No. 04-1144

In the
Supreme Court of the United States

KELLY A. AYOTTE, Attorney General of the State of New Hampshire, in her Official Capacity,

Petitioner,

v.

PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND, *et al.,*

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF ORGANIZATIONS COMMITTED TO WOMEN'S EQUALITY AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

JENNIFER K. BROWN
Counsel of Record
GILLIAN L. THOMAS
LEGAL MOMENTUM
395 Hudson Street
New York, New York 10014
(212) 925-6635

Counsel for Amici Curiae

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae are organizations committed to attaining full legal and social equality for women. *Amici* agree with this Court that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Planned Parenthood v. Casey,* 505 U.S. 833, 856 (1992). *Amici* submit this brief to the Court to highlight the importance of the right to choose abortion to women's equality, and to demonstrate how abandonment of overbreadth doctrine in analyzing abortion restrictions would threaten that equality. The names and individual statements of interest of the *amici* are contained in the Appendix to this brief.[1]

SUMMARY OF ARGUMENT

Women's constitutional right to decide for themselves when and whether to have children is of central importance not only to their individual privacy interests, but also to their ability to achieve equality. Government restrictions on access to abortion that interfere with this right impose on women physical risks that they would otherwise avoid. Restricting women's choice in childbearing may impose a role of the State's choosing on women, a result contrary to this Court's disapproval of government action that enforces sex role stereotypes. Moreover, when the role that is imposed, that of motherhood, is unwanted, it may significantly inhibit women's ability to participate fully in civic life. Thus, invalidation of abortion restrictions that prevent women

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[1] The parties' letters consenting to the filing of this brief have been filed with the Clerk of the Court. Counsel for the *amici curiae* authored this brief in its entirety. No person or entity other than *amici* and their counsel made a monetary contribution to the preparation of this brief.

from exercising choice in childbearing is necessary to promote women's equality. (Point I, *infra*.)

In light of the privacy and equality interests that are at stake, this Court's application of overbreadth analysis to judge facial challenges to restrictions on the right to choose abortion is not only justified, but vital to avoid chilling its exercise. To abandon overbreadth review in favor of the standard drawn from *United States v. Salerno*, 481 U.S. 739 (1987), would be virtually to preclude facial challenges to even the broadest abortion restrictions. Permitting only as-applied challenges to such restrictions would severely chill women's exercise of their constitutional right to end a pregnancy. Just as overbreadth analysis protects the public good of free speech, so too does it protect the public good of women's equality from the corrosive impact that unrestrained legislative enactments against abortion would have. The *Salerno* standard, by contrast, would invite such enactments, casting women's constitutional right to choose and the interests it serves into a continuous state of insecurity. (Point II, *infra*.) *Amici* therefore urge this Court to uphold the decision below.

ARGUMENT

I. RESTRICTING THE RIGHT TO CHOOSE WHEN AND WHETHER TO HAVE CHILDREN IMPEDES WOMEN'S EQUALITY

"The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. [The State may not] insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role . . . ." *Casey*, 505 U.S. at 852. With these words, this Court recognized two central features of abortion restrictions. First, such restrictions may compel

women who wish to end their pregnancies to instead continue them and give birth, and thereby, to go through "sacrifice [and] suffering [that is] intimate and personal," at the State's behest. Second, such restrictions, when pressed upon unwilling women, inevitably enforce a State-mandated "vision of the woman's role," a vision in which motherhood effectively becomes a duty rather than a choice. As explained below, the ultimate impact of abortion restrictions that interfere with women's ability to control whether and when to have children is to impede women's equality.

A. Restricting Choice in Childbearing Requires Women to Endure the Physical Constraints and Risks of Pregnancy

When abortion restrictions require a woman to continue a pregnancy she would otherwise end, the physical impact is readily perceived: such restrictions "touch[] . . . upon the very bodily integrity of the pregnant woman." *Casey*, 505 U.S. at 896. They leave women who wish to but are prevented from ending their pregnancies vulnerable to physical constraints and risks, including the labor of childbirth, that they otherwise would avoid.[2]

This physical impact of restraints on women's choice in childbearing—the effect of continuing an unwanted pregnancy on mobility, its potential interference with work, including the care of existing children, and the possibility of serious medical complications—is

[2] Pregnancy poses greater health risks than does abortion. *See* Stanley K. Henshaw, M.D., *Unintended Pregnancy and Abortion: A Public Health Perspective*, *in A Clinician's Guide to Medical and Surgical Abortion* 20 (Maureen Paul, M.D. ed., 1999) (noting risk of death due to complications from pregnancy or childbirth is ten times greater than risk of death from abortion).

temporary, yet, as this list suggests, it is far from trivial. Its constitutional significance is that the resulting intrusion on women's bodies is greater than bodily intrusions that, in other contexts, have been deemed beyond the State's power to compel. *See, e.g.*, *Winston v. Lee*, 470 U.S. 753, 761, 766 (1985) (holding that compelled surgery to retrieve bullet from criminal defendant was unconstitutional "intrusion upon the individual's dignitary interest in personal privacy and bodily integrity"); *Rochin v. California*, 342 U.S. 165, 174 (1952) (finding that forcible stomach pumping was "so brutal and so offensive to human dignity" as to violate due process). Moreover, when a statute, like the one at issue here, has no exception to protect the pregnant woman's or teen's health, it may require her to sacrifice her well-being in favor of potential life, a result contrary to the Constitution: "[t]he essential holding of *Roe* forbids a State to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health." *Casey*, 505 U.S. at 880.

From these perspectives, permitting the State a free hand with abortion restrictions would allow a degree of control over women's bodies that is nowhere countenanced for men, reinforcing women's inequality. As Justice Stevens wrote in his separate opinion in *Casey*, "'Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.' The same holds true for the power to control women's bodies." *Casey*, 505 U.S. at 915 (Stevens, J., concurring in part and dissenting in part) (citation omitted).[3]

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[3] Cases involving abortion often discuss the issue in terms of the woman's right to choose abortion or to terminate her pregnancy. *See, e.g., Stenberg v. Carhart*, 530 U.S. 914, 930 (2000) ("right to choose abortion"); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (referring to "woman's decision whether or not to terminate her pregnancy").

B. Restricting Choice in Childbearing Imposes a Stereotypical Role on Women

The *Casey* decision further recognized that when the State interferes with women's exercise of choice in childbearing, it does far more than simply expose women to physical consequences—it also distorts women's ability to shape their own lives.

One aspect of the damage that unbridled State authority in this realm would impose was expressed eloquently by the *Casey* Court when it recognized that a zone of privacy around the pregnant woman's decision whether to continue or end her pregnancy is necessary to preserve her ability to "define [her] own concept of existence, of meaning, of the universe, and of the mystery of human life" free from the "compulsion of the State." *Casey*, 505 U.S. at 851. Eleven years later, this Court acknowledged that *Casey* and the privacy decisions that preceded it protect even more than personal decisions over childbearing; they also protect the expression of

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However, it is revealing for an equality-focused analysis also to consider these cases from another angle, as deciding the circumstances under which government may compel a pregnant woman to continue her pregnancy and give birth. *See, e.g., Casey,* 505 U.S. at 928 ("State restrictions on abortion compel women to continue pregnancies they otherwise might terminate.") (Blackmun, J., concurring in part, concurring in the judgment in part and dissenting in part); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 350 (1992) ("A pregnant woman seeking an abortion has the practical capacity to terminate a pregnancy, which she would exercise but for the community's decision to prevent or deter her. If the community successfully effectuates its will, it is the state, and not nature, which is responsible for causing her to continue the pregnancy.").

personal autonomy and meaning through intimate, sexual relationships. *Lawrence v. Texas,* 539 U.S. 558, 574 (2003).

Yet *Casey*, by referring to the State's imposition of its "vision of the woman's role," 505 U.S. at 852, also points out that restrictions on reproductive choice go beyond allowing the State to *interfere* with the female's capacity to direct her life; they allow the State to *choose* the direction for her, and the path that the State chooses is motherhood. Justice Blackmun pinpointed precisely this concern in his separate opinion in *Casey*:

> A State's restrictions on a woman's right to terminate her pregnancy also implicate constitutional guarantees of gender equality. . . . By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State . . . assumes that [women] owe this duty as a matter of course. This 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.

This role-enforcing aspect of abortion restrictions places them squarely within this Court's equality-based concern with government enforcement of sex role stereotypes. *See, e.g.*, *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140 (1994) (finding that reliance on gender stereotypes impermissibly "ratif[ies] and reinforce[s] prejudicial views of the relative abilities of men and

women"); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725-26 (1982) (disapproving policy reflecting "archaic and stereotypic notions" of the "proper roles of men and women"). *See also UAW v. Johnson Controls, Inc*., 499 U.S. 187, 211 (1991) ("It is no more appropriate for the Courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role."). *See generally* David H. Gans, *Note: Stereotyping and Difference:* Planned Parenthood v. Casey *and the Future of Sex Discrimination Law*, 104 Yale L.J. 1875, 1876-81 (1995) (discussing the role of stereotypes in the Court's gender equality jurisprudence).

C. Restricting Choice in Childbearing Impedes Women's Equal Participation in Civic Life

A more public, equality-focused dimension of women's right to choose appears in the *Casey* decision, as well: "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." *Casey*, 505 U.S. at 856. With recognition of their authority to decide for themselves whether to continue or end a pregnancy, women are more able to "ma[k]e choices that define their views of themselves and their places in society." *Id. See also id.* at 912 ("*Roe* is an integral part of a correct understanding of . . . the basic equality of men and women.") (Stevens, J., concurring in part and dissenting in part). Similarly, in *Lawrence*, this Court recognized that "[e]quality 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." *Lawrence*, 539 U.S. at 575.

Abortion restrictions that impede women's choice in childbearing particularly affect women's equality because the role such restrictions may impose on an unwilling woman, that of motherhood, can heavily burden the woman's ability to "define [her] place[] in society." *Casey*, 505 U.S. at 856. This is true in part because, "[s]ince time immemorial, women's biology and ability to bear children have been used as a basis for discrimination against them." *Doe v. Maher*, 515 A.2d 134, 159 (Conn. Super. Ct. 1986) (citation omitted). In *Doe*, the court pointed to "some outrageous examples of this": *Hoyt v. Florida*, 368 U.S. 57, 62 (1961) (exempting women from jury duty because they are "regarded as the center of home and family life"); *Muller v. Oregon*, 208 U.S. 412, 421-22 (1908) (restricting work hours of women, but not men, on basis of women's role in childbearing and dependence on men); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141-42 (1872) (Bradley, J., concurring) (prohibiting women from the practice of law based on women's "paramount destiny and mission" as wives and mothers).

This Court correctly recognized in *Casey* that the premise of these now-rejected cases, that women's "'special responsibilities' . . . preclude[] full and independent legal status under the Constitution," *Casey*, 505 U.S. at 897 (citation omitted), is "no longer consistent with our understanding of the family, the individual, or the Constitution," *id*. It nonetheless remains true, however, that the actual responsibilities of motherhood, particularly if forced upon a woman, may dramatically redirect her participation in society. Thus, only a dozen years after *Roe v. Wade*, then-Judge Ginsburg offered this observation concerning abortion restrictions: "Also in the balance is a woman's autonomous charge of her full life's course . . . her ability to stand in relation to man, society, and the state as an independent, self-sustaining, equal

citizen." Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. Rev. 375, 383 (1985). Another observer elaborated on this point:

> When the state prohibits abortion, all women of childbearing age know that pregnancy may violently alter their lives at any time. This pervasively affects the ability of women to plan their lives, to sustain relationships with other people, and to contribute through wage work and public life. The right to equal citizenship encompasses the right "to take responsibility for choosing one's own future."

Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955, 1017 (1984) (citation omitted); *see also* Kenneth L. Karst, *Constitutional Equality as a Cultural Form: The Courts and the Meanings of Sex and Gender*, 38 Wake Forest L. Rev. 513, 532 (2003) (women's control over "their own sexuality and maternity" is "plainly indispensable, if women are to take their place as equal citizens in the public life of the community").

While the lasting impact of bearing a child could be mitigated by surrendering the child for others to raise, in reality, fewer than one percent of children born to never-married women are placed for adoption. National Adoption Information Clearinghouse, U.S. Administration for Children & Families, *Voluntary Relinquishment for Adoption, Numbers and Trends* (2005) (*available at* http://naic.acf.hhs.gov/pubs/s_place.cfm). This likely reflects the psychological toll of giving up a child at birth, which may be significant. *See* Holli Ann Askren & Kathaleen C. Bloom, *Postadoptive Reactions of the Relinquishing Mother: A Review*, 28 J. Obst. Gyn. & Neonatal Nursing 395, 397 (1999) ("Relinquishing

mothers have more grief symptoms than women who have lost a child to death, including more denial; despair; atypical responses; and disturbances in sleep, appetite, and vigor. . . . Lack of social acceptance of the grief response in relinquishing mothers also contributes to chronic, pathologic grief."). Thus, overbroad interference with the ability to obtain an abortion is likely to result in women not only giving birth, but also having lifelong responsibility for children they did not intend to bear.

Moreover, intense social forces operate on women once they have children. These emphatically are not inevitable or biological; nonetheless, they are very real and must be taken into account in considering the impact of abortion regulation on women's equality.

One such force was recently discussed by this Court: the "'pervasive presumption that women are mothers first, and workers second. . . . has in turn justified discrimination against women when they are mothers or mothers-to-be.'" *Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (citation omitted). "[P]arallel stereotypes presuming a lack of domestic responsibilities for men . . . . 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." *Id.* Without question, there has been substantial progress away from such stereotypes, and a long-term effort is underway to achieve a more equitable distribution of the irreplaceable work of raising children. Yet contemporary evidence continues to demonstrate the deep and sustained impact that motherhood may have on women's participation in work and public life.

Teenagers have the most to lose when abortion restrictions push them into unwanted, premature

childbearing. Teen childbearing has "major adverse socio-economic consequences," including substantial reductions in wages by age 25. Daniel Klepinger *et al.*, *How Does Adolescent Fertility Affect the Human Capital and Wages of Young Women?*, 24 J. Hum. Resources, 421, 443 (1999). Teenage mothers are also far less likely than women who first give birth later on to attend college. Sandra L. Hofferth *et al.*, *The Effects of Early Childbearing on Schooling Over Time*, 33 Fam. Plan. Persp. 259, 266 (2001).

Motherhood that is not freely chosen—whether begun in the teen years or later—may impose significant and unwanted limitations on older women, as well. Two-thirds of mothers aged 25-44 work less than full-time year-round, so that "[i]n an age where virtually all good jobs require full-time work, and many of the best jobs require overtime, mothers are cut out of the labor pool for many desirable jobs, blue- as well as white-collar." Joan Williams, *Our Economy of Mothers and Others: Women and Economics Revisited*, 5 J. Gender Race & Justice 411, 415-16 (2002). Economists have identified a "wage penalty" for motherhood of approximately 7 percent per child. Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 Am. Soc. Rev. 204, 219 (2001). And mothers, whether married or single, continue to carry the primary workload of child rearing and housekeeping. Anne L. Alstott, *No Exit*: *What Parents Owe Children and What Society Owes Parents* 27-30 (2004).

These statistics, of course, show only part of the picture, because many, if not most, women find deep satisfaction in bearing and raising children and experience motherhood as a uniquely valuable endeavor. Yet no matter how widespread the acceptance of a traditional role, it is still well beyond government's power to compel

adhesion to it. *See United States v. Virginia*, 518 U.S. 515, 550 (1996) (holding that "generalizations about 'the way women are,' estimates of what is appropriate for *most women*, no longer justify" government action limiting opportunities for women to act outside their traditional roles). Moreover where, as here, the traditional role has so long been used to limit a whole class's participation in public life, the impact on equality must be of special concern.[4]

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[4] The role-reinforcing aspect of restrictions on the right to choose abortion is underscored by examining the history of such restrictions in the United States. Abortion was permitted under common law until the stage of pregnancy known as quickening, when the pregnant woman reported that she detected fetal movement. *See Roe,* 410 U.S. at 132. Scholars have detailed how the nineteenth century campaign to ban abortion throughout pregnancy was intended in part to enforce strict views of women's permissible roles. *See, e.g.*, Siegel, *supra* n.3, at 293-304 (1992). The doctors who led the campaign argued that by aborting a pregnancy, a woman "'becomes unmindful of the course marked out for her by Providence, she overlooks the duties imposed on her by the marriage contract.'" *Id.* at 295 (quoting D.A. O'Donnell & W.L. Atlee, *Report on Criminal Abortion*, 22 Transactions Am. Med. Ass'n 239, 241 (1871)). Giving birth was not only a duty the woman owed her husband, it was also "'a duty [she] tacitly promised to the State.'" *Id.* at 297 (quoting D.H., *On Producing Abortion: A Physician's Reply to the Solicitations of a Married Woman to Produce a Miscarriage for Her*, 17 Nashville J. Med. & Surgery 200, 201 (1876)). At times, proponents of banning abortion stated outright their distress about women's rising aspirations toward equal participation in society:

> "Woman's rights" now are understood to be, that she should be a man, and that her physical organism, which is constituted by Nature to bear and rear offspring, should be left in abeyance, and that her ministrations in the formation of character as mother should be abandoned for the sterner rights of voting and law making.
>
> The whole county is in an abnormal state, and the tendency to force women into men's places, creates new ideas of women's duties, and therefore . . . the marriage state is frequently childless.

Viewed from an equality perspective, State-imposed limits on women's reproductive choice may work to undermine their claim to equal citizenship in a manner that bears a resemblance to the operation of the Colorado constitutional provision that was invalidated in *Romer v. Evans*, 517 U.S. 620 (1996). This Court held that the Colorado provision, which barred lesbians and gay men in the state from obtaining legal protection against discrimination, impermissibly "disqualif[ied] . . . a class of persons from the right to seek specific protection from the law." *Id.* at 633. Restrictions on women's ability to exercise choice over childbearing clearly do not bar women from advocating for themselves, yet, by treating women's right to a basic means of asserting control over their lives as a constantly unsettled and open question, the ongoing enactment of such restrictions actually diminishes women's ability to advocate for their needs. Faced with the necessity of continually fending off threats to their reproductive freedom, women are far less able to pursue a positive agenda on issues like improving the availability of quality, affordable child care and increasing women's access to high-paying jobs. *Cf.* Frances Olsen, *The Supreme Court, 1988 Term—Comment: Unraveling Compromise*, 103 Harv. L. Rev. 105, 124 (1989) ("[t]he abortion debate keeps women off-balance and less able to struggle against the unreasonable conditions that make unwanted pregnancy so common an occurrence").

Moreover, when government imposes its will on women by denying them control over their reproductive lives, it, like the State of Colorado under the discriminatory amendment, "put[s] [women] in a solitary

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Id. at 303-04 (quoting Montrose A. Pallen, *Foeticide, or Criminal Abortion*, 3 Med. Archives 193, 205-06 (1869)).

class with respect to transactions and relations in both the private and governmental spheres," *Romer*, 517 U.S. at 627. Women are made subject to having their private volition swept away by the government in the event of an unintended pregnancy, while men face no parallel threat to their "autonomous charge of [their] full life's course." *See* Ginsburg, *supra,* at 383. Such differential treatment itself casts doubt on women's entitlement to full equality.

II. ANALYZING ABORTION RESTRICTIONS ACCORDING TO OVERBREADTH DOCTRINE RATHER THAN THE *SALERNO* STANDARD IS NECESSARY TO PROTECT WOMEN'S EQUALITY AS WELL AS THEIR PRIVACY

This Court's repeated application of overbreadth doctrine to uphold facial challenges to abortion restrictions is fully justified by the values that doctrine serves. Thus, while the applicability of overbreadth analysis to abortion restrictions was conclusively resolved by its use in *Casey* and *Stenberg v. Carhart*, 530 U.S. 914 (2000), should this Court revisit the issue the conclusion must be the same. This is true for at least two reasons. First, the same concern that overbroad restrictions of speech will chill the legitimate exercise of constitutional rights applies to overbroad restrictions on abortion. Second, just as free speech promotes both the individual's interest in speaking and the society's interest in democracy, so does freedom from state interference in the decision whether to bear a child promote both the individual's interest in privacy and the society's interest in equality. The alternative standard contended for here, articulated in *United States v. Salerno*, 481 U.S. 739, 745 (1987), would, by contrast, deny a facial challenge to a statute restricting abortion no matter how profoundly it chilled women's right to reproductive choice, so long as a single abortion came within the statute's lawful reach.

Under *Salerno*, women could vindicate their right to choose only through as-applied challenges, however, doing so would fall far short of adequately protecting women's constitutional rights. Applying the *Salerno* standard would thus inhibit countless women from exercising their right to choose whether to continue or end their pregnancies, deeply undermining women's equality. For these reasons, this Court should reject the State's call, joined by the Solicitor General and others, to apply the *Salerno* standard when assessing facial challenges to restrictions on abortion, and instead should adhere to the overbreadth approach that has properly guided the analysis of such restrictions from *Roe* to *Casey* to *Carhart.*

A. Overbreadth Analysis is Necessary to Avoid Chilling the Exercise of the Right to Choose Abortion

Overbroad restrictions on abortion pose the same threat of chilling individuals from engaging in constitutionally protected conduct that this Court has recognized in allowing facial challenges to statutes that threaten to inhibit freedom of speech. *See, e.g.*, *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (explaining that overbreadth challenge permitted because "[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech"); *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) ("the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression"). Thus, contrary to Petitioner's contention that overbreadth doctrine applies only in the context of the First Amendment, this Court repeatedly has struck down overbroad abortion restrictions based on their chilling effect. *See, e.g.*,

Thornburgh v. American Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 767-68, 771 (1986); *Colautti v. Franklin*, 439 U.S. 379, 396 (1979). Moreover, just last year, this Court acknowledged that "weighty" reasons support the "validity of facial attacks alleging overbreadth" in suits challenging abortion restrictions, as well as in limited other contexts. *Sabri v. United States*, 541 U.S. 600, 609-10 (2004) (citing *Stenberg v. Carhart* as application of overbreadth doctrine in abortion case).

In these limited contexts, overbreadth analysis addresses the chilling effect that arises when a statute that is constitutional in its impact on some is likely to work an unconstitutional restraint on others. The invalidation in *Casey* of a provision that required a married woman seeking an abortion to certify that she had notified her husband of her plans provides a good example of this Court's recognition of the chilling effect of an overbroad restriction on abortion.[5] The Court invalidated this notification provision because it found that women threatened by their husbands' physical or psychological abuse—women who, under the Constitution, had a right to decide to obtain an abortion—were "likely to be deterred from procuring an abortion" by the husband notification requirement. *Id.* at 894. The Court reached this conclusion notwithstanding that most married women tell their husbands before obtaining an abortion, *id.* (noting that 95 percent of women notify their husbands of planned abortion), and that the statute allowed a woman alternatively to certify that she believed notifying her husband of her abortion would result in bodily injury to

[5] The undue burden standard articulated in *Casey* is widely recognized as a form of overbreadth review. *See, e.g.,* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 276 (1994); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1355-56 (2000).

her, *id.* Thus, while the statute did not work an unconstitutional interference with the right to abortion for most women, allowing it to stay in force would have chilled some women's exercise of that right, and therefore facial invalidation was appropriate.

The *Salerno* standard, on the other hand, provides no such protection against chilling the citizenry's exercise of constitutional rights. Applied to the husband-notification provision at issue in *Casey*, a court would find that plaintiffs had failed to meet their burden of establishing "that no set of circumstances exists under which the Act would be valid," as *Salerno* requires, 481 U.S. at 745, because the statute would not create an undue burden on those women who would notify their husbands of a planned abortion whether compelled by statute to do so or not. *Salerno* would, of course, permit an abused woman to bring an as-applied challenge, but even that would not cure the chill on constitutional rights. Requiring each pregnant woman with an abusive husband to go into court to seek personal vindication of her right to make the abortion decision would be impracticable for many reasons, including the unlikelihood that such women would come forward. Even if a court granted as-applied relief for a group of women, essentially rewriting the provision to exempt all women with abusive husbands, the impact of such a ruling would be limited. Some abused women would fear asserting that they qualified for the court-created exemption, *cf. Casey*, 505 U.S. at 893 (noting abused women's fears of reporting abuse); others would be too ashamed to claim it; and in some cases, doctors would not know which women qualified for it. Facial invalidation of the overbroad restriction on the basis of its chilling effect was the only way to secure the constitutional rights of these women against legislative encroachment.

In fact, further analysis demonstrates that adopting the *Salerno* standard for facial challenges to abortion restrictions would make widespread chilling of the right to decide when and whether to have children the norm rather than the exception. The implications of applying *Salerno* to abortion restrictions are clearly demonstrated by the dissent filed to the denial of *certiorari* in *Ada v. Guam Society of Obstetricians and Gynecologists*, 113 S. Ct. 633 (1992) (Scalia, J., dissenting). That case involved a seemingly unremarkable holding that a territorial statute was unconstitutional under *Roe v. Wade* because it prohibited any abortion unless two physicians agreed that continuing the pregnancy would endanger the woman's life or gravely impair her health. *Guam Society of Obstetricians and Gynecologists v. Ada*, 1992 U.S. App. LEXIS 13490, at *1, *22-*23 (9th Cir. 1992). A facial challenge was successful in the district court and upheld by the Ninth Circuit, *id.*, and this Court denied the Territory's petition for *certiorari, Guam Society*, 506 U.S. 1011 (1992). Three Justices dissented, however, arguing that the *Salerno* standard, not overbreadth, supplied the appropriate rule of decision. *Guam Society*, 113 S. Ct. at 634. The Guam statute would pass *Salerno*'s test for a facial challenge, they contended, because it appeared to have at least one constitutional application—to post-viability abortion. *Id. Salerno*, then, would have prohibited a court from adequately remedying this patently unconstitutional restriction on women's right to choose abortion on a facial challenge. Instead, only as-applied challenges could be brought, and most likely, a series of such challenges would have been required simply to conform the statute to the Constitution's clear requirements.

The chill that applying *Salerno* to facial challenges would exert on women's rights is demonstrated by considering just a few of the potential outcomes had the

dissent in *Guam Society* carried the day. A court might have ruled the Guam statute unconstitutional as applied in a challenge brought by a woman in the first trimester of pregnancy, while explicitly leaving open the question of a second trimester abortion. An as-applied challenge brought by a woman who needed an abortion for medical reasons but had only one doctor's advice on the matter might succeed without any ruling as to the statute's application to women whose reasons for seeking abortions were not related to health. In each of these cases, the exercise of the right to choose by women whose circumstances did not match those of the litigants would be unconstitutionally chilled unless and until a challenge that fit their circumstances was litigated.

Discarding overbreadth review in favor of the *Salerno* standard would substantially chill the exercise of reproductive rights even in the case of a less sweeping statute, as a hypothetical example demonstrates. Suppose that South Dakota enacted a law requiring any woman seeking an abortion in that state to make three trips to the abortion provider, each separated by twenty-four hours: the first, for an in-person counseling session about pregnancy alternatives; the second, to consult with a psychologist; and the third, for the abortion procedure itself. Under *Casey*'s overbreadth standard, a facial challenge could be brought based on the impact of this law on women seeking abortions in South Dakota. Given that South Dakota has just one abortion provider,[6] the evidence might convince a court that this mandate would actually *prevent* a significant percentage of women from obtaining an abortion: for example, those who had to travel the farthest; those for whom the obstacles of

[6] *See Planned Parenthood v. Rounds*, 372 F.3d 969, 972-73 (8th Cir. 2004) (concluding that there is only one abortion provider in South Dakota, located in Sioux Falls).

arranging for child care, losing work income, and paying for multiple trips would be insurmountable; and those teens who would need to pursue a judicial bypass in addition to making three confidential trips to the abortion provider.[7] *Cf. Casey*, 505 U.S. at 886 (noting trial court's findings that 24-hour waiting period was "particularly burdensome" for "those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others"). Based on this showing of undue burden, the court could strike down the statute as a whole.

If *Salerno* provided the standard, however, the facial challenge would fail, and women would have to seek as-applied relief. Such relief would inevitably be inadequate: some women would not go to court and would be unable to exercise their right, and those who did go to court would achieve only piecemeal relief. A teenager who was burdened by the requirement might obtain judicial relief that would apply to other young women needing judicial bypasses, but adult women burdened by the law would remain unsure of their right to obtain an abortion. A successful as-applied challenge brought by a woman who showed that the distances involved created a substantial burden for her would not remove the chill for those women who lived closer but faced a substantial burden due to the expenses associated with complying with the law. Moreover, it is unclear how the court could craft appropriate relief. For an as-applied challenge on behalf of women unable to obtain abortions under the law due to geography, would relief be granted just for women living the same distance from the abortion provider as the

[7] South Dakota requires notification of one parent before a minor obtains an abortion and provides a judicial bypass procedure. S.D. Codified Laws § 34-23A-1 *et seq*. (2005).

woman mounting the challenge? Similarly, would relief for a woman based on the undue financial strain created by the three-trip requirement be limited to women at or below the same income level, so that women with higher incomes who nonetheless were unable to comply with the requirement would need to bring their own challenge? Short of facial invalidation, a ruling in any one case cannot answer such questions. Each as-applied holding would leave in place the chill on the rights of those women who were unconstitutionally burdened by the statute, but whose burden varied enough to put them outside the clear terms of any one holding.

B. Applying the *Salerno* Standard Would Threaten Women's Equality

Robust overbreadth protection against unconstitutional incursions on women's right of choice in childbearing protects a second value, as well: women's equality. This protective function is parallel to the role that robust overbreadth protection for speech plays in the functioning of our democracy. As with freedom of speech, the right to end an unwanted pregnancy "contributes vitally to the preservation of an open, democratic political regime, at the same time as it secures rights of high importance to particular individuals." *See* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 264 (1994). The *Salerno* alternative, by contrast, would have a devastating impact on reproductive freedom and women's equality, and for that reason, too, it must be rejected.

Depriving women of choice concerning childbearing severely curtails their ability to participate in our "open, democratic political regime," both by waylaying their efforts to fulfill roles of their own choosing, and by imposing significant burdens on them. (*See supra* Point I).

Just as freedom of speech protects "'[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people,'" *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Stromberg v. California*, 283 U.S. 359, 369 (1931)), so does reproductive freedom protect the opportunity of women to participate on their own terms in public life. Laws that strike directly at the ability of half the population to fully participate in our democracy threaten its vitality as surely as do laws that infringe speech. Thus, applying overbreadth analysis to void unduly burdensome abortion restrictions goes beyond "protect[ing] personal moral decisions," Dorf, *supra*, at 269. Protection against deprivation of reproductive choice promotes equality among the citizenry, an "affirmative good" of the highest constitutional order. *See id.* at 269-70 (recognizing that overbreadth analysis promotes "affirmative good" of free speech).

Adopting the *Salerno* standard to evaluate abortion restrictions would, by contrast, foment insecurity by unleashing a flood of unconstitutional restrictions on abortion and docket-clogging as-applied challenges. As matters stand, states can, and most states do, bar abortion after viability. These bans are constitutionally permitted so long as they provide exceptions for abortions needed to protect the woman's life or health. *Roe*, 410 U.S. at 164-65. Against this background, virtually any abortion regulation could be crafted to have some valid application—and therefore to withstand a facial challenge under the *Salerno* standard—so long as its reach included post-viability abortions not needed to preserve life or health. Thus, as the *Guam Society* dissent indicates, the *Salerno* standard would make it virtually impossible to mount a successful facial challenge to an abortion restriction. Indeed, even with the availability of facial challenges and clear guidance from this Court as to the

permissible scope of abortion restrictions, over the last ten years, more than four hundred such restrictions have been enacted. If legislators were given free rein to demonstrate their antipathy to abortion with any legislation, so long as its coverage included post-viability abortions, there would be no limit to their ingenuity. In this circumstance, "when a constitutional provision both affords protection to . . . conduct that is especially prone to 'chill' and reflects a value that legislatures may be unusually disposed to undervalue," overbreadth analysis serves as a much-needed "judicially established disincentive" to unconstitutional legislation. Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1352 (2000).

Thus, applying the *Salerno* standard to facial challenges to abortion restrictions would keep women in a constant state of uncertainty over the parameters of the right to choose, with all the harmful consequences for their liberty and equality interests that flow from such uncertainty. *Cf. Casey*, 505 U.S. at 844 ("Liberty finds no refuge in a jurisprudence of doubt."); *id.* at 856 (recognizing that individuals organize their relationships and their lives mindful of the availability of abortion if needed). Women would be thrown back almost to the pre-*Roe* days, when, at best, states allowed them to plead with doctors or hospital committees for permission to obtain an abortion, *cf. Doe v. Bolton*, 410 U.S. 179, 195-98 (1973) (discussing hospital abortion committee process), except that their pleas would now be in a judicial forum. To force women into case-by-case adjudication of infringements on the right to choose abortion would do inestimable damage to them as individuals and as a class.

The damage that applying the *Salerno* standard to abortion restrictions would do to women's constitutional rights would be magnified many times over by a practical

impediment particular to as-applied challenges brought by pregnant women. That impediment is the inevitable time constraint: the short duration of pregnancy, and the even shorter period during which a pregnancy may be lawfully terminated, often does not permit a pregnant woman sufficient time to mount an as-applied constitutional challenge to an abortion restriction. A teenager is even less likely to mount a timely challenge, as teens tend to seek abortion later than older women. Centers for Disease Control and Prevention, *Abortion Surveillance—United States, 2001*, in *Surveillance Summaries*, 53 Morbidity & Mortality Wkly. Rep. (No. SS-9) tbl. 16 (Nov. 26, 2004). Thus, a pregnant woman "may not obtain a declaratory judgment on [the statute's] invalidity as applied to her in time to exercise her right. Also, she may not wish to pursue what she sees as an uncertain and expensive legal remedy, especially if she lacks legal sophistication or financial resources. Instead, she may . . . engage in self-help, or simply carry the unwanted pregnancy to term." Dorf, *supra*, at 270-71. For these reasons, as well as those discussed above (*see supra* Point II(A)), the protection that as-applied challenges provide against government interference with a woman's right to choose abortion is illusory.

In sum, applying the *Salerno* standard to abortion restrictions would invite chaos in a fundamental realm of women's lives. The harm it would engender would go well beyond requiring women to troop to courthouse after courthouse in state after state to secure what this Court has repeatedly declared is already theirs under the Constitution: the right to decide, for themselves, when and whether to have children. For while it is conceivable that blatantly unconstitutional restrictions on abortion could eventually be narrowed to their constitutional boundaries through case-by-case adjudication, this would happen only if women and their doctors continued to

come forward to challenge the laws; if they continued to find lawyers willing and able to represent them; if they continued to find judges on the bench with the courage to uphold their constitutional rights in a hostile environment; and if narrowing constructions could be clearly crafted and made known to all women. But even if the necessary narrowing eventually came to pass, meanwhile, such statutes would be spreading their chill, taking their toll on the lives of tens or hundreds of thousands, or even millions of women, depriving them of the "ability to control their reproductive lives" that facilitates their "ability . . . to participate equally in the economic and social life of the Nation." *Casey*, 505 U.S. at 856. Adopting *Salerno* as the standard that governs restrictions on abortion would make a mockery of the constitutional rights of women and of their aspirations to equal treatment under the law.

CONCLUSION

For the reasons herein, and those set forth by Respondents, *amici curiae* urge this Court to uphold the decision below.

October 12, 2005

JENNIFER K. BROWN*
GILLIAN L. THOMAS
LEGAL MOMENTUM
395 Hudson Street
New York, New York 10014
(212) 925-6635

**Counsel of Record*

Counsel for Amici Curiae

APPENDIX

NAMES AND INDIVIDUAL STATEMENTS OF INTEREST OF *AMICI CURIAE*

CALIFORNIA WOMEN'S LAW CENTER

The California Women's Law Center (CWLC) works to ensure, through systemic change, that life opportunities for women and girls are free from unjust social, economic and political constraints. CWLC, established in 1989, works in the following priority areas: sex discrimination in education and employment, women's health and reproductive rights, violence against women, women's economic security, race and gender, and exploitation of women. Since its inception, CWLC has worked to ensure that women have full and complete access to all reproductive health services including abortion.

CENTER FOR WOMEN POLICY STUDIES

The Center for Women Policy Studies was founded in 1972 with a mission to shape public policy to improve women's lives. A hallmark of our work is the multiethnic feminist lens through which we view all issues affecting women and girls. In all of our work, we look at the combined impact of gender, race, ethnicity, class, age, disability, and sexual orientation. We struggle for women's human rights – justice and equality for women at home and abroad. The Center represents the interests of young women whose ability to control their reproductive lives will be detrimentally impaired by abortion restrictions such as those imposed by the New Hampshire Parental Notification Prior to Abortion Act.

COALITION OF LABOR UNION WOMEN

Coalition of Labor Union Women (CLUW) is an AFL-CIO affiliated non-profit membership organization that

focuses on issues of primary concern to working women, including equal pay, child and elder care benefits, job security, affordable health and child care, reproductive rights, protection from sexual harassment and violence at work and affirmative action. Founded in 1974, CLUW has over 20,000 members and 75 chapters across the United States. The CLUW Center for Education and Research has been actively involved in training and educational activities designed to inform women about reproductive choices and related health care issues. CLUW's educational and advocacy efforts have led to collective bargaining proposals and policies protecting women's reproductive rights.

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

Communications Workers of America, AFL-CIO (CWA) is an international labor union representing more than 700,000 workers in media and information technology, telecommunications, printing and publishing, health care, higher education, airlines and manufacturing industries. A significant portion of CWA members are women. CWA has long advocated for gender equality in working conditions and benefits for its represented workers and for legal and contractual protections that ensure equal treatment for working women in all aspects of society.

CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND

Connecticut Women's Education and Legal Fund (CWEALF) is a statewide non-profit organization dedicated to empowering women, girls, and their families to achieve equal opportunities in their professional and personal lives. CWEALF joined this brief because it believes that the freedom to make their own choices

without anyone else's consent, including the choice to terminate a pregnancy, is essential to women's equality.

FEMINIST MAJORITY FOUNDATION

Founded in 1987, the Feminist Majority Foundation (FMF) is the largest feminist research and action non-profit organization dedicated to women's equality and reproductive health in the country. Our programs focus on advancing the legal, social and political equality of women, securing reproductive freedom and access for all women, and recruiting and empowering young women leaders. The Feminist Majority Foundation's reproductive rights projects involve public education; media outreach and advocacy work; research and public policy; community and grassroots organizing; and leadership training. FMF supports and actively pursues legal protection for reproductive health services and women's access to reproductive health care. In 1994, FMF provided legal counsel in *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994).

LEGAL MOMENTUM

Legal Momentum (the new name of NOW Legal Defense and Education Fund) advances the rights of women and girls by using the power of the law and creating innovative public policy. Legal Momentum views reproductive rights as central to women's equality. To this end, Legal Momentum has litigated numerous cases involving reproductive health services, including *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997), and *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993).

MS. FOUNDATION FOR WOMEN

The Ms. Foundation for Women is the first and leading national women's philanthropy, and is dedicated to lifting women's and girls' voices and promoting their power to

create a more equitable society. The Ms. Foundation has long recognized that the extent to which women can control their reproductive capacities is a principal factor in determining the quality and character of their lives; this is especially true for low-income women, young women, and women of color, who are often the first victims of anti-choice legislation. The Ms. Foundation for Women has been responding to attacks on reproductive freedom with a combination of grant-making, technical assistance, and advocacy for more than 30 years.

NATIONAL CENTER FOR LESBIAN RIGHTS

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

NATIONAL ORGANIZATION FOR WOMEN

The National Organization for Women (NOW) is the nation's oldest and largest women's rights advocacy organization, with more than 500,000 contributing members in 450 chapters in all 50 states and the District of Columbia. A major goal of NOW for more than 35 years has been to ensure reproductive freedom for women, including safe, legal, and accessible abortion and birth control.

NATIONAL WOMEN'S POLITICAL CAUCUS

The National Women's Political Caucus (NWPC) is a national, multipartisan, grassroots membership organization dedicated to supporting pro-choice women candidates for elected and appointed office. All

candidates who receive NWPC's endorsement believe that a woman's reproductive health should remain unfettered by parental notification requirements and abortion procedure bans.

NORTHWEST WOMEN'S LAW CENTER

The Northwest Women's Law Center (NWLC) is a nonprofit public interest organization that works to advance the legal rights of all women through litigation, education, legislation, and the provision of legal information and referral services. Since its founding in 1978, the NWLC has been dedicated to protecting and expanding women's reproductive rights and has long focused on the threats to young women's access to abortion and other reproductive healthcare.

PEOPLE FOR THE AMERICAN WAY FOUNDATION

People For the American Way Foundation (People For) is a national, non-partisan education-oriented citizens organization established to promote fundamental constitutional rights and civil liberties. Founded in 1980 by religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For has over 750,000 members, supporters and activists across the country. People For has previously joined *amicus* briefs before this Court in cases raising important questions relating to women's constitutional right to privacy and access to reproductive health services, including abortion.

SOUTHWEST WOMEN'S LAW CENTER

The Southwest Women's Law Center is a nonprofit public interest organization based in Albuquerque, New Mexico. Its mission is to advance the health, safety, social, educational, and economic interests and needs of women

and girls. The Southwest Women's Law Center seeks to promote access to comprehensive reproductive health care information and services and to eliminate discrimination and disparities in access to such services and information based on gender.

THIRD WAVE FOUNDATION

Founded in 1996, the Third Wave Foundation is the first national, feminist foundation focused on supporting the vision and voices of young women ages 15 to 30. Our purpose is to support and strengthen young women and their allies working for gender, racial, social, and economic justice. We do this through financial resources, public education, and relationship building opportunities. Third Wave is dedicated to supporting a young woman's access to reproductive health services through much needed monetary support. Third Wave joined this brief because it strives to ensure that women and girls have the resources and power to make healthy decisions about their bodies, sexuality, and reproduction for themselves and their communities.

WOMENS WAY

WOMENS WAY is the nation's oldest and largest women's funding federation. Since its inception in 1976, WOMENS WAY has recognized that the extent to which women can control their reproductive health is a critical factor in determining the quality and impact of their lives. As attacks on reproductive choice escalate in our clinics and statehouses, WOMENS WAY continues to defend reproductive freedom by raising funds and mobilizing community resources to enhance and improve the lives of hundreds of thousands of Delaware Valley, Pennsylvania women and families each year.

APPEALTECH
205 Lexington Avenue, 10th Floor
New York, New York 10016
(212) 213-3222
{11285}