Nos. 21-2913 & 21-2922

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PLANNED PARENTHOOD MINNESOTA, NORTH DAKOTA, SOUTH DAKOTA AND SARAH A. TRAXLER, M.D.,
Plaintiffs-Appellees,

v.

KRISTI NOEM, GOVERNOR, JASON RAVNSBORG, ATTORNEY GENERAL, KIMBERLEY MALSAM-RYSDON, SECRETARY, SOUTH DAKOTA DEPARTMENT OF HEALTH, AND PHILLIP MEYER D.O., PRESIDENT, BOARD OF MEDICAL AND OSTEOPATHIC EXAMINERS, IN THEIR OFFICIAL CAPACITIES,
Defendants-Appellants,

ALPHA CENTER AND BLACK HILLS CRISIS PREGNANCY CENTER, D/B/A CARE NET PREGNANCY RESOURCE CENTER
Intervenors-Appellants.

Appeal from the United States District Court
for the District of South Dakota, Southern Division, Case No. 4:11-04071-KES
The Honorable Karen E. Schreier, Judge Presiding.

BRIEF *AMICUS CURIAE* OF AMERICANS UNITED FOR LIFE SUPPORTING INTERVENORS-APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Americans United for Life has no parent corporations or stock that a publicly held corporation can hold.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Founded in 1971, before the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), Americans United for Life (AUL) is the nation's oldest and most active pro-life non-profit advocacy organization. Briefs authored by AUL have been cited in *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 426 n.9 (1983), *Webster v. Reproductive Health Services*, 492 U.S. 490, 530 (1989) (O'Connor, J., concurring in part and concurring in the judgment), and *June Medical Services L.L.C. v. Russo*, 140 S. Ct. 2103, 2156 n.3 (2020) (Alito, J., dissenting). AUL attorneys regularly evaluate and testify on various bioethics bills and amendments across the country. AUL has created comprehensive model legislation and works extensively with state legislators to enact constitutional pro-life laws, including informed consent bills for women and girls who choose abortion. *See* Ams. United for Life, *Defending Life 2021* (2021 ed.) (state policy guide providing model bills that protect women's health). Numerous states, including Arkansas, Texas, and Arizona, have enacted AUL's informed consent bills.

[1] No party's counsel authored any part of this brief. No person other than *Amicus* and its counsel contributed any money intended to fund the preparation or submission of this brief. Counsel for all parties received timely notice. Plaintiffs-Appellees, Defendants-Appellants, and Intervenors-Appellants have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Informed consent is a foundational principle of modern medicine. *Code of Medical Ethics Opinion 2.1.1,* Am. Med. Ass'n, https://www.ama-assn.org/delivering-care/ethics/informed-consent (last visited Nov. 22, 2021). Following this bedrock principle, *Casey*'s undue burden standard recognizes a state may enact regulations "to ensure [a woman's] choice [to terminate or continue her pregnancy] is thoughtful and informed." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 872 (1992). Finding inadequate informed consent protections in the abortion industry, the South Dakota legislature passed House Bill 1217 (HB 1217) to establish procedures that guarantee a woman's decision is "voluntary, uncoerced, and informed." S.D. Codified Laws §§ 34-23A-54, 34-23A-55 (2011). These protections ensure informed consent and further the public interest of preventing reproductive coercion. Yet, relying upon an obsolete understanding of *Casey*'s undue burden test, the district court determined HB 1217 likely infringes on a woman's First Amendment free speech rights and "presents an undue burden on a woman's right to access abortion." *Planned Parenthood Minn., N.D., S.D. v. Noem*, No. 4:11-CV-4071-KES, slip op. at 30 (D.S.D. Aug. 20, 2021) ("*Noem* 2021 Order"). Accordingly, the district court refused to dissolve what remains of the preliminary injunction.

We agree with Appellants that HB 1217 is constitutional under the First Amendment. *See* Br. and Addendum on Behalf of Appellants Alpha Ctr. and Black Hills Crisis Pregnancy Ctr. 64–68; State Appellants' Br. 56–63. We write separately to address how the law passes constitutional muster under *Casey*'s undue burden standard, and how plaintiffs are unlikely to succeed on this claim.[2]

ARGUMENT

I. THE DISTRICT COURT MISAPPLIED *CASEY*'S UNDUE BURDEN STANDARD.

In denying the motion to dissolve what remains of the preliminary injunction, the district court analyzed HB 1217 under *Casey*'s large fraction test. Relying heavily upon its 2011 order granting a preliminary injunction, the district court noted, "The parties point to no reason why the 2011 determinations by the court are now invalid." *Noem* 2021 Order, slip op. at 22. The district court did not properly follow Supreme Court precedent acknowledging the State's ability to enact abortion informed consent provisions. The district court also disregarded Chief Justice

[2] "[W]hether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981). *Amicus curiae* focus on the undue burden standard under prong three (likelihood of success on the merits) but maintain that this brief's analysis shows the preliminary injunction factors tilt in favor of Appellants.

Roberts' controlling opinion in *June Medical Services v. Russo*. 140 S. Ct. 2103, 2133 (2020) (Roberts, C.J., concurring in the judgment).

The Supreme Court has recognized state protections for women's informed consent are constitutional under abortion jurisprudence. In 1973, *Roe v. Wade* established the constitutional "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." 410 U.S. 113, 153 (1973). Even so, the Supreme Court noted "The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. . . . [A] State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life." *Id*. at 154.

The Supreme Court reaffirmed this principle in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. 505 U.S. at 878–879. The Court recognized that the "[Supreme Court's] prior decisions establish that, as with any medical procedure, the State may require a woman to give her written informed consent to an abortion." *Id*. at 881. Similarly, under *Roe*, a law is not unconstitutional simply "when the government requires . . . the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestation age' of the fetus." *Id*. at 882.

Recognizing that "*Roe v. Wade* was express in its recognition of the State's important and legitimate interest[s] in preserving and protecting the health of the pregnant woman [and] in protecting [preborn] human life," the Supreme Court accordingly crafted the undue burden standard. *Id*. at 875–876. "An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus obtains viability." *Id*. at 878. However, there still is "a substantial government interest justifying a requirement that a woman be appraised of the health risks of abortion and childbirth." *Id*. at 882. In fact, "under the undue burden standard, a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest." *Id*. at 886–887.

Notably, *Casey* instituted its undue burden standard in the context of Pennsylvania's abortion informed consent laws: a 24-hour reflection period and parental consent provision for minors. *Id*. at 844.[3] Upholding both laws, the Court held, "A particular burden is not, of necessity, a substantial obstacle." *Id*. at 887. Even if a statute delays the abortion procedure, raises medical costs, and increases

[3] *Casey* also decided the constitutionality of Pennsylvania's medical emergency exception, spousal notification requirement for married women, and abortion facility reporting provisions. *Casey*, 505 U.S. at 844–845. Under the undue burden standard, the Court upheld the medical emergency exception, partially upheld the abortion facility reporting requirements, and struck down the spousal notification requirement. *Id*. at 880–881, 898, 900–901.

the woman's exposure to anti-abortion protestors, it does not necessarily amount to an *undue* burden. *Id*. at 885–887, 899.

In *Whole Woman's Health v. Hellerstedt*, the Court interpreted *Casey*'s rule as "requir[ing] that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer." 136 S. Ct. 2292, 2309 (2016). Chief Justice Roberts' concurrence in *June Medical Services*, however, rejects this balancing test. According to the Chief Justice, under *Casey*, so long as "the State ha[s] a 'legitimate purpose' and [] the law [is] 'reasonably related to that goal,'" then "the only question for a court is whether a law has the 'effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.'" 140 S. Ct. at 2138 (Roberts, C.J., concurring in the judgment) (citing *Casey*, 505 U.S. at 877).

Chief Justice Roberts reaffirmed that the undue burden standard permits States to further their interests in ensuring women's health and safety and protecting preborn human life. *Id*. at 2135. The Chief Justice writes:

> To serve the former interest, the State may, "[a]s with any medical procedure," enact "regulations to further the health or safety of a woman seeking an abortion." . . . To serve the latter interest, the State may, among other things, "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 in favor of continuing the pregnancy to full term." . . . The State's freedom to enact such rules is "consistent with *Roe*'s central premises, and indeed the inevitable consequence of our holding that the State has an interest in protecting the life of the unborn."

Id. (internal citations omitted). Chief Justice Roberts emphasized that the *Casey* Court upheld various abortion regulations. The reflection period in particular "ha[d] the effect of increasing the cost and risk of delay of abortions," but nevertheless it did not amount to an undue burden. *Id*. at 2136 (citing *Casey*, 505 U.S. at 886). The *Casey* Court accordingly upheld the law "notwithstanding the District Court's finding that the reflection period did 'not further the state interest in maternal health.'" *Id*. (citing *Casey*, 505 U.S. at 886).

The Eighth Circuit has determined that Chief Justice Roberts' concurrence is controlling under the *Marks* rule. *Hopkins v. Jegley*, 968 F.3d 912, 916 (8th Cir. 2020); *Little Rock Fam. Planning Servs. v. Rutledge*, 984 F.3d 682, 687 n.2 (8th Cir. 2021). Yet, the district court failed to identify Chief Justice Roberts' *June Medical Services* concurrence as controlling precedent. *Noem* 2021 Order, slip op. at 20–28. The district court described:

> The undue burden framework, set forth by the plurality in *Casey*, was reaffirmed by the Supreme Court in 2016 in *Whole Women's* [sic] Health…."[T]here 'exists' an 'undue burden' on a woman's right to decide to have an abortion, and consequently a provision of law is constitutionally invalid, if the '*purpose or effect'* of the provision '*is to place a substantial obstacle'* in the path of a woman seeking an abortion before the fetus attains viability." . . . In 2020, in *June Medical Services*, a plurality of the Court again affirmed the undue burden standard…. The court will analyze the pregnancy help center requirement under the undue burden standard here.

Id. at 20 (internal citations omitted). Accordingly, the district court analyzed HB 1217 under *Casey*'s large fraction test and whether the law "operate[s] as a

substantial obstacle to a woman's choice to undergo an abortion in a large fraction of the cases in which [it] is relevant." *Id*. (internal quotation marks omitted) (alterations in original).

The district court neither recognized nor followed Chief Justice Roberts' controlling *June Medical* concurrence. Under the Chief Justice's interpretation of *Casey*, a court must identify (1) the State's legitimate purpose and determine if the law is reasonably related to that goal, and (2) decide whether the law has the "effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *June Med. Servs.*, 140 S. Ct. at 2138 (Roberts, C.J., concurring in the judgment). The district court did not portray the undue burden standard under the Chief Justice's *Casey* formulation.

Chief Justice Roberts also reaffirmed that *Casey* allows states to legislate in furtherance of preborn life and women's health and safety. *Id*. at 2135. The Chief Justice highlighted that while Pennsylvania's 24-hour reflection period imposed burdens, it did not rise to the level of an undue burden despite the fact the law did not further Pennsylvania's interest in maternal health. *Id*. at 2136. By neglecting to analyze the present case under Chief Justice Roberts' *June Medical* concurrence, the district court failed to properly assess South Dakota's interests and whether any purported burdens HB 1217 impose rise to the level of an undue burden.

II. HB 1217 IS CONSTITUTIONAL UNDER CHIEF JUSTICE ROBERTS' FORMULATION OF *CASEY*'S UNDUE BURDEN STANDARD.

South Dakota seeks to protect maternal health and further its interest in preborn life. HB 1217 reasonably relates to these goals by safeguarding informed consent and averting domestic violence. In addition, HB 1217 does not present a substantial obstacle to women seeking abortion in South Dakota. Accordingly, HB 1217 is constitutional.

A. South Dakota Seeks to Protect the Best Interests of the Pregnant Mother and Her Child, and HB 1217 Reasonably Relates to Those Goals by Ensuring Informed Consent and Preventing Domestic Violence.

Under the first step of *Casey*, a court must determine whether a state has a legitimate purpose in enacting a law and whether that law is reasonably related to the state's alleged interests. *June Med. Servs.*, 140 S. Ct. at 2138 (Roberts, C.J., concurring in the judgment). Here, South Dakota intends to ensure a "pregnant mother's [abortion] decision is truly voluntary, uncoerced, and informed." S.D. Codified Laws § 34-23A-54(2). This law furthers "the best interests of the pregnant mother and her child . . . [by] protect[ing] the pregnant mother's interest in her relationship with her child and her health." *Id*. § 34-23A-54(3). HB 1217 is reasonably related to these goals because it safeguards women's informed consent and prevents domestic violence.

1. HB 1217 Ensures the Informed Consent of Women Considering Abortion.

The district court determined, without evidence, that women presenting to abortion clinics have conclusively decided to obtain an abortion. *See Planned Parenthood Minn., N.D., S.D. v. Daugaard*, No. 4:11-CV-4071-KES, slip op. at 26 (D.S.D. June 30, 2011) ("*Daugaard* 2011 Order") ("[S]he will be forced to disclose her decision to someone who is fundamentally opposed to it"); *id*. at 19 ("these women are forced into a hostile environment"); *Noem* 2021 Order, slip op. at 26 ("she must still submit to a counseling session, against her will, at a non-medical facility that is ideologically opposed to her choice to have an abortion."). Yet less than one in four women in the United States will have an abortion by age forty-five. Rachel K. Jones & Jenna Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008–2014*, 107 Am. J. Pub. Health 1904, 1904 (Dec. 2017). This means that, contrary to the district court's speculation, most women in the United States choose childbirth over abortion. These women are not entering a "hostile environment" at the pregnancy help center. Rather, most women will be receptive to a pregnancy help center's counseling.

Contrary to the district court's assertions, and irrespective of HB 1217, women may not obtain an abortion without informed consent. The district court's conclusion overlooks a foundational principle of medicine: a woman has not, and cannot, conclusively agree to medical treatment unless she is "competent, adequately

informed and not coerced" in giving informed consent. Christine S. Cocanour, *Informed Consent—It's More Than a Signature on a Piece of Paper*, 214 Am. J. Surgery 993, 993 (2017).

Informed consent is a cornerstone of medical treatment. In tort law, informed consent historically is rooted in battery, as "an unauthorized or nonconsensual operation would constitute an assault and battery." *Walstad v. Univ. of Minn. Hosps.*, 442 F.2d 634, 639 (8th Cir. 1971). As Justice Benjamin Cardozo declared, "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages." *Schloendorff v. N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914), *overruled on other grounds*, *Bing v. Thunig*, 143 N.E.2d 3 (N.Y. 1957). Over the years, informed consent lawsuits transformed from a battery to a negligence cause of action. *See*, *e.g.*, *Natanson v. Kline*, 350 P.2d 1093 (Kan. 1960) (deciding one of the first informed consent cases grounded in a negligence theory). Currently, "many states have codified medical informed consent into statutory law." Timothy J. Paterick et al., *Medical Informed Consent: General Considerations for Physicians*, 83 Mayo Clinic Proc. 313, 313–314 (2008) (listing state informed consent statutes); *see also* S.D. Codified Laws § 34-12C-2 (1993) (concerning health care informed consent

given by a surrogate decision maker) *and* S.D. Codified Laws § 34-14-22 (2001) (regulating informed consent of predictive genetic tests).

HB 1217 codifies and clarifies informed consent within the abortion context. The law provides, "The physician's common law duty to determine that the physician's patient's consent is voluntary and uncoerced and informed applies to all abortion procedures." S.D. Codified Laws § 34-23A-55. HB 1217's pregnancy help center provisions, which "require procedures designed to insure that a consent to an abortion is voluntary and uncoerced and informed, are an express clarification of, and are in addition to, those common law duties." *Id*.

Informed consent "is a process by which the treating health care provider discloses appropriate information to a competent patient so that the patient may make a voluntary choice to accept or refuse treatment." Cocanour, *supra*, at 993. South Dakota passed HB 1217 amidst findings that "In the overwhelming majority of cases [in South Dakota], abortion surgery and medical abortions are scheduled for a pregnant mother without the mother first meeting and consulting with a physician or establishing a traditional physician-patient relationship." S.D. Codified Laws § 34-23A-54(1). Similarly, abortions were:

> scheduled by someone other than a physician, without a medical or social assessment concerning the appropriateness of such a procedure or whether the pregnant mother's decision is truly voluntary, uncoerced, and informed, or whether there has been an adequate screening for a pregnant mother with regard to the risk factors that may cause complications if the abortion is performed.

Id. § 34-23A-54(2). South Dakota found "Such practices are contrary to the best interests of the pregnant mother and her child" and there was a need for remedial legislation. *Id*. § 34-23A-54(3). Accordingly, South Dakota enacted HB 1217 so that neutral third parties—state-approved registered pregnancy help centers—would provide "counseling, education, and assistance" to pregnant mothers considering abortion. *Id*. § 34-23A-54(4). This law furthered the state's interest in protecting maternal health and promoting a "mother's fundamental interest in her relationship with her child over the irrevocable method of termination of that relationship by induced abortion." *Id*. § 34-23-A-54(3), (5).

Again, "*Roe v. Wade* . . . sets forth [the Supreme Court's] conclusion that a pregnant woman does not have an absolute constitutional right to an abortion on her demand." *Doe v. Bolton*, 410 U.S. 179, 190 (1973). Abortion procedures and prescriptions still require a woman's informed consent and States may pass legislation ensuring a woman's abortion decision "is thoughtful and informed." *Casey*, 505 U.S. at 872. Induced abortions require informed consent, but South Dakota's abortion industry has inadequately facilitated this crucial step. HB 1217 is reasonably related to ensuring a woman's informed consent, which is required regardless of HB 1217, for an induced abortion.

2. Domestic Violence Is a Pressing Concern for Pregnant Women Considering Abortion.

The district court further speculates that "[a] pregnancy help center counselor enters an interview with a pregnant woman under the paternalistic assumption that the woman has not decided to seek an abortion of her own volition, but rather because she is unable to make a decision on her own and is subject to societal pressures." *Noem* 2021 Order, slip op. at 22. This assertion overlooks the domestic violence crisis in the United States.

Intimate partner violence ["IPV"] and reproductive control can be serious domestic violence concerns for women seeking an abortion. IPV includes physical violence, sexual violence, stalking, and psychological aggression by a current or former intimate partner. *Preventing Intimate Partner Violence*, Ctrs. for Disease Control and Prevention (Nov. 2, 2021), https://www.cdc.gov/violenceprevention/intimatepartnerviolence/fastfact.html. The Centers for Disease Control and Prevention (CDC) notes that "IPV is a significant public health issue that has many individual and societal costs." *Id*. IPV may produce chronic health conditions affecting survivors' heart, digestive, reproductive, musculoskeletal, and nervous systems. *Id*. IPV survivors may experience depression and post-traumatic stress disorder. Survivors are also at higher risk for engaging in health risk behaviors, such as smoking, binge drinking, and sexual risk behaviors. *Id*. The CDC estimates the lifetime medical, lost work productivity, and criminal

justice costs of IPV are $3.6 trillion. *Id*. The lifetime cost for a female IPV victim is $103,767. *Id*. Thus, there are steep individual and societal costs for IPV.

Unfortunately, IPV is common. *Id*. One in four women have experienced IPV, *id*. and nearly one in five women have experienced severe physical violence by an intimate partner. *Id*. "Unintended" pregnancy, which may be a reason to seek an abortion, raises the risk of IPV. Women with unintended pregnancies are four times as likely to experience IPV as women with intended pregnancies. Comm. on Health Care for Underserved Women, *Reproductive and Sexual Coercion*, Comm. Op. No. 554, at 2 (Feb. 2013) (internal citation omitted). Notably, irrespective of abortion, half of all pregnancies are characterized as "unintended." Comm. on Gynecologic Practice Long-Acting Reversible Contraception Working Grp., *Increasing Access to Contraceptive Implants and Intrauterine Devices to Reduce Unintended Pregnancy*, Comm. Op. No. 645, at 1 (reaffirmed 2018).

Abortion also increases the risk of IPV. There are "[h]igh rates of physical, sexual, and emotional IPV . . . among women seeking a[n abortion]." Megan Hall et al., *Associations Between Intimate Partner Violence and Termination of Pregnancy: A Systematic Review and Meta-Analysis*, 11 PLOS Med. 1, 15 (Jan. 2014). For women seeking abortion, the prevalence of IPV is nearly three times greater than women continuing a pregnancy. *Reproductive and Sexual Coercion*, *supra*, at 2. Post-abortive IPV victims also have a "significant association" with "psychosocial

problems including depression, suicidal ideation, stress, and disturbing thoughts." Hall, *supra*, at 11.

Notably, a survey in the *American Journal of Public Health* indicated IPV perpetrators are more likely than non-abusive men to be involved in a pregnancy that ended in abortion. Jay G. Silverman et al., *Male Perpetration of Intimate Partner Violence and Involvement in Abortions and Abortion-Related Conflict*, 100 Am. J. Pub. Health 1415, 1416 (Aug. 2010). Similarly, in the survey, IPV conflicts often occurred over a female partner's decision of whether to seek an abortion or carry her pregnancy to term, regardless of whether the woman ultimately obtained an abortion. *Id*. Intimate partner violence is thus a grave concern for women seeking abortion.

Reproductive control, which overlaps IPV, also is a public policy concern for women seeking abortion. Reproductive control describes "actions that interfere with a woman's reproductive intentions." Sam Rowlands & Susan Walker, *Reproductive Control by Others: Means, Perpetrators and Effects*, 45 BMJ Sexual & Reprod. Health 61, 62 (2019). Reproductive control occurs over "decisions around whether or not to start, continue or terminate a pregnancy, including deployment of contraception, and may be exercised at various times in relation to intercourse, conception, gestation and delivery." *Id.* Reproductive control includes intimate partners, family members, and sex traffickers asserting control over a woman's reproductive decisions. *Id*. at 65. Thus, in the context of abortion, reproductive

control not only produces coerced abortions or continued pregnancies, but it also affects whether the pregnancy was intended in the first place. *Id*. at 62–63.

Reproductive control is a prevalent issue for women. "As many as one-quarter of women of reproductive age attending for sexual and reproductive health services give a history of ever having suffered [reproductive control]." *Id*. at 62. In the United States, African American and multiracial women disproportionately experience reproductive control. Charvonne N. Holliday et al., *Racial/Ethnic Differences in Women's Experiences of Reproductive Coercion, Intimate Partner Violence, and Unintended Pregnancy*, 26 J. Women's Health 828 (2017). Younger women also are more at risk for reproductive control. Elizabeth Miller et al., *Recent Reproductive Coercion and Unintended Pregnancy Among Female Family Planning Clients*, 89 Contraception 122 (2014). Coerced abortion particularly is a problem for victims, including minors, of sex trafficking in the United States. Rowlands, *supra*, at 64.

The CDC "recognizes[s] the importance of universal prevention education, screening, and intervention for IPV, reproductive coercion, and other behavioral risks." *Preventing Intimate Partner Violence Across the Lifespan: A Technical Package of Programs, Policies, and Practices*, Ctrs. for Disease Control and Prevention 38 (2017), https://www.cdc.gov/violenceprevention/pdf/ipv-technicalpackages.pdf. IPV screening should occur periodically and "at various times . . . because some women do not disclose abuse the first time they are asked."

Comm. on Health Care for Underserved Women, *Intimate Partner Violence*, Comm. Op. No. 518, at 3 (Feb. 2012).

> Universal prevention education, screening, and intervention may occur in health care settings but may also be considered in the context of other intervention or program models. Intervention services may include counseling, health promotion, patient education resources, referrals to community services and other supports tailored to a patient's specific risks.

Preventing Intimate Partner Violence Across the Lifespan, *supra*, at 38. Pregnancy help centers are an ideal location for domestic violence screening and intervention.

In South Dakota, pregnancy help centers "have as their central mission providing counseling, education, and other assistance to pregnant mothers to help them maintain and keep their relationship with their unborn children." S.D. Codified Laws § 34-23A-54(4). Conversely, abortion providers schedule abortions "without the mother first meeting and consulting with a physician or establishing a traditional physician-patient relationship." *Id*. § 34-23A-54(1). Non-physicians often schedule abortions and do not screen the woman for risk factors, assess whether an abortion is appropriate, or determine "whether the pregnant mother's decision is truly voluntary, uncoerced, and informed." *Id*. § 34-23A-54(2).

Women seeking abortion are susceptible to domestic violence in the forms of IPV and reproductive control. In turn, IPV and reproductive control may impair a woman's ability to genuinely consent to an abortion. HB 1217 addresses the inadequate informed consent procedures existing in the South Dakota abortion

industry. Accordingly, HB 1217 is reasonably related to its goal of ensuring women's informed consent is voluntary and uncoerced.

B. HB 1217 Passes Constitutional Muster Under *Casey*'s Undue Burden Standard, Which Recognizes State Laws May Ensure Women's Informed Consent for Abortion Procedures.

Under the second step of *Casey*'s undue burden test, a court must determine "whether a law has the 'effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.'" 140 S. Ct. at 2138 (Roberts, C.J., concurring in the judgment) (citing *Casey*, 505 U.S. at 877).

Casey's undue burden test is awkward and obsolete, and the Supreme Court is currently reconsidering it in *Dobbs v. Jackson Women's Health Organization*. No. 19-1392 (*cert. granted* May 17, 2021). The undue burden standard is conclusory, as "[a] finding of an undue burden is a *shorthand for the conclusion* that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 505 U.S. at 877 (emphasis added). The test fosters confusion, because "defining an 'undue burden' as an 'undue hindrance' (or a 'substantial obstacle') hardly 'clarifies' the test." *Id*. at 987 (Scalia, J., dissenting in part). Ultimately, *Casey*'s undue burden standard is a "verbal shell game [that] conceal[s] raw judicial policy choices concerning what is 'appropriate' abortion legislation." *Id*. Despite the undue burden standard's issues, HB 1217 nevertheless is constitutional under the test.

Under *Casey*, "A particular burden is not, of necessity, a substantial obstacle." *Id.* at 887 (plurality opinion). "As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion." *Id*. at 879. States also "may take measures to ensure that the woman's choice is informed. Measures designed to advance [the State's interest in preborn life] should not be invalidated if their purpose is to persuade the woman to choose childbirth over abortion." *Id*. "Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage [the woman] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term." *Id*. at 872. It is only "Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion [that] impose an undue burden on the right." *Id*. at 879.

The district court determined HB 1217 likely posed an undue burden to women seeking abortion in South Dakota. *Noem* 2021 Order, slip op. at 28. The district court particularly was concerned with the pregnancy help center's supposed "hostile environment" and ideological opposition to abortion, the lack of privacy and security protections for patient data, the lengthier counseling, and the delay in obtaining an abortion which would result from following HB 1217's provisions. *Id*. at 22–27.

Even without HB 1217, informed consent is a prerequisite to any induced abortion. *See* S.D. Codified Laws § 34-23A-55 (noting HB 1217's provisions are "an express clarification of, and are in addition to, [a physician's] common law duties" to ensure a "patient's consent is voluntary and uncoerced and informed"). "Even the broadest reading of *Roe*, however, has not suggested that there is a constitutional right to abortion on demand. . . . Rather, the right protected by *Roe* is a right to decide to terminate a pregnancy free of undue interference by the State." *Casey*, 505 U.S. at 887 (internal citation omitted). Similarly, "What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so." *Id*. at 877. In other words, although the Supreme Court has recognized a woman's constitutional right to decide to terminate her pregnancy, this recognition does not abrogate informed consent. Women still must give informed consent to obtain an induced abortion. Yet, the state legislature found the South Dakota abortion industry had inadequate safeguards for ensuring women's informed consent. S.D. Codified Laws § 34-23A-54.

As discussed above, women have not, and cannot, conclusively decide on obtaining an induced abortion until they have given their informed consent. *See* Cocanour, *supra*, at 993. Likewise, most women ultimately will choose childbirth over abortion. Jones & Jerman, *supra*, at 1904. Accordingly, most women may be

receptive to the pregnancy help center's neutral counseling. They are not entering a "hostile environment."

The district court also found that "[t]he lack of privacy and security protections at pregnancy help centers places an undue burden on a woman who wishes to have an abortion." *Noem* 2021 Order, slip op. at 25. While HB 1217 makes it a Class 2 misdemeanor to "knowingly and intentionally release[] any information obtained during any consultations," the district court claims the law "does not protect pregnant women from negligent or unintentional disclosures." *Id*.; S.D. Codified Laws § 34-23A-59.2 (2012). In this manner, the district court determined HB 1217 poses an undue burden, because "[a] pregnant woman might reasonably be concerned that, without laws in place to encourage strong data security, a pregnancy help center may be prone to inadvertent disclosures of her sensitive information and vulnerable to data breaches." *Noem* 2021 Order, slip op. at 25.

The district court overlooks the common law tort of negligence. Here, South Dakota partially has abrogated the common law tort of negligence for medical data breaches by pregnancy help centers. S.D. Codified Laws § 34-23A-59.2 (2012). HB 1217 provides criminal penalties for "Any person who knowingly and intentionally releases any information obtained during any consultations . . . under circumstances not in accord with the confidentiality provisions required by [this law]." *Id*. Yet, South Dakota has not codified, let alone abrogated, the common law negligence

cause of action for inadvertent data breaches of medical information by a pregnancy help center. *See id*.

Although voluntarily self-imposed, intervenor-appellant Alpha Center has assumed a HIPAA-level standard of care towards women seeking abortion in South Dakota. *Noem* 2021 Order, slip op. at 24. If Alpha Center breaches this duty, an impacted woman may bring a common law negligence lawsuit for any inadvertent data breaches by the pregnancy help center. *See Fischer Sand & Gravel Co. v. State By & Through South Dakota DOT*, 558 N.W.2d 864, 867 (S.D. 1997) ("In order to prevail in a suit based on negligence, a plaintiff must prove duty, breach of that duty, proximate and factual causation, and actual injury."). This HIPAA-level standard of care renders the pregnancy help center potentially liable to a common law negligence lawsuit for inadvertent disclosures. Even if privacy concerns about HB 1217 were to pose an obstacle to women seeking abortion in South Dakota, they are redressable, and do not rise to the level of a substantial obstacle.

The district court also found that HB 1217's additional counseling requirements and possible delay of the abortion procedure posed an undue burden. *Noem* 2021 Order, slip op. at 25-27. As the Supreme Court stated in *Casey*,

> Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.

505 U.S. at 874. Here, South Dakota found the state abortion industry had questionable informed consent practices. S.D. Codified Laws § 34-23A-54. Informed consent is a prerequisite of any medical procedure. With abortion, informed consent is especially important because "[t]he decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences." *Planned Parenthood of Mo. v. Danforth*, 428 U.S. 52, 67 (1976).

Even if the informed consent counseling delayed an abortion procedure, this delay would not present a substantial obstacle to obtaining the abortion. South Dakota limits abortions after twenty-two weeks gestation to cases of medical emergency. S.D. Codified Laws § 34-23A-5 (2016). In 2020, only 11.3% of women who underwent an abortion in South Dakota sought an abortion at thirteen or more weeks gestation. *South Dakota 2020 Report of Induced Abortions*, at 8 (June 29, 2021). Stated in a different manner, 88.7% of women who sought and obtained an abortion in South Dakota had more than nine weeks to seek informed consent counseling from a pregnancy help center before they reached the twenty-two-week gestational cut-off. *Id*. Accordingly, even if the counseling delayed an abortion procedure, it likely would not preclude an abortion altogether or present a substantial obstacle to women seeking abortion in South Dakota.

In sum, HB 1217 is reasonably related to furthering South Dakota's interests in informed consent and domestic violence prevention. Abortion providers already have a common law duty to obtain informed consent before an abortion procedure. HB 1217 merely clarifies and adds to these existing common law duties, and its provisions do not create an undue burden.

CONCLUSION

Under Chief Justice Roberts' controlling interpretation of *Casey*'s undue burden standard, HB 1217 does not pose an undue burden to women seeking abortion in South Dakota. *Amicus curiae* respectfully urges the Court to reverse the district court and vacate what remains of the temporary injunction.

Respectfully submitted,

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CERTFICATE OF SERVICE

I certify that on December 10, 2021, I electronically filed the foregoing brief with the Clerk of Court throughout the CM/ECF system, which shall send notification of such filing to any CM/ECF participants.

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