14-2128

IN THE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

MKB MANAGEMENT CORP., d/b/a RED RIVER WOMEN'S CLINIC, and KATHRYN L. EGGLESTON, M.D.,

Plaintiffs-Appellees,

—v.—

WAYNE STENEHJEM, In his Official Capacity as Attorney General for the State of North Dakota, et al.,

Defendants-Appellants,

BIRCH BURDICK, In his Official Capacity as State Attorney for Cass County,

Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
HONORABLE DANIEL L. HOVLAND

BRIEF OF *AMICUS CURIAE* PROGRAM FOR THE STUDY OF REPRODUCTIVE JUSTICE—INFORMATION SOCIETY PROJECT AT THE YALE LAW SCHOOL

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INTEREST OF AMICUS CURIAE[1]

Amicus is the Program for the Study of Reproductive Justice in the Information Society Project[2] at Yale Law School.[3] The Program for the Study of Reproductive Justice ("PSRJ"), serves as a national center for academic research and development of new ideas to promote justice with respect to reproductive health issues. PSRJ focuses on a wide range of issues concerning the intersections between reproductive rights, constitutional law, health policy, technology policy, privacy concerns, and the regulation and dissemination of information relevant to reproductive freedoms. PSRJ has a special interest in the evolving nature of abortion jurisprudence and specifically its recognition of constitutional sex equality guarantees. Yale Law School faculty and fellows associated with PSRJ have

[1] The undersigned sought consent of the parties as required under F.R.A.P. 29. Plaintiffs counsel granted consent, but counsel for the State has refused consent to the filing of this brief. Accordingly, this brief is accompanied by a motion to file an amicus brief. No counsel for a party authored the brief in whole or in part; no party or party's counsel contributed money to fund preparing or submitting the brief; and no person other than the amici curiae or their counsel contributed money intended to fund preparing or submitting the brief.

[2] The Information Society Project studies the implications of new information technologies for law and society, guided by the values of democracy, human development, and social justice.

[3] This brief has been prepared and joined by a Program affiliated with Yale Law School, but does not purport to present Yale Law School's institutional views, if any.

published numerous articles on these topics and other associated constitutional law issues.

SUMMARY OF ARGUMENT

One of North Dakota's primary arguments in support of House Bill 1456 (H.B. 1456 or the "Abortion Ban"), which prohibits abortions starting at approximately 6 weeks of pregnancy, is that the Ban is necessary to protect women's health. Despite overwhelming medical evidence to the contrary, North Dakota asserts that abortions subject women to a number of physical and emotional harms. As amici outline below, both these "women-protective antiabortion arguments" rest on stereotypes about women's capacity and proper roles in public and private life.

For centuries, government enforced different roles for men and women in the public sphere and in private life, but today we understand such laws to violate principles of equal citizenship. North Dakota's reliance in this case to support its Abortion Ban on a Legislative Task Force report written in support of a 1996 South Dakota abortion ban, as well as the arguments made in its briefs and by its experts, make clear the understandings of women's nature and roles upon which its abortion ban is based, and which it is designed to promote. While the ban differs in structure from the laws struck down in many of the classic equal protection

sex discrimination cases, it violates the sex equality guarantees of the Equal Protection Clause because it reflects and enforces many of the same gender stereotypes. Moreover, it violates the Court's demand in its substantive due process cases that the liberty right must be available equally to all and that restrictions on abortion cannot be based on outmoded notions of women's roles.

Although North Dakota's Abortion Ban also violates clearly established Supreme Court precedent prohibiting undue burdens on abortion, the Amicus Program for the Study of Reproductive Justice in the ISP at Yale Law School submits this brief to address these important sex equality principles that are also at stake in this case. Amicus reviews the constitutional jurisprudence that bars state action enforcing sex-specific family roles, both the equal protection as well as substantive due process liberty cases, and explaining how these cases constrain the regulation of abortion. Amicus shows that in the past abortion legislation reflected judgments about women as well as the unborn, and that understandings of women on which nineteenth-century abortion law rested violate the United States Constitution as we understand it today. As were the nineteenth century bans on abortion, North Dakota's Abortion Ban is concerned with regulating pregnant women, as well as the potential life they bear, in

violation of constitutional sex equality principles based in both the equal protection clause and due process liberty jurisprudence.

ARGUMENT

I. LAWS ENACTED IN NINETEENTH CENTURY TO CRIMINALIZE ABORTION IN THE UNITED STATES WERE DESIGNED IN LARGE PART TO ENFORCE THE IDEA THAT WOMAN'S PROPER ROLE WAS AS WIFE AND MOTHER.

It is well documented by historians that at common law, abortions were legal until "quickening," a pregnant woman's first perception of fetal movement.[4] In the mid-nineteenth century, physicians associated with the newly formed American Medical Association began a campaign to criminalize abortions. They argued that the new laws were justified to protect human life from the moment of conception, and to ensure that women performed their proper roles as wives and mothers. Thus, the new criminal abortion laws enacted starting in the 1860s were adopted as caste legislation, for the purpose of enforcing gender-specific family roles.[5]

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[4] Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 UNIV. ILL. L. REV. 991, 1000 n.30 ("*New Politics*") (citing *inter alia*, William Blackstone, 1 COMMENTARIES *129-30; Linda Gordon, THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA (2002); James C. Mohr, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900 (1978)).

[5] Siegel, *New Politics*, 2007 UNIV. ILL. L. REV. at 1002.

For example, while condemning abortion as feticide, these doctors also condemned abortion, claiming, for example 1) that a woman had a duty to procreate that was dictated by her anatomy,[6] 2) that women who shirked their duty to bear children committed "physiological sin,"[7] 3) that bearing children was "often absolutely necessary to the physical and moral health of woman,"[8] and 4) that preventing and terminating pregnancy are "alike disastrous to a woman's mental, moral, and physical wellbeing."[9] These physicians blamed "women's rights," including the call for women's suffrage, for creating "new ideas of women's duties," resulting in childless couples and the shirking, neglect or criminal prevention of "duties necessary to women's physical organization."[10]

II. NORTH DAKOTA'S JUSTIFICATIONS FOR THE 2013 ABORTION BAN REST ON STEREOTYPES OF WOMEN REMINISCENT OF THE RATIONALES FOR BANS ON ABORTION ADVANCED IN THE NINETEENTH CENTURY.

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[6] *Id.* at 1000-1002.

[7] *Id.* at 1001 & n.33 (quoting Hiram S. Pomeroy, THE ETHICS OF MARRIAGE 97 (1888)).

[8] *Id.* at 1001 & n. 34 (quoting Edwin M. Hale, THE GREAT CRIME OF THE NINETEEN CENTURY 6 (C.S. Halsey ed., 1867).

[9] Id. & n.35 (quoting Horatio Robinson Storer, WHY NOT? A BOOK FOR EVERY WOMAN 31 (1866) and Storer, WHY NOT? A BOOK FOR EVERY MAN 115-116 (referring to married woman's duty to bear a child as a duty owed to the community and the best mean sof insuring her health)).

[10] Id. at 1002 & n. 38 (citing Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 303-04 (1992) (quoting paper read before the Missouri State Medical Association in April 1868)).

North Dakota's rationales for the ban similarly rest on stereotypes about women's capacity and "proper" roles in public and family life, specifically relying, like their 19th century counterparts, on women's physiological need to have children, indeed to carry *every* pregnancy to term, in order to live a healthy and emotionally fulfilling life. In defending the Ban, North Dakota claims that it is furthering its interest in women's health, arguing in spite of overwhelming medical evidence to the contrary, that abortions subject women to physical and emotional harms. They make these claims that, for example, abortion causes breast cancer, infertility or other problems in future pregnancies, and increased risk of suicide or suicidal ideation, even though they have been disproven time and again by exhaustive medical studies.[11] This use of "women-protective" antiabortion argument to defend

[11] *Refuting the claim that abortion increases a woman's risk of breast cancer, see generally Fact Sheet: Abortion, Miscarriage, and Breast Cancer Risk*, NAT'L CANCER INST. (last updated Jan. 12, 2010), http://www.cancer.gov/cancertopics/factsheet/Risk/abortion-miscarriage (last visited Feb. 4, 2014) (reporting that "[i]n February 2003, the National Cancer Institute (NCI) convened a workshop of over 100 of the world's leading experts who study pregnancy and breast cancer risk. . . . [and] [t]hey concluded that having an abortion or miscarriage does not increase a woman's subsequent risk of developing breast cancer"). *Refuting the claim that abortion increases the risk of metal health problems, see* AM. PSYCHOLOGICAL ASS'N, REPORT OF THE APA TASK FORCE ON MENTAL HEALTH AND ABORTION 6 (2008), http://www.apa.org/pi/women/programs/abortion/mental-health.pdf (noting that evidence indicates that the relative risk of mental health problems due to an abortion is similar to the

the law is part of a nationwide shift in strategy from fetal-focused justifications to gender-based justifications for abortion regulation which first developed in the 1980s. [12]

It is unsurprising that the claims are untrue because they are in fact at heart dependent on a view of women's "nature" reminiscent of 19th century views, views that women and men have worked tirelessly all over the Globe to debunk, that is, that biology is destiny, and specifically, that a woman can only be truly fulfilled in her role as mother. [13] Indeed, as the State's declarants openly state, the State's argument for protecting women against abortion turns on a claim about women's nature. Women who have

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risk associated with an unplanned pregnancy but that risk increases in certain circumstances); *see also* Gonzales v. Carhart, 550 U.S. 124, 183 n.7 (2007) (Ginsburg, J., dissenting) (listing studies in support of the proposition that the weight of scientific evidence does not comport "with the idea that having an abortion is any more dangerous to a woman's long-term mental health than delivering and parenting a child that she did not intend to have"). *See also* Caroline Corbin, *Abortion Distortions*, 71 WASH. & LEE L. REV. 1175 (2014) (discussing the "abortion syndrome that wasn't there").

[12] For a detailed history of these arguments, their development and evolving use in abortion cases, *see generally* Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008) ("*The Right's Reasons*"); Reva Siegel, *New Politics*, 2007 U. ILL. LAW REV. 991 (2007).

[13] In fact, the claim goes even further as it must if it is being used to support a ban on abortion, because approximately 6 in 10 women obtaining abortions are already parenting 1 or more children. *See* Jones RK and Kavanaugh ML, *Changes in abortion rates between 2000 and 2008 and lifetime incidence of abortion*, 117 OBSTETRICS & GYNECOLOGY 1358 (2011). Defendant claims that women are harmed emotionally and physically unless they carry *each and every* pregnancy to term.

abortions are mistaken or misled or coerced or pressured into decisions they do not want to make and should not make because abortion violates women's nature as mothers. Defendant's App. Br. at 24-26. To support its views, Defendants also rely on a Legislative Task Force Report issued to accompany enactment of a South Dakota law banning abortions.[14] That report describes the State's point of view as follows:

> [T]his method of waiver of the mother's rights expects far too much of the mother. It is so far outside the normal conduct of a mother to implicate herself in the killing of her own child. Either the abortion provider must deceive the mother into thinking the unborn child does not yet exist, and thereby induce her consent without being informed, or the abortion provider must encourage her to defy her very nature as a mother to protect her child. Either way, this method of waiver denigrates her rights to reach a decision for herself.[15]

This type of argument, rests on stereotypes about women's capacity and family roles, specifically that women are too weak or confused to be responsible for a decision to end a pregnancy, and that they can only be truly fulfilled if they become mothers every time they become pregnant, because of the "mother's intrinsic natural right" to what the Task Force Report refers

[14] Def.'s Opp. To Preliminary Injunction at 7 (filed July 19, 2013) (relying on Report of the South Dakota Task Force Report to Study Abortion as "confirm[ing] the negative effects of abortion.").

[15] South Dakota Task Force Report to Study Abortion (Dec. 2005) (appended as Exh. H to Def's Opp. To Preliminary Injunction) at 56 (JA 181).

to as "the mother's fundamental right to a relationship with her child."[16] The State must step in, under this view, to ban abortions to protect women from choices they would make that violate their "true nature," that is motherhood.[17]

III. LAWS THAT REINFORCE GENDER STEREOTYPES, LIKE THE ABORTION BAN, ARE IMPERMISSIBLE UNDER CONSTITUTIONAL SEX EQUALITY GUARANTEES.

A. THE EQUAL PROTECTION CLAUSE PROHIBITS LAWS LIKE THE ABORTION BAN, BECAUSE A MOTIVATING FACTOR FOR THE LAW'S ENACTMENT WAS TO REINFORCE STEREOTYPES ABOUT WOMEN'S ROLES IN PUBLIC AND PRIVATE LIFE.

As the Plaintiffs argue, the ban on previability abortions also violates constitutional guarantees of sex equality protected by the Equal Protection Clause under a long line of Supreme Court precedent from *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973)[18] to *United States v. Virginia*, 518 U.S. 515, 531 (1996) (hereinafter *VMI*) and *Nev. Dept. of Human Resources v. Hibbs*, (hereinafter "*Hibbs*") 538 U.S. 721, 729 (2003). The Ban violates the Equal Protection Clause because a motivating factor in enacting the ban, as the State itself proudly asserts, was to reinforce stereotypes of women's abilities and place in society, the idea that women will only live healthy and

[16] *Id.* at 55-56 (JA 180-81).
[17] Siegel, The Right's Reasons, 57 Duke L.J. at 1688.
[18] *See also Reed v. Reed*, 404 U.S. 71, 75 (1971) (a statute that "provides that different treatment be accorded . . . on the basis of . . . sex . . . establishes a classification subject to scrutiny under the Equal Protection Clause").

fulfilling lives if they carry each and every pregnancy to term. The law precludes only women, but not men, from making an important medical decision vital to their ability to determine the course of their lives, depriving them of equal citizenship status.

As the Supreme Court has held, "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action." *VMI*, 518 U.S. at 531 (1996). "The burden of justification is demanding and it rests entirely on the State." *Id.* at 533 (citing *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982)). The State must show "at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." *Id.* at 533 (internal quotation marks and citations omitted). Moreover, justification for a law "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Id.* (citing *Califano v. Goldfarb*, 430 U.S. 199, 223-24 (1977) (Stevens, J., concurring); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643, 648 (1975).

The State opposes the Equal Protection claim with the argument that "the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." N.D.'s 8th Cir.

Br. at 49. But this misses the point. As the Court made clear in *VMI*, differences that do exist between the sexes, such as differences in reproductive functions, cannot be used to justify "denigration of the members of either sex or for artificial constraints on an individual's opportunity." *VMI*, 518 U.S. at 533; *see also* N.D. App. Br. At 50 (noting that Supreme Court has held that the "legislature may not 'make overbroad generalizations based on sex . . . which demean the ability or social status of the affected class.'") (internal citations omitted). As the Court wrote, "[s]ex classifications may be used to compensate women 'for particular [harms they have] suffered, [and] to promot[e] equal[ity]," *id.* but can no longer be used "to create or perpetuate the legal social, and economic inferiority of women." *Id.* at 534. Gender-based classifications, such as laws regulating pregnancy, are subject to heightened scrutiny:

> in recognition of 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, or based on outdated misconceptions concerning the role of females in the home rather than in the marketplace and world of ideas.

J.E.B. v. Alabama, 511 U.S. 127, 130 (1994) (internal quotation marks and citations omitted). *See also VMI*, 518 U.S. at 531 ("Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history. . . . '[O]ur Nation has had a long and

unfortunate history of sex discrimination.") (quoting *Frontiero*, 411 U.S. at 684).[19]

Under this framework, laws regulating pregnancy are unconstitutional under *Washington v. Davis* and *Personnel Administrator of Massachusetts v. Feeney*, if the plaintiff can show that the statute was adopted with a discriminatory purpose: at least in part because of and not despite its impact on women. The unconstitutional purpose need not be the sole purpose for the law's enactment. To demonstrate the law's unconstitutionality, cases like *Village of Arlington Heights v. Metropolitan Housing Development Corp.* teach, the plaintiff would have to demonstrate that an unconstitutional purpose was a "motivating factor" in the law's enactment.[20]

Thus, the State's justification for the gender-based statute in this case "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *VMI*, 518 U.S. at 533 (citations omitted). "If the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an

[19] *See e.g.*, Decl. of Linda K., Ph.D., attached as Exh. 4 to Pls.' Mot. for Summ. J. ("Kerber Decl.") at ¶¶ 6, 8, 11, 13, 16-19, 21-22, 26-27 (JA 227, 228, 229, 231-33, 234-35).

[20] 429 U.S. 252, 265-66 (1977) ("[*Washington v.*] *Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. . . . When there is a proof that a discriminatory purpose has been a motivating factor in the decision, . . . judicial deference is no longer required.")

inherent handicap or to be innately inferior, the objective itself is illegitimate." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) (citing *Frontiero*, 411 U.S. at 684-85 (noting that traditionally, discrimination against women "was rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage")). Review of assumptions based on stereotypes is not limited to the State's justification, but also requires the court to analyze if there is a substantial fit between *means* and ends. *See id.*, 482 U.S. at 725-26 ("[t]he purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women").

Applying heightened scrutiny, the Supreme Court has invalidated both state and federal statutes that burdened one sex and that relied on and reinforced gender stereotypes about women's role in society. For example, in *Wiesenfeld*, 420 U.S. 636, the Court held that a provision of the Social Security Act providing spousal survivor benefits to women but not to men was invalid. According to the Court, an "archaic and overbroad generalization not tolerated under the Constitution underlies the distinction drawn by [the challenged provision], namely, that male workers' earnings

are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support." *Id.* at 643 (internal quotation marks and citation omitted). In *Orr v. Orr*, the Court invalidated Alabama's alimony statutes, which provided that husbands, but not wives, may be required to pay alimony upon divorce, noting that "[l]egislative classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing the stereotypes about the 'proper place' of women and their need for special protection." 440 U.S. 268, 283 (1979) (citation omitted). In *Califano v. Westcott*, the Court concluded that provision of benefits under the Aid to Families with Dependent Children program to children deprived of parental support because of an unemployed father but not an unemployed mother, was not substantially related to an important government interest, but rather, was "part of the baggage of sexual stereotypes that presumes the father has the primary responsibility to provide a home and its essentials." 443 U.S. 76, 89 (1979) (internal quotation marks and citations omitted). *See also J.E.B.*, 511 U.S. at 137-38 (Alabama's justification for gender-based peremptory challenges in trials – which was that men and women react differently to the accused in a paternity and child support suit - was based on "outmoded notions of the relative capabilities of men and women") (citation omitted).

Finally, in *VMI*, 518 U.S. at 541-42, the Court held that the males-only admission policy of Virginia's public military college violated the Equal Protection Clause, and the State's proffered justification that women are ill-suited to the college's adversarial method of training was based on overbroad generalizations.

It is true, as Defendant points out, N.D. Br. At 30, that the Supreme Court has not relied on the equal protection clause to strike down an abortion regulation. Judicial review of abortion regulations has been concentrated within the due process liberty jurisprudence applied in *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). Yet, the Court has never precluded the use of the Equal Protection Clause in this context, nor had the opportunity to address an equal protection sex equality claim in this context. As the Plaintiffs explain, Pls' Br. at 33-34, and Defendants appear to concede, *Geduldig v. Aiello*, 417 U.S. 484 (1974), decided at the dawn of the Court's modern substantive due process jurisprudence, does not preclude the plaintiff's claim that the law violates sex equality guarantees. It merely held that government regulation of pregnancy does not *always* qualify as a sex qualification, *but could*. *Id.* at 496-97 n. 20 (acknowledging that "distinctions involving pregnancy" might

inflict "an invidious discrimination against the members of one sex or the other.").[21]

Indeed, since the mid-1970s, American society has grown to recognize the forms of sex discrimination directed at pregnant women. When the Court first interpreted federal employment discrimination law on the premise that pregnancy discrimination is not sex discrimination, Congress objected and enacted the Pregnancy Discrimination Amendment ("PDA") to Title VII.[22] Recently, the Court drew upon the understandings forged in nearly three decades of PDA litigation when Chief Justice Rehnquist held in *Nevada Department of Human Resources v. Hibbs*,[23] that the Family and Medical Leave Act ("FMLA") was a valid exercise of Congress's power to enforce the Fourteenth Amendment because the FMLA deterred and remedied sex stereotyping in the treatment of new mothers and mothers-to-be in the workplace. As the Court noted, Congress determined that:

Historically, denial or curtailment of women's employment

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[21] *See also* Neil S. Siegel, Reva B. Siegel, *Equality Arguments for Abortion Rights*, 60 UCLA L. Rev. Disc. 160, 167 (2013) ("*Equality Arguments*"); Neil S. Siegel & Reva B. Siegel, *and Sex Role Stereotyping: From* Struck *to* Carhart, 70 Ohio St. L. J. 1095, 1111-13 (2009); Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in* Hibbs, 58 Stan. L. Rev. 1871, 1891-97 (2006).

[22] Pregnancy Discrimination Act of 1978, 42 U.S.C. Sec. 2000e(k) (2006).

[23] 538 U.S. 721 (2003).

> opportunities has been traceable directly to the pervasive presumption that women are mothers first, and workers second. This prevailing ideology about women's roles has in turn justified discrimination against women when they are mothers or mothers-to-be.[24]

The Court continued:

> Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees.[25]

Hibbs, decided almost thirty years after *Geduldig*, after the risk of sex-role stereotyping and stereotyping around pregnancy was more fully developed in the Court's jurisprudence, provides context for the *Geduldig* decision, and an explanation of the circumstances where pregnancy regulations cross the line. After *Hibbs*, pregnancy classifications that rest on "the pervasive sex-role stereotype that caring for family members is women's work" are "gender-discriminatory" in violation of constitutional equal protection guarantees. *Hibbs*, 538 U.S. at 731. *Hibbs* thus makes clear that abortion restrictions that are based on or reinforce sex stereotypes

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[24] Id. at 736.

[25] Id. *See generally*, Reva B. Siegel, *"You've Come a Long Way, Baby,": Rehnquist's New Approach to Pregnancy Discrimination in Hibbs*, 58 Stan L. Rev. 1871 (2006).

are regulations of pregnancy that violate constitutional sex equality principles.

Equal Protection Case Law requires that "[t]he justification must be genuine, not hypothesized or invented *post hoc* in response to litigation." *Id.* (citations omitted). "[T]he mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Hogan*, 458 U.S. at 728 (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 (1975)). Thus, claiming a "woman-protective" rationale for the Abortion Ban, as the defendants do here, does not shield the law from the heightened scrutiny required under the Equal Protection Clause, nor protect the law from invalidation based on its reliance on impermissible stereotypes.

B. THE ABORTION BAN ALSO VIOLATES SEX EQUALITY PRINCIPLES GUARANTEED BY THE SUBSTANTIVE DUE PROCESS CLAUSES.

While Roe originally located the abortion right in the Due Process liberty clause,[26] the Court has since come to conceive of the right as

[26] *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding that the "right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

protecting women's equality as well as women's right to liberty.[27] The Court recognizes that equality arguments supporting the right to abortion are linked in a significant way to the liberty right, in much the way the Court recognizes an "equal right to liberty" at work in the gay rights cases.[28]

For example, the opinion in *Planned Parenthood v. Casey* is shaped to a substantial degree by equality values.[29] At the very moment in *Casey* when the court reaffirms constitutional protection for abortion rights, the Court explains that a pregnant woman's "suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our

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[27] *See, e.g.*, Siegel & Siegel, *Equality Arguments*, 60 UCLA L. REV. DISC. at 164-65.

[28] For example, in *Lawrence v. Texas*, the Court wrote that "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. 539 U.S. 558, 575 (2003). *See also United States v. Windsor*, 133 S. Ct. 2675, 2695-96 (2013) (striking down the Defense of Marriage Act as a violation of the plaintiff's equal right to liberty).

[29] This view of linked equality and liberty concerns animating the right to abortion and enforced through the Due Process Clauses had been developing on the Court at least since the mid-1980s when Justice Blackmun wrote for the Court: "A woman's right to make that choice [to have an abortion] freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all." *Thornburg v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986) (emphasis added), overruled in part on other grounds by *Casey*, 505 U.S. at 870, 882-83 (overruling part of *Thornburgh* striking mandatory information requirements).

culture." *Id*. at 852. This emphasis on the role autonomy of the pregnant woman reflects the influence of the equal protection sex discrimination cases, which prohibit the government from enforcing stereotypical roles on women. Likewise, in the stare decisis passages of *Casey*, the Court emphasizes, as a reason to reaffirm Roe, that "[t]he ability of women to participate equally in the economics and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Id*. at 856. Here, as elsewhere in *Casey*, the Court is interpreting the Due Process Clause and drawing on equality values in order to make sense of the substance of the right.

This equality reasoning in *Casey* proves vital to the Court's ruling. Equality values help to identify the kinds of restrictions on abortion that are unconstitutional under *Casey's* undue burden test. As the joint opinion applies the test, abortion restrictions that deny women's equality impose an undue burden on women's fundamental right to decide whether to become a mother.[30] Accordingly, the *Casey* Court upheld a twenty-four hour waiting

[30] Justice Blackmun stressed this aspect of the decision in his *Casey* concurrence, forcefully declaring that abortion regulations implicate "constitutional guarantees of gender equality." Id. at 928 (Blackmun, J., concurring in part and dissenting in part). Abortion restrictions "compel women to continue pregnancies," "conscript[ ]" their bodies into the service of the state, "forc[e]" them to "suffer the pains of childbirth[,] and in most instances, provide years of maternal care." Id. Moreover, Blackmun saw the state's failure to compensate women for forced childbearing and caretaking as proof of the state's assumption that women "owe this duty as a matter of

period, but struck down a spousal notification provision that was eerily reminiscent of the common law's enforcement of a hierarchical relationship between husband and wife. Just as state's could no longer give a husband absolute dominion over his wife, as was the case under the now unconstitutional coverture laws, so too, "[a] State may not give to man the kind of dominion over his wife that parents exercise over their children." *Id*. at 898.

Most recently, Justice Ginsburg--joined by three other Justices--wrote in dissent in *Gonzales v. Carhart* that what is "at stake in cases challenging abortion restrictions is a woman's 'control over her [own] destiny."' [31] Notably, rather than citing to equal protection jurisprudence, Justice Ginsburg cited provisions in the due process liberty jurisprudence rejecting

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course." Id. He then connected the dots, tying these forms of state coercion and stereotyping to the equal protection cases, declaring "[t]his assumption--that women can simply be forced to accept the 'natural' status and incidents of motherhood--appears to rest upon a conception of women's role that has triggered the protection of the Equal Protection Clause." Id. at 928-29 (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724-26 (1982); *Craig v. Boren*, 429 U.S. 190, 198-99 (1976)); see also id. at 928 n.4. He also tied the plurality opinion's analysis to his own, highlighting the plurality's recognition that "these assumptions about women's place in society 'are no longer consistent with our understanding of the family, the individual, or the Constitution."' Id. at 928 (quoting *Casey* plurality opinion at 897).

[31] *Gonzales v. Carhar*t, 550 U.S. 124, 171 (2007) (Ginsburg, J., dissenting) (quoting *Casey*, 505 U.S. at 869).

stereotyping[32] and reaffirming women's right "to participate equally in the economic and social life of the Nation,"[33] a right that is "intimately connected to 'their ability to control their reproductive lives.'"[34] As a result she wrote: "[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."[35] *See also Tucson Women's Clinic v. Eden*, 379 F.3d 531, 548 (9th Cir. 2004) (*Hibbs* strongly supports plaintiffs' argument that singling out abortion in ways unrelated to the facts distinguishing abortion from other medical procedures is an unconstitutional form of discrimination on the basis of gender."); *Planned Parenthood v. Van Hollen,* 738 F.3d 786, 790 (7th Cir. 2013) (while evaluating substantive due process liberty challenge to state law requiring physicians performing abortions, but not physician performing other services, to obtain hospital admitting privileges, noting that an "issue of equal protection of the laws is lurking in this case."). Under *Casey*, a woman's right to liberty is violated when a law reinforces gender stereotypes or otherwise subordinates women, reinforcing their unequal status as citizens. A restriction that promotes

[32] Id. (citing *Casey*, 505 U.S. at 852, 896-97).
[33] *Casey*, 505 U.S. at 856.
[34] *Carhart*, 550 U.S. at 171 (quoting *Casey*, 505 U.S. at 856).
[35] *Id*. at 172 (internal citations omitted).

stereotyped views of women's roles, like the Abortion Ban at issue here, violates *Casey*, which prohibited such an unlawful purpose,[36] and therefore places an undue burden on the woman's equal right to liberty.

CONCLUSION

For the foregoing reasons, the Amicus respectfully requests that this Court affirm the district court's order granting summary judgment to Plaintiffs.

Respectfully submitted,

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[36] *Casey*, 505 U.S. at 898 (discussing spousal notice provision's unlawful purpose of "empower[ing the husband] with this troubling degree of authority over his wife . . . reminiscent of the common law . . . [and] embod[ying] a view of marriage consonant with the common-law status of married women but repugnant to our present understanding of marriage and of the nature of the rights secured by the Constitution."). *See also* Priscilla J. Smith, *If the Purpose Fits: the Two Functions of* Casey's *Purpose Inquiry*, 71 Wash. & Lee L. Rev. 1135, 1145-47 (2014) (discussing "smoking out" function of Casey's purpose inquiry).

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 5,657 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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The electronic files comprising this brief and filed with the Court have been scanned and are virus-free, as set forth in Eighth Circuit Rule 28A(h)(2).

Dated: August 13, 2014 /s/ Priscilla J. Smith

CERTIFICATE OF SERVICE

I, Priscilla J. Smith, do hereby certify that on August 13, 2014, I electronically submitted the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit via the CM/ECF system. I further certify that, once this brief has been accepted for filing by the Clerk, bound paper copies of this brief will be mailed, via Federal Express, to the Clerk of the Court, and to the following:

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