ideation and suicide." *Planned Parenthood v. Rounds*, 2009 U.S. Dist. LEXIS 73970 at *28 (Dist. S.D. Aug. 20, 2009). Not only is this errant standard backwards—the district court placed the burden on the State rather than the Plaintiffs, thus ignoring the Supreme Court's explicit guidance that the State had wide discretion in enacting § 34-23A-10.1(1)(e)(ii).—but it also totally disregarded evidence presented by the State and Intervenors.[42]

[42] Furthermore, the district court misstated the aim of the law. Section 34-23A-10.1 does not require that women be told that abortion *causes* suicide and suicide ideation; rather, the law specifically requires that women be told there is an *increased risk* of suicide ideation and suicide following induced abortion. The

In its opinion, the district court focused on statements from two groups—the American College of Obstetricians and Gynecologists (ACOG), and the American Psychological Association's Task Force on Mental Health and Abortion—both of which have a decidedly pro-abortion bent and agenda.[43] In fact, expert witness Dr. Priscilla K. Coleman set forth a very detailed declaration pointing out the flaws in the APA Task Force's analysis—including the fact that revered pro-abortion researcher David M. Fergusson participated in a protest letter to the APA because

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testimony and studies presented by the State and Intervenors provide ample evidence that there is an *increased risk* of suicide. By referencing *causation* as opposed to *increased risk*, the district court once again placed an incorrect heightened standard on the State.

[43] The district court mentioned only one of the State's experts by name—Dr. Elizabeth Shadigian—and mischaracterized her testimony. First, while the district court claimed that Dr. Shadigian stated that abortion is not a "cause" of suicide, it neglected to also state that in the context Dr. Shadigian was simply distinguishing between a *cause* and a *risk factor*. *See* Statement of Elizabeth Shadigian, Docket no. 172-4 at 3. She *does not agree* that women face no risk of suicide following abortion. *Id*. The court's failure to report that point is clearly faulty. *See* n.43, *infra*. Further, the court quoted Dr. Shadigian as stating she does not know of an abortion provider who informs patients of the risk of suicide. This is misleading for two reasons. First, Dr. Shadigian's first answer to the question was that she had never asked physicians who perform abortions whether they inform women of a risk of suicide. *See* Deposition of Elizabeth Shadigian, Docket no. 147-14 at 14-15. And in that same deposition, Dr. Shadigian clearly stated that if a physician asked her if he should advise that there is an increased risk of suicide following abortion, she would suggest he do so. *Id*. at 14. Second, basing its decision on the fact that Dr. Shadigian does not know a physician who counsels on the suicide risk presupposes that she knows all abortion providers in the nation and that not knowing an abortion provider (who has a financial interest in a woman's abortion) who does so is dispositive of whether they should be doing so in the first place.

the Task Forces' analysis was so inherently flawed. *See* Declaration of Priscilla K. Coleman, Docket no. 288. Among other flaws, the Task Force "combed" the reviews and utilized only those statements that supported its pro-abortion ideology. *Id*. at 3. For example, it utilized a review of the scientific literature by Bradshaw and Slade,[44] but failed to report that study's central conclusion that "**up to 30% of women [who abort] are still experiencing emotional problem [sic] after a month**." *Id*. (emphasis added). The researchers added,

> The proportion of women with high levels of anxiety in the month following abortion ranged from 19-27% with 3-9% reporting high levels of depression. **The better quality studies suggested that 8-32% of women were experiencing high levels of distress**.

Id. (emphasis added).

This is just the tip of the proverbial iceberg in Dr. Coleman's critical evaluation of the Task Forces' statement. Dr. Coleman also pointed out that **the consensus among most social and medical science scholars is that**

> **[A] minimum of 10 to 30% of women who abort suffer from serious, prolonged negative psychological consequences.** With nearly 1.3 million abortions each year in the U.S., the conservative 10% figure yields approximately 130,000 new cases of mental health problems each year.

Id. at 4 (citing multiple peer reviewed studies) (emphasis added).

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[44] *The effects of induced abortion on emotional experiences and relationships: A critical review of the literature*, CLINICAL PSYCHOLOGY REV. 23:929 (2003).

Dr. Coleman also explained that the studies ignored by the Task Force—*i.e.*, those studies demonstrating negative effects of abortion—were published in peer-reviewed journals, many in very prestigious journals with low acceptance rates, and that the strength of those studies outweighed any claimed weaknesses by the Task Force. *Id*. at 6. She concluded that the findings of the Task Force should not be taken at face value by the public, healthcare professionals, or legislative bodies—but that is exactly what the district court did. *Id*. at 15.

Not only did the lower court fail to take this expert testimony into account, but it also ignored other evidence presented by the State and Intervenors. Its failure to even address this evidence is glaring. For instance, Dr. Coleman explained that "[t]he results of the 4 largest, record-based studies in the world have consistently revealed that abortion is associated with an increased risk to mental health." Rebuttal Report of Priscilla K. Coleman, Ph.D., Docket no. 121, at 10.[45] Two of the studies were published in prestigious journals with high rejection rates and stringent criteria for acceptance, with one journal going so far as to state, "In

[45] Dr. Coleman then discussed those four studies: T. Ostbye et al., *Health services utilization after induced abortions in Ontario: A comparison between community clinics and hospitals*, AMER. J. MED. QUALITY 16:99 (2001); H. David et al., *Postpartum and postabortion psychotic reactions*, FAMILY PLANNING PERSPECTIVES 13:88 (1981); P.K. Coleman et al., *State-funded abortions vs. deliveries*, *supra*; D.C. Reardon et al., *Psychiatric admissions of low-income women following abortion and childbirth*, CANADIAN MED. ASS'N J. 168:1253 (2003).

light of the passion surrounding the subject of abortion we subjected this paper to especially cautious review and revision." *Id*. at 11. Such studies simply cannot be dismissed—but the district court blatantly did so.

Dr. Coleman also presented numerous credible studies supporting a link between induced abortion and suicide, a detailed critique of the Plaintiffs' expert witness' statement, and a Table[46] summarizing 69 peer-reviewed, empirical studies demonstrating adverse mental health outcomes associated with induced abortion. *See id*. at Appendix A.[47]

Dr. Coleman concluded that, "[d]espite emotional or political objections to the contrary, the overwhelming preponderance of objective scientific evidence published in prestigious academic journals world-wide indicates that abortion does indeed pose significant mental health risks, which should be accurately conveyed to women considering termination of pregnancy." *Id*. at 22.

Yet the district court's only reference to this evidence is that "Defendants rely on their experts' opinions and five limited studies…." *Rounds*, 2009 U.S.

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[46] Each study listed in the Table met the following criteria: 1) a minimum sample size of 50; 2) a quantitative data analysis strategy; and 3) publication in a peer-reviewed journal.

[47] There is simply not enough room in an *amicus* brief to discuss the extent of the evidence ignored by the district court. *Amici* urge this Court to read the evidence on the record presented to the lower court by Dr. Coleman and Dr. Speckhard in Docket nos. 121, 124, 141, 189, and 288.

Dist. LEXIS 73970 at *28. The court provided no explanation for this disregard for the State's and Intervenors' experts nor any reasoning as to why it deemed the studies "limited." The district court's dismissal of the robust evidence provided by the expert witnesses is unwarranted.

Even if the district court disagreed with the studies and expert testimony presented by the State and Intervenors, those studies appeared in peer-reviewed journals, and the experts are extensively published and held in high regard in their field. It is clear that, at most, Plaintiffs can merely demonstrate that there is a range of opinion on the association between induced abortion and suicide—and therefore their claims fail under *Gonzales*. Defendants, on the other hand, have demonstrated that numerous credible peer-reviewed studies demonstrate an increased risk of suicide ideation and suicide following induced abortion.

South Dakota has a compelling interest in protecting women from all the harms of abortion—and that includes the potential for suicide. The State properly exercised its wide discretion and interest in protecting women when it enacted S.D. CODIFIED LAWS § 34-23A-10.1(1)(e)(ii).

CONCLUSION

The judgment of the lower court, as it pertains to S.D. CODIFIED LAWS § 34-23A-10.1(1)(e)(ii), must be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32-1

Case No. 09-3231

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APPENDIX

Studies demonstrating an association between Abortion and Adverse Mental Health Outcomes. (Total studies 102)

- Provided by *Amicus Curiae* American Association of Pro-Life Obstetricians and Gynecologists (AAPLOG)

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