

No. \_\_\_\_\_

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**In The  
Supreme Court of the United States**

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NORMA MCCORVEY,  
FORMERLY KNOWN AS JANE ROE,

*Petitioner,*

v.

WILLIAM "BILL" HILL, DALLAS COUNTY  
DISTRICT ATTORNEY AS SUCCESSOR  
IN OFFICE TO HENRY WADE,

*Respondent.*

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**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Fifth Circuit**

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED FOR REVIEW

Petitioner Norma McCorvey, the former “Jane Roe” in *Roe v. Wade* comes before this Court as an original party asking that the judgment in this case be vacated pursuant to FRCP Rule 60(b). Since the original judgment in *Roe v. Wade*, factual conditions surrounding abortion have changed significantly demonstrating that abortion hurts women. Evidence of those changed factual conditions includes: the testimony of women harmed by abortion; medical studies documenting abortion injuries; an explosion of knowledge since 1973 concerning the effects of abortion on women; and, the fact that abortion clinics do not provide the normal doctor-patient relationship anticipated by *Roe*. There have also been significant changes in legal conditions, including forty-six states that have enacted laws transferring the burden of unwanted child care to society, and this Court’s Federalism jurisprudence restoring more autonomy to the states. The *Roe* decision is also a case of great national importance, and therefore, the questions presented are:

1. Should the original judgment in *Roe v. Wade* be vacated under Rule 60 due to the substantially changed factual and/or legal conditions that make *Roe* no longer just or equitable for prospective application?
2. Is Petitioner Norma McCorvey entitled under Rule 60 to any relief, substantive or procedural?
3. Should the Court, at a minimum, require a hearing to afford fundamental due process which would lead to determining whether *Roe v. Wade* should be re-examined?

**PARTIES TO THE PROCEEDINGS**

Petitioner is Norma McCorvey, the original “Jane Roe” of *Roe v. Wade*.

Respondent is William “Bill” Hill, District Attorney of Dallas County, as successor in office to Henry Wade.

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## OPINIONS BELOW

The opinion of the court of appeals is reported at 385 F.3d 846 (5th Cir. 2004). App. at 1-12. The opinion of the district court is found at 2003 U.S. Dist. LEXIS 12986, 2003 WL 21448388 (N.D. Tex., June 19, 2003). App. at 17-25.

## JURISDICTION

The revised judgment of the court of appeals was entered on September 17, 2004. A timely petition for rehearing en banc was denied on October 18, 2004. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

## STATUTES AND RULES INVOLVED

The relevant constitutional provisions, statutes, and rules involved in this case are set forth at App. at 28-29. The most important rule is FED. R. CIV. P. 60(b) which states in relevant part:

Rule 60. Relief from Judgment or Order

(b) . . . On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, . . . for the following reasons: . . . (5) . . . it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

## STATEMENT OF THE CASE

This case involves a judgment, originally decided by a three-judge District Court in the Northern District of Texas under federal question jurisdiction, 28 U.S.C. § 1331. On June 17, 1970, the lower court declared the Texas abortion laws unconstitutional.<sup>1</sup> On January 22, 1973, the Supreme Court of the United States affirmed.<sup>2</sup>

On June 17, 2003, Norma McCorvey (hereinafter “Petitioner” or “McCorvey”), the original party known as

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<sup>1</sup> *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970).

<sup>2</sup> *Roe v. Wade*, 410 U.S. 113 (1973) (hereinafter “Roe”).

“Jane Roe” in *Roe v. Wade*, filed a Rule 60 Motion for Relief from Judgment (hereinafter “Rule 60 Motion” or “Motion”), App. at 163-188, based on changed conditions relying on this Court’s decision in *Agostini v. Felton*.<sup>3</sup> The Rule 60 Motion requested a three-judge court, an evidentiary hearing, and oral argument. App. at 163-188. It provided case law and authorities for its Motion and included 5,347 pages of sworn evidence including affidavits from: Petitioner McCorvey; over 1,000 post-abortive women; scientific and medical experts; and, former abortion clinic personnel. (R. vol. 1, 0003 et seq.).

Only two days later, on June 19, 2003, the district court denied the Rule 60 Motion as untimely stating that thirty years after *Roe* was too long. (App. at 17-25). The district court also denied the request for a three-judge court and an evidentiary hearing. (App. at 17-25). On July 3, 2003, Petitioner filed a timely Motion for Reconsideration. (App. at 213-243). The district court denied that Motion two days later on the same grounds. (App. at 13-16).

An appeal was timely filed with the United States Court of Appeals for the Fifth Circuit. McCorvey argued that the district court abused its discretion because: (a) it ignored the Court of Appeals’ recent directive in *Collins v. Morgan Stanley Dean Witter*<sup>4</sup> mandating proper and careful consideration of Rule 60 motions; (b) the Motion should have been granted because it was timely, her evidence was legally sufficient and compelling, and procedural requirements had been met; (c) in the alternative, an evidentiary hearing should have been held; and, (d) the district court lacked jurisdiction to enter an order denying a three-judge court.

On September 14, 2004, the panel of Judges Jones, Wiener, and Prado dismissed the appeal and held that (a)

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<sup>3</sup> 521 U.S. 203 (1997) (hereinafter *Agostini*).

<sup>4</sup> 224 F.3d 496 (5th Cir. 2000).

although the original action in *Roe* was tried by a three-judge court, the Rule 60(b) Motion was not a matter for a three-judge court;<sup>5</sup> (b) the district court erred in concluding that thirty years was too long; (c) the case was moot even though the district court did not address that issue;<sup>6</sup> and, (d) the district court did not abuse its discretion in denying an evidentiary hearing.<sup>7</sup> The court held the Motion was moot because the Texas statutes criminalizing abortion had been repealed by implication.<sup>8</sup> Because repeal by implication had not been raised before, Petitioner filed for rehearing en banc addressing the mootness issue arguing the Texas abortion statutes were not repealed either expressly or by implication.<sup>9</sup> The court denied the petition for rehearing en banc on October 18, 2004, without opinion.<sup>10</sup>

### INTRODUCTION

This case involves questions of exceptional national importance that can only be decided by this Court. It squarely presents to this Court the question of whether prospective application of *Roe v. Wade* remains just and equitable given the changed factual and legal conditions surrounding abortions since 1973, and it goes to the heart of the balance that was struck in *Roe*. Only this Court can decide this question, for *Roe* itself effectively foreclosed any other branch of federal or state government, and even lower courts, from addressing the substantial scientific and medical evidence that abortion hurts women.

Petitioner McCorvey, the original plaintiff in *Roe v. Wade*, seeks relief from judgment under Rule 60(b) of the

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<sup>5</sup> Panel Opinion, App. at 3.

<sup>6</sup> Panel Opinion, App. at 6, n.4.

<sup>7</sup> Panel Opinion, App. at 7.

<sup>8</sup> Panel Opinion, App. at 5-6.

<sup>9</sup> The Petition for Rehearing En Banc solely and completely addresses the mootness issue and is reproduced in full in the Appendix, App. at 244-269.

<sup>10</sup> Order Denying Rehearing En Banc (October 18, 2004). App. at 26-27.

Federal Rules of Civil Procedure on the grounds it is no longer just. Rule 60(b) allows the Court to consider whether a prior decision remains “equitable” or “just” in light of changed factual and/or legal conditions. There have been substantial changes in *both* the factual and legal conditions. This case thus provides the Court with its first opportunity to review *Roe* in light of over thirty years of experience with legalized abortion and its effect on women. The substantial body of evidence proves prospective application of *Roe* is unjust. The Court should grant Petitioner a writ of certiorari and take this question of great national importance.

### **REASONS FOR GRANTING CERTIORARI**

#### **I. WHEN AN IMPORTANT AREA OF SOCIAL RESPONSIBILITY IS CONSTITUTIONALIZED, AFFECTING THE HEALTH OF MILLIONS OF WOMEN AND EFFECTIVELY WITHDRAWING IT FROM THE LEGISLATIVE ARENA AND LOWER COURTS, THIS COURT HAS A SPECIAL DUTY TO MONITOR SUBSTANTIALLY CHANGED CONDITIONS TO ENSURE JUSTICE AND PROTECT WOMEN’S HEALTH.**

The Court essentially removed the regulation of the practice of abortion from the legislative and political process; therefore, the Court is the only entity that can truly consider the factual and legal changes concerning abortion since 1973.<sup>11</sup> After reviewing McCorvey’s legally sufficient and compelling evidence consisting of 5,347 pages of affidavits of post-abortive women, medical and psychological experts, and former abortion clinic personnel, Judge Edith Jones in her concurring opinion expressed her fervent hope that this Court would acknowledge the developments and re-evaluate *Roe*.<sup>12</sup> Judge Jones based her hope on the evidence which she summarized as follows:

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<sup>11</sup> Panel Opinion, App. at 12 (Jones, J., concurring).

<sup>12</sup> *Id.* “One may fervently hope that the Court will someday acknowledge such developments and re-evaluate *Roe* and *Casey* (Continued on following page)

McCorvey presented evidence that goes to the heart of the balance *Roe* struck between the choice of a mother and the life of her unborn child. First, there are about one thousand affidavits of women who have had abortions and claimed to have suffered long term emotional damage and impaired relationships from their decisions. Studies by scientists, offered by McCorvey, suggest that women may be affected emotionally and physically for years afterward and may be more prone to engage in high-risk, self-destructive conduct as a result of having had abortions. Second, *Roe*'s assumption that the decision to abort a baby will be made in close consultation with a woman's private physician is called into question by affidavits from workers at abortion clinics, where most abortions are now performed. According to the affidavits, women are often herded through their procedures with little or no medical or emotional counseling. Third, McCorvey contends that the sociological landscape surrounding unwed motherhood has changed dramatically since *Roe* was decided. No longer does the unwed mother face social ostracism, and government programs offer medical care, social services, and even, through "Baby Moses" laws in over three-quarters of the states, the option of leaving a newborn directly in the care of the state until it can be adopted. Finally, neonatal and medical science, summarized by McCorvey, now graphically portrays, as science was unable to do 31 years ago, how a baby develops sensitivity to external stimuli and to pain much earlier than was then believed. In sum, if courts were to delve into the facts underlying *Roe*'s balancing scheme with present-day knowledge, they might conclude that the woman's

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accordingly. That the Court's constitutional decision making leaves our nation in a position of willful blindness to evolving knowledge should trouble any dispassionate observer. . . ." *Id.*

“choice” is far more risky and less beneficial, and the child’s sentience far more advanced, than the *Roe* Court knew.<sup>13</sup>

Judge Jones discusses the “perverse result”<sup>14</sup> that an issue that affects millions of women and unborn babies cannot be heard or effectively debated:

At the same time, because the Court’s rulings have rendered basic abortion policy beyond the power of our legislative bodies, the arms of representative government may not meaningfully debate McCorvey’s evidence. The perverse result of the Court’s having determined through constitutional adjudication this fundamental social policy, which affects over a million women and unborn babies each year, is that the facts no longer matter . . .<sup>15</sup>

The sheer impact and importance of *Roe* on women, and its immense effect on the Nation, warranted at a minimum an evidentiary hearing to examine the changes in the factual and legal conditions since 1973. The evidence of this impact is widespread and undeniable as Justice Sandra Day O’Connor has noted:

Abortion is still hotly debated in all political arenas. No one, it seems, considers the Supreme Court decision in *Roe v. Wade* to have settled the issue for all time. Such intense debate by citizens is as it should be. A nation that docilely and unthinkingly approved every Supreme Court decision as infallible and immutable would, I believe, have severely disappointed our founders.<sup>16</sup>

Justice Ruth Bader Ginsburg has commented that *Roe*’s “Heavy-handed judicial intervention was difficult to

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<sup>13</sup> Panel Opinion, App. at 8-11 (Jones, J., concurring) (extensive footnotes discussing scientific studies).

<sup>14</sup> *Id.* at 12.

<sup>15</sup> *Id.*

<sup>16</sup> Sandra Day O’Connor, *THE MAJESTY OF THE LAW: REFLECTIONS OF A SUPREME COURT JUSTICE* 45 (Random House 2003).

justify and appears to have provoked, not resolved conflict.”<sup>17</sup> Justices have publicly criticized *Roe*.<sup>18</sup>

Like the Court in *Roe*, Petitioner McCorvey thought that abortion would help her.<sup>19</sup> She was not told about any consequences. She placed the *Roe* baby for adoption and never had an abortion. Subsequently, she worked in several abortion clinics and saw abortion first-hand – the crying women, baby parts, inadequate counseling, the lack of informed consent and no real doctor-patient relationship.<sup>20</sup> She came to understand through her first-hand experience, as well as from the testimony of women who had experienced abortion, that abortion hurts women. The reality of abortion practice can change the mind of anyone willing to look at the evidence, as it did for McCorvey. “From time to time – with due solemnity, and after much searching of conscience – the Supreme Court has overruled its own decisions.”<sup>21</sup>

Thirty-two years later, this Court now has information that was not available in 1973. Petitioner outlined in her Rule 60 Motion the significantly changed factual and legal conditions. App. at 163-188. What this Court did not know in 1973 is now knowable through advances in medicine, science, and technology. Although this Court believed it was helping women, the real life experiences of women over the last thirty years now demonstrate that abortion hurts women.

By constitutionalizing the right to abortion in *Roe*, state legislatures and lower courts cannot decide the issue. The

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<sup>17</sup> Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 385-86 (1985).

<sup>18</sup> Chief Justice Rehnquist, concurring in part and dissenting in part, joined by Justices White, Scalia, and Thomas stated: “We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases.” *Planned Parenthood v. Casey*, 505 U.S. 833, 944 (1992) (Rehnquist, C.J., concurring in part and dissenting in part).

<sup>19</sup> Affidavit of Norma McCorvey, App. at 31.

<sup>20</sup> Affidavit of Norma McCorvey, App. at 37-41.

<sup>21</sup> Anthony Lewis, *GIDEON’S TRUMPET* 10 (Random House 1964).

Supreme Court has frozen the law based on obsolete 1973 assumptions and prevented the normal regulation of the practice of medicine.<sup>22</sup> This Court now stands as the sole legal entity responsible for protecting women and children from the harm of abortion, which the evidence shows is occurring daily on a vast scale, and therefore, justice requires review of its decision in *Roe v. Wade*.

## **II. THE FACTUAL AND LEGAL CONDITIONS UNDERLYING *ROE* HAVE MATERIALLY AND SUBSTANTIALLY CHANGED SINCE 1973, AND THEREBY RENDER PROSPECTIVE APPLICATION OF *ROE* UNJUST.**

### **A. Relief from Judgment Is Appropriate If There Has Been a Significant Change in Either Factual or Legal Conditions.**

It is appropriate to grant a Rule 60(b) Motion when the party seeking relief can show “‘a significant change either in factual conditions or in law.’ A court may recognize subsequent changes in either statutory or decisional law.”<sup>23</sup> Both need not be proven. This is especially true where changed circumstances have turned the law into an “instrument of wrong.”<sup>24</sup> There have been significant changes in both factual circumstances and law since the original judgment in *Roe*. In the Record, which has already been filed with the Clerk,<sup>25</sup> there is legally sufficient and

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<sup>22</sup> For example, a woman may not legally choose to use heroin in the United States, nor may she use Laetrile treatments for cancer, nor may she engage in prostitution, even though all of these involve a liberty interest in her own body. Legislatures are free to act in these areas based on changing social, factual, and legal conditions.

<sup>23</sup> *Agostini v. Felton*, 521 U.S. 203, 215 (1997) (citing *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992) and *Railway Employees v. Wright*, 364 U.S. 642 (1961)).

<sup>24</sup> *Railway Employees v. Wright*, 364 U.S. 642, 647 (1961).

<sup>25</sup> A Rule 32 filing letter was used due to the extensive nature of the evidence required to document changed factual conditions, which is too voluminous to attach here. The Rule 32 filing letter summarizes the most important evidence. App. at 189-212.

substantial evidence of changed factual and legal conditions, which establishes that *Roe* has become an “instrument of wrong” because it results in injuries to many innocent victims.<sup>26</sup> Accordingly, it is no longer just or equitable to give *Roe* prospective application.

Application of the doctrine of *stare decisis* does not lead to a contrary result. *Stare decisis* is at its weakest when interpreting the Constitution because such “interpretation can be altered only by constitutional amendment or by overruling our [the Court’s] prior decisions.”<sup>27</sup> In constitutional cases, “correction through legislative action is practically impossible,”<sup>28</sup> thus leading to what Judge Jones called the “perverse results” of this case.<sup>29</sup>

Petitioner’s evidence met the established legal standard in *Agostini v. Felton*,<sup>30</sup> the lead case applying Rule 60 to a prior decision of this Court. Both lower courts completely ignored *Agostini*. In *Agostini*, this Court held that it had sole jurisdiction and authority to overrule its prior twelve-year-old ruling when considering a Rule 60(b) motion as well as the authority to overrule a companion case.<sup>31</sup> Based on *Agostini*, the threshold issue is “whether the factual or legal landscape has changed since . . . [the prior ruling of the Court].”<sup>32</sup>

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<sup>26</sup> See *Railway Employees v. Wright*, 364 U.S. 642, 647 (1961).

<sup>27</sup> *Agostini v. Felton* 521 U.S. 203, 235 (1997).

<sup>28</sup> *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

<sup>29</sup> Panel Opinion, App. at 12, (Jones, J., concurring).

<sup>30</sup> 521 U.S. 203, 235 (1997).

<sup>31</sup> *Agostini v. Felton*, 521 U.S. 203 (1997). Petitioner McCorvey also filed Sandra Cano’s Affidavit, the “Doe” of *Doe v. Bolton*, *Roe*’s companion case, supporting reversal. (R. at 1411-1421) (hereinafter R. cites to evidence generally refer to the bates stamp number on the original 5,347 pages of evidence attached to Petitioner’s Motion. This is the easiest method of finding the document).

<sup>32</sup> *Id.* at 216.

**B. There Have Been Significant Changes in the Factual Conditions Underlying *Roe* Since 1973, Including Evidence of Psychological and Physical Harm to Women.**

Petitioner's substantial evidence outlined the changed factual conditions regarding the physical and psychological consequences of abortion to women. Abortion was illegal in most states and relatively rare in 1973.<sup>33</sup> No evidence existed then regarding how widespread, legalized abortion would actually affect women. The Court assumed that abortion would be good for women and made many other non-evidence-based assumptions. The Court assumed abortion was like other medical procedures and as safe as childbirth because the long-term effects of abortion on women were unknown at the time.<sup>34</sup> Based on the little evidence before it, a single affidavit from Petitioner, the Court knew that unwanted pregnancies could put severe pressure on women and that women needed help and compassion in such situations.<sup>35</sup> The Court, however, had no evidence or experience on whether abortion would in fact help or hurt women in the long run. The evidence from post-abortive women now shows abortion is a short-term "solution" with long-term negative consequences.<sup>36</sup>

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<sup>33</sup> *Roe v. Wade*, 410 U.S. 113, 118, n.2 (1973).

<sup>34</sup> *Id.* at 149-50.

<sup>35</sup> *Id.* at 153.

<sup>36</sup> *See, e.g.*, Scherrie, "Twenty-five years later, I still cannot talk about it without tears and pain in my heart. It all looks simple on paper and seems like an easy way out of a bad spot, but no one tells you that the easy way out will cost you later in emotional damage and physical problems." (R. 1200). Nora, "It never goes away and you will always think of what could have been and the anger of how the government allows this hideous procedure." (R. 304). L.M.C., "[I]t hurts women physically and emotionally! That it does not end when you leave the clinic." (R. 295). Dianne, "I didn't know that the hurt would never go away." (R. 376). *See also* App. at 53, 56, 68, 75-76, 81, and 115 (hereinafter, references to Women's Affidavits not in the Appendix use R. and the bate stamp number attached to the original Rule 60 Motion, which is the easiest way to find individual affidavits that are not in the Appendix).

Abortion has negative psychological effects on women.<sup>37</sup> *Casey* placed abortion in the range of choices that are “central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”<sup>38</sup> However, the Court of Appeals for the Fifth Circuit recently cited testimony that abortion as practiced is “almost always a negative experience for the patient. . . .”<sup>39</sup> In *Bell*, the Court of Appeals struck down Texas abortion facility regulations that required Texas abortions to be done in a manner that enhanced women’s “self-esteem” and “dignity.”<sup>40</sup> Contrary to the non-evidence-based assumption in *Casey*, the decision in *Bell* and the Women’s Affidavits totally refute the assumption that abortion enhances female dignity, self-esteem, and autonomy.<sup>41</sup>

As Petitioner McCorvey’s Affidavit and the Affidavits of more than 1,000 women who have experienced abortion now show, a vast gulf exists between theoretically supporting an abortion and experiencing one. These more than 1,000 Affidavits constitute the largest body of direct, sworn evidence in the world on the adverse effects of abortion on women.<sup>42</sup> Ironically, the abortion itself often causes a destructive cycle which may lead to more abortions.<sup>43</sup>

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<sup>37</sup> See, e.g., Nicole, “Abortion is so devastating that I would never do it again – even at the cost of my own life.” App. at 70.

<sup>38</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

<sup>39</sup> *Women’s Medical Center v. Bell*, 248 F.3d 411, 418 (5th Cir. 2001).

<sup>40</sup> *Id.*

<sup>41</sup> For example, Camelia, “I have suffered with low self-esteem, self-hatred, suicidal impulses, constant anxiety (especially about sex and about making decisions). . . .” App. at 120. A.C.N., “My abortion took away my sense of self worth and self confidence.” App. at 124.

<sup>42</sup> R. 15-1410, hereinafter referred to as “Women’s Affidavits.” For example, see Victoria, “All they would need to see is the pain, sorrow and grief that I carry with me for the rest of my life.” (R. 763). Debra, “While I was still under the effects of the sedation, but after the procedure was completed, I began loud, uncontrollable sobbing . . . I can honestly say this was and is the lowest day of my life.” (R. 1202).

<sup>43</sup> See, e.g., S.M.P., “I immediately gained lots of weight and drank . . . I felt it poisoned everything I thought, felt or did.” (R. 1016). See generally Affidavit of Dr. Burke (R. 1422-1667).

Women are overwhelmed with the guilt and depression of abortion for years after having an abortion.<sup>44</sup> In the Women's Affidavits, post-abortive women were asked: "How has your abortion affected you?" The women's responses show the Court the devastation caused by their abortions.<sup>45</sup> Excerpts from one hundred Women's Affidavits are included for the Court's general review in the Appendix. App. at 43-162. All of the more than 1,000 Women's Affidavits were filed with the Clerk of the Supreme Court under Rule 32 and are in the Record at R. 15-1410.

The Affidavit of Dr. David Reardon, one of the world's leading experts on the effects of abortion on women, and the Affidavit of Dr. Theresa Burke, a clinical psychotherapist who has counseled hundreds of post-abortive women, further demonstrate the devastating psychological consequences of abortion.<sup>46</sup>

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<sup>44</sup> See Brandy, "No one told me that I would hear cries in the middle of the night." (R. 1251). Beverly, "It's not a quick and easy solution. Don't do it! It will haunt you the rest of your life." App. at 84. See generally, the Women's Affidavits (R. 15-1410); the Affidavit of Theresa Burke, Ph.D. (R. 1422-1667); the Affidavit of David Reardon, Ph.D. (R. 1668-1804), Exhibits to Affidavit of David Reardon, Ph.D. (R. 1805-4307); the Client Intake Records From Pregnancy Care Centers (R. 4308-5188); the Affidavit of Carol Everett, former abortion provider (R. 5189-5196). See also App. at 45, 46, and 47.

<sup>45</sup> For example, Amy Marie, "It devastated me. I had nightmares, flashbacks, fits of rage, uncontrollable crying, trouble sleeping, and could not look at pregnant women or children without feeling hurt, anger, and guilt." (R. 1159).

<sup>46</sup> See the Affidavit of David Reardon, Ph.D., filed with the Clerk of the Court under Rule 32, R. 1668-1804, Exhibits to Affidavit of David Reardon, Ph.D. (R. 1805-4307) (citing over 300 medical and scientific articles or studies, Dr. Reardon stated: "Newly found research has discovered that women who abort, compared with women who carry their pregnancy to term, are more likely to require psychiatric care, to suffer from anxiety, sleep disorders, sexual dysfunction, eating disorders, promiscuity, depression, and other negative emotions, which can cause behavioral problems in the children born to them subsequently. They are more likely to remain on Medicaid longer, to have more subsequent health care claims, and to have more subsequent pregnancies and miscarriages. In addition, aborting women are more likely to

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Abortion has also had negative physical effects on women. As the Women's Affidavits and the scientific evidence demonstrate, there are many physical complications that can result from abortion.<sup>47</sup> These complications include, but are not limited to: increased bleeding in subsequent pregnancies, infertility, miscarriages, ectopic pregnancy, prematurity, endometriosis, pelvic inflammatory disease, uterine perforations, genital tract infection, placenta previa, and retention of placenta.<sup>48</sup> These complications are not only hazardous to the immediate well being of the mother, but they can also have lasting effects on her health and the health of her subsequent children.

In addition, suicide is one of the effects of abortion.<sup>49</sup> The suicide rate for women who have had an abortion is significantly higher than for those who carry their pregnancies to

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commit suicide, abuse drugs or alcohol, and have higher rates of divorce.) (footnotes omitted); the Affidavit of Theresa Burke, Ph.D. (R. 1422-1667). The Rule 32 filing letter with a Summary of the Evidence is in App. at 189-212. *See, e.g.*, Julie, "One month later I had a nervous breakdown . . ." App. at 155; Beth, "I was suicidal; full of guilt and shame. Suffered from fear and depression. Caused marital and relational problems, crying spells, anxiety, panic attacks, sleep disturbances. Suffered most on anniversary of abortion." App. at 149. *See also* App. at 58, 64, "torment", App. at 68, among many others.

<sup>47</sup> Complications from all types of abortions, as described in the GALE ENCYCLOPEDIA OF MEDICINE, include "uncontrolled bleeding, infection, blood clots accumulating in the uterus, a tear in the cervix or uterus, missed abortion where the pregnancy continues, and incomplete abortion where some material from the pregnancy remains in the uterus."

<sup>48</sup> *See* Summary Affidavit of David Reardon, Ph.D. (R. 162 of the Court's Record numbers, attached to Motion for Reconsideration), Affidavit of David Reardon, Ph.D. (R. 1668-1804), Exhibits to Affidavit of David Reardon, Ph.D. (R. 1805-4307); *see also* the Women's Affidavits (R. 15-1410).

<sup>49</sup> For example, Kathy, "I would tell them about the hell I went through. About hearing babies cry when none were around, being suicidal, an alcoholic." (R. 530). Women specifically testified of suicidal thoughts at App. at 65, 71, 92, 107, 109, 115, 120, 149, 151, 153, and 161, among many others.

term.<sup>50</sup> Abortion can lead to depression and anxiety and other mental disorders. To deal with this, many women turn to suicide. As a result of the shame and guilt, many women feel they do not deserve to live, as the Women's Affidavits repeatedly demonstrate. The felt shame often prevents them from seeking help. The resulting feeling of isolation leads to severe depression and a search for a way out, such as suicide.<sup>51</sup> There is compelling scientific and medical evidence since 1973 that clearly demonstrates that human life begins at conception,<sup>52</sup> and therefore, many women express great remorse over the "murder" of their own child.<sup>53</sup> This evidence was presented in the Record and could have been more thoroughly presented at the evidentiary hearing which was denied.

In sum, the Court may come to believe, after reviewing the evidence, that abortion creates problems more closely related to the Court's concerns about assisted suicide than the ideal situation assumed in *Roe* and *Casey*. As in *Glucksberg*,<sup>54</sup> abortion and assisted suicide may have a certain appeal in hard cases, but knowledge of the reality helps remove the illusory luster, especially when multiplied by millions. In theory, abortion is supposed to be free and voluntary, but like assisted suicide, the "knowing and responsible mind is harder to assess,"<sup>55</sup> than one would anticipate. Additionally, "there is no reason to think the democratic process will not strike the proper balance

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<sup>50</sup> See Affidavit of David Reardon, Ph.D. (R.1668-1804), Exhibits to Affidavit of David Reardon, Ph.D. (R. 1805-4307).

<sup>51</sup> See the Women's Affidavits, R. 15-1410; the Affidavit of Dr. Theresa Burke, R. 1422-1667; the Affidavit of David Reardon, Ph.D., R. 1668-1804, Exhibits to Affidavit of David Reardon, Ph.D., R. 1805-4307.

<sup>52</sup> See Scientific and Medical Analysis R. 5197-5347.

<sup>53</sup> For example, Wilma, "[y]ou feel like you have committed murder." App. at 52 and R. 000133. For further references by women to murder see App. at 43, 60, 72, 74, 75, 86, 94, 103, 106, 108, 116, 118, 125, and 129, among many others.

<sup>54</sup> *Washington v. Glucksberg*, 521 U.S. 702 (1997).

<sup>55</sup> *Id.* at 784 (Souter, J., concurring).

between the interests of terminally ill [here, pregnant women], . . . and the state's interest in protecting those who might seek to end life mistakenly or under pressure,"<sup>56</sup> as is all too often the case with women in unwanted pregnancies.

**C. There Have Been Significant Changes in Legal Conditions Underlying *Roe* Since 1973, Including Changes in the Law of Federalism, and "Baby Moses" Laws in Forty-Six States Which Shift the Burden of Unwanted Child Care from Women to Society.**

In recent years, there have been significant changes in the law of federalism, which could justify returning to the states the decision whether to allow or prohibit abortion. Before *Roe* federalized abortion, health and safety issues and specifically abortion were traditional state and local concerns.<sup>57</sup> Beginning in 1995 with *United States v. Lopez*,<sup>58</sup> there has been a renewed emphasis on the judicial enforcement of the boundary lines of federalism.<sup>59</sup> While the Court has focused on Congress in *Lopez* and its progeny, the doctrine of federalism applies to the dangers of overreaching national power among all branches of government. In fact, "the danger to federalism may be greater from the federal courts than from Congress simply because judicial intervention is anti-democratic" such that "the states have relatively little recourse."<sup>60</sup> The common thread

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<sup>56</sup> *Id.* at 737 (O'Connor, J., concurring, joined by Ginsburg, J.) (further analogies to assisted suicide were developed in the Motion and the full Record).

<sup>57</sup> *Roe*, 410 U.S. at 139-140 n.34-37; see also *Webster v. Reproductive Health Services*, 492 U.S. 490, 520 (1989) (commenting that *Roe*'s framework pertained to "areas of medical practice traditionally subject to state regulation").

<sup>58</sup> *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>59</sup> See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1995); *United States v. Lopez*, 514 U.S. 549 (1995).

<sup>60</sup> J. Harvie Wilkinson III, *The 2000 Justice Lester W. Roth Lecture: Federalism for the Future*, 74 S. CAL. L. REV. 523, 536 (2001).

among the line of federalism cases involves the Court's restriction of expansion of national power into traditional state law matters such as education, crime, family law and health issues, where abortion clearly falls. *Roe* is contrary to this line of cases arising after *Casey* and therefore has made *Roe* "obsolete."<sup>61</sup> The Court's application of *Lopez* federalism to *Roe* could not only properly return this traditional state law matter to the states, but it could also restore the democratic processes to this issue of great controversy, which has not been resolved as *Casey* hoped.<sup>62</sup>

In addition, there have been significant changes in the statutory law since *Roe*. Forty-six states are now willing to completely relieve the burden of childcare for "unwanted children" for all women. For example, in Texas, a woman can now simply leave an "unwanted" child at a hospital, clinic or emergency room within sixty days of birth with no questions asked and no threat of criminal prosecution.<sup>63</sup> Because of this new law, there is no longer a need to seek an abortion to avoid any "unwanted" burdens of motherhood. The effect is that Texas will help the mother and is willing to assume the responsibilities, financial and otherwise, of raising the child.

Since 1999 when Texas pioneered this legislation, forty-five other states have enacted similar legislation called "Baby Moses" or "safe haven" laws.<sup>64</sup> In addition,

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<sup>61</sup> In 1992, before the new Federalism decisions, the Court held: "No development of constitutional law since the case was decided has implicitly or explicitly left *Roe* behind as a mere survivor of obsolete constitutional thinking." *Casey*, 505 U.S. at 857.

<sup>62</sup> The Court unsuccessfully "call[ed] the contending sides to end their national division . . ." *Casey*, 505 U.S. at 867.

<sup>63</sup> TEX. FAM. CODE ANN. §§ 262.301-262.303, and § 262.105; TEX. PENAL CODE § 22.041(h).

<sup>64</sup> See ALA. CODE § 26-25-1 et seq. (2000); ARIZ. REV. STAT. § 13-3623.01 (2001); ARK. CODE ANN. § 9-34-202 (Michie 2001); CAL. HEALTH & SAFETY CODE § 1255.7 (Deering 2000); COLO. REV. STAT. § 19-3-304.5 (2000); CONN. GEN. STAT. § 17a-57 et seq. (2000); DEL. CODE ANN. tit. 16 § 907A (2001); FLA. STAT. ANN. § 383.50 et seq. (West 2000); GA. CODE ANN. § 19-10A-1 et seq. (2002); IDAHO CODE § 39-8201 et seq. (2001); § 383.50 ILL. COMP. STAT.

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Texas, along with other states, will pay for medical expenses associated with pregnancy for the needy. In *Roe*, this Court was concerned with imposing upon the mother “a distressful life and future . . . associated with the unwanted child.”<sup>65</sup> Now, the mother can choose to be free of the burdens or blessings of raising a child without killing the child and without the subsequent damage to herself.

Similarly in *Casey*, this Court stated: “The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.”<sup>66</sup> A woman’s “destiny” can still be shaped by her own conception of her place in society because she can separate herself from

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2/1 et seq. (West 2001); IND. CODE ANN. § 31-34-2.5-1 et seq. (Michie 2000); IOWA CODE § 233.1 et seq. (2001); KAN. STAT. ANN. § 38-15,000 (2000); KY. REV. STAT. ANN. § 405.075 (Michie 2002); LA. CH. CODE art. 1701 et seq. (West 2000); ME. REV. STAT. ANN. tit. 17-A § 553 (West 2002); MD. CODE ANN. CTS. & JUD. PROC. § 5-641 (2002); MASS. GEN. LAWS ch. 119, § 391/2 (2004); MICH. COMP. LAWS § 750.135 (2000); MINN. STAT. § 145.902 (2000); MISS. CODE ANN. § 43-15-201 et seq. (2001); MO. REV. STAT. § 210.950 (2002); MONT. CODE ANN. § 40-6-401 et seq. (2001); NEV. REV. STAT. § 432B (2001); N.H. REV. STAT. ANN. § 132-A et seq. (2003); N.J. STAT. ANN. § 30:4C-15.5 et seq. (West 2000); N.M. STAT. ANN. §§ 24-22-2 et seq. and 30-6-1 (Michie 2001); N.Y. PENAL § 260.03; PENAL § 260.15; and, SOC. SERV. § 372-g (2000); N.C. GEN. STAT. § 7B-500 (2001); N.D. CENT. CODE § 50-25.1-15 (2001); OHIO REV. CODE ANN. § 2151.3515 et seq. (Anderson 2001); OKLA STAT. tit. 10 § 7115.1 (2001); OR. REV. STAT. § 418.017 (2001); PA. STAT. ANN. tit. 23 § 6501 et seq. (West 2002); R.I. GEN. LAWS § 23-13.1-1 et seq. (2001); S.C. CODE ANN. § 20-7-85 (Law. Co-op. 2000); S.D. CODIFIED LAWS § 25-5A-27 et seq. (Michie 2001); TENN. CODE ANN. § 68-11-255 (2001); TEX. FAM. CODE ANN. § 262.301 et seq. (West 1999); UTAH CODE ANN. § 62A-4a-801 et seq. (2001); VA. CODE ANN. § 18.2-371.1 (Michie 2003); WASH. REV. CODE § 13.34.260 (2002); W. VA. CODE § 49-6E-1 et seq. (2000); WIS. STAT. ANN. § 49.192 (West 2001); WYO. STAT. ANN. § 14-11-101 et seq. (Michie 2003).

<sup>65</sup> This Court stated that “. . . a distressful life and future . . . Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it.” *Roe*, 410 U.S. at 153.

<sup>66</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992).

the child if he or she is still “unwanted” at birth, and for sixty days thereafter. She has the liberty to separate herself from the child without the guilt and shame that comes from the intentional killing of her child.<sup>67</sup> If her circumstances improve over time, she is free to reunite with her child, if she so desires, and the child has not yet been adopted. Her decision that she cannot care for the child is reversible, not irrevocable as with abortion. Her range of destiny shaping choices has expanded and her liberty is now greater.

In sum, if *Roe* were vacated, some states would allow abortion and some states would restrict abortions to some degree. This would more accurately reflect the democratic diversity of America, yet women would not be without alternatives.

**D. The Underlying Assumptions in *Roe* and *Casey* Have Proven Unworkable in Practice.**

*Casey* recognized that one of the reasons a case should be overruled is if it proves to be unworkable in practice.<sup>68</sup> The changed factual conditions go to the heart of *Roe*’s assumptions and support McCorvey’s Rule 60 Motion because the judicial assumptions are not the reality of abortion practice today.

**1. Abortion Practice Usually Does Not Involve a Normal Doctor-Patient Relationship Nor a Voluntary, Informed Private Decision Between a Woman and Her Doctor.**

The real life experiences of the women who have had abortions and the individuals who have worked in abortion

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<sup>67</sup> *See, e.g.*, Shawn, “. . . constant (almost daily) thought about the tragic manner in which my baby was killed, and extreme guilt.” App. at 77. *See also* App. at 82, 85, 89, 97, 106, 108, and 112, among many others.

<sup>68</sup> *Casey*, 505 U.S. at 854.

clinics since 1973 show that there is not usually a normal doctor-patient relationship and that the abortion industry does not adequately protect women.<sup>69</sup> As the Women's Affidavits demonstrate, most women never see their abortionist until the procedure is being performed.

At the heart of *Roe* is the assumption that the abortion decision should be between a woman and her doctor.<sup>70</sup> The sworn testimony of post-abortive women and personnel in abortion clinics shows that the abortion industry fails to (1) adequately provide women with the protections of a true doctor-patient relationship; (2) provide women with the information necessary to truly make an informed decision regarding the procedure; (3) maintain the normal standards of health, safety, and professionalism required of medical personnel; (4) protect the mental and physical safety of women; (5) fully and fairly inform patients about the nature of the abortion procedure, that it is a baby and not just a mass of cells, or at least, that they may come to believe it is a baby, and the consequences of having an abortion; and, (6) regularly misleads or deceives women regarding the nature and development of their unborn children.<sup>71</sup>

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<sup>69</sup> For example, M.E.A., "I was never told that I could be, and was in labor for 18 hours, delivered baby with no one present. Nurse came in room with doctor, umbilical cord was cut, baby placed in bucket on food tray cart in my room." (R. 017). Linda, "This is the horror of our generation – I believe that this abuse to women needs to be outlawed." (R. 384). *See, e.g.*, Motion, paragraph 26, App. at 181 and Affidavit of Norma McCorvey, App. at 31-42; Affidavits of more than one thousand Post-Abortive Women (R. 15-1410); Affidavit of Theresa Burke, Ph.D. (R. 1422-1667); Affidavit of David Reardon, Ph.D. (R. 1805-4307); Client Intake Records for Pregnancy Care Centers (R. 4308-5188); Affidavit of Carol Everett, former abortion provider (R. 5189-5196).

<sup>70</sup> "All these are factors the woman and her responsible physician necessarily will consider in consultation." *Roe*, 410 U.S. at 153.

<sup>71</sup> Women were also asked, "Were you adequately informed of the nature of abortion?" Typical responses demonstrate that they were not. *See, e.g.*, Paula, "I was not told about the years of emotional torment I would experience." (R. 84). Tina, "No, I was not told anything about abortion. . . . No one told me of the risks I was taking." (R. 159). *See also* Affidavit of Norma McCorvey, App. at 31-42; the Affidavits of more than 1,000  
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## **2. Abortion Is Often the Result of Coercion from Relatives, Sexual Partners, or Circumstances.**

*Roe* is not workable because of other practical flaws that go to the heart of the liberty interest. For example, women are frequently coerced. The Supreme Court in *Roe* and *Casey* assumed that abortion would be a voluntary choice. Rather than being the result of a knowing, voluntary, dignity-enhancing woman's choice, the Women's Affidavits reveal that abortion is almost always the result of pressure or coercion from sexual partners, family members, abortion clinic workers or abortionists, or circumstances.<sup>72</sup> Many women testify that they would have never considered an abortion, if it were not legal. The "abortion choice" gave freedom to others to pressure them into something they did not want and later deeply regretted.<sup>73</sup>

## **3. Women Are Left Alone to Deal with the Problem of Perceived Guilt.**

In addition, there is no true liberty for women because guilt is another consequence of abortion. There are three

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Post-Abortive Women (R. 15-1410); the Affidavit of Theresa Burke, Ph.D. (R. 1422-1667); the Affidavit of David Reardon, Ph.D. (R. 1668-1804), Exhibits to Affidavit of David Reardon, Ph.D. (R. 1805-4307); the Client Intake Records From Pregnancy Care Centers (R. 4308-5188); the Affidavit of Carol Everett, former abortion clinic worker (R. 5189-5196). Women were also asked: "Were you adequately informed of the consequences of abortion?" Typical responses demonstrate that they were not. *See, e.g.*, R. 27, 35, 37, 58, 88, 102, 125, and 133 among many others.

<sup>72</sup> Women's Affidavits show pressure or coercion when asked, "Did anyone pressure you into having an abortion? *See, e.g.*, Jennifer, "Yes, my family and the counselor at the clinic." (R. 584). Janet, "Yes. Mostly my parents but also my then boyfriend." (R. 641). Cori Elizabeth, "Yes, my fiancé at the time." (R. 780). *See also* R. 315, 328, 373, 393, and 410 among many others.

<sup>73</sup> For example, Janice, "Because of the fear I lived under perpetrated by my ex-husband, I chose to have the abortion to avoid any more of his wrath and terror . . . it has affected me emotionally to this day." App. at 83.

typical responses to guilt: punishment, even self-punishment, forgiveness, and denial. Denial is a psychological coping mechanism, which can be effective in the short-run, but eventually leads to problems.<sup>74</sup> Whatever the legal status of the “fetus,” “millions of Americans believe that life begins at conception. . . .”<sup>75</sup> Thus, many women who have abortions feel or will feel guilt about the procedure at some point in their life, often years later. The Supreme Court has never dealt with this perceived guilt issue. The Court cannot assure a woman she has not killed her baby since the Court even today has not “resolve[d] the difficult question of when life begins.”<sup>76</sup>

If even a conservative ten percent of women suffer severe psychological injury at some point in their life, then at least 100,000 women a year could suffer needless trauma, especially now that society will care for unwanted children. Petitioner’s evidence demonstrates the figure is much, much higher. While the initial reaction to an abortion may be relief for some, though certainly not all, this relief is due to the end of a very tragic, pressure-packed, emotionally-conflicted situation. Merely making the decision sometimes produces some temporary relief, but the evidence now shows the relief is not long-lasting for millions of women. Because of *Roe* and *Casey*, normal social controls and investigations, experiments, and consumer protection cannot occur. If a procedure this Court once thought beneficial is in fact dangerous, this Court should at least look at the evidence, or order a remand for a trial.

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<sup>74</sup> See Dr. Burke’s Affidavit which “explains some of the human defense mechanisms [post-abortive] women experience in various ways such as suppression, repression, rationalization, reaction formation, introjection, undoing, projection, provocative behavior, displacement, conversion, withdrawal, regression, deflection, and denial.” Rule 32 Filing Letter, App. at 206.

<sup>75</sup> *Stenberg v. Carhart*, 530 U.S. 914, 920 (2000); see also *Women’s Affidavits*.

<sup>76</sup> *Roe*, 410 U.S. at 159.

### III. THE COURTS BELOW ERRED IN DENYING PETITIONER DUE PROCESS AND ABUSED THEIR DISCRETION.

#### A. Petitioner Has Met All Procedural Requirements.

The courts below erred in denying Petitioner’s Rule 60 Motion on procedural grounds, which will result in untold further injuries to women. Petitioner has met all procedural requirements.<sup>77</sup> At the time *Roe* was originally decided, all of the procedural requirements had been met. No independent jurisdiction is needed to support a Rule 60(b) Motion because the district court has continuing jurisdiction.<sup>78</sup> By the plain language of Rule 60(b),<sup>79</sup> Petitioner has standing to bring this Motion because she was a party to the “final judgment, order, or proceeding . . . .”<sup>80</sup> The courts have followed this plain reading of the Rule.<sup>81</sup> There is no question that Norma McCorvey was and is a party, and

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<sup>77</sup> Petitioner addressed in her Brief to the Court of Appeals for the Fifth Circuit the procedural issues of standing, mootness, judicial estoppel, *stare decisis*, and binding precedent in greater detail. She continues to assert that all procedural requirements have been met and that no independent jurisdiction is needed to support a Rule 60(b) Motion.

<sup>78</sup> *Charter Township of Muskegon v. City of Muskegon*, 303 F.3d 755, 762 (6th Cir. 2002) (quoting MOORE’S FEDERAL PRACTICE § 60.84[1][a] (3d ed. 1997) that “It has been long established that no independent federal jurisdictional basis is needed to support a Rule 60(b) motion proceeding. A Rule 60(b) motion is considered a continuation of the original proceeding. “If the district court had jurisdiction when the suit was filed, it has jurisdiction to entertain a Rule 60(b) motion. This jurisdiction is not divested by subsequent events.”).

<sup>79</sup> FED. R. CIV. P. 60(b) states: “On motion and upon such terms as are just, the court may relieve a party or a party’s legal representative from a final judgment, order, or proceeding. . . .”

<sup>80</sup> FED. R. CIV. P 60(b).

<sup>81</sup> See *National Acceptance Co. v. Frigidmeats*, 627 F.2d 764, 766 (7th Cir. 1980). See generally 11 Charles Alan Wright, Arthur R. Miller, et al., FEDERAL PRACTICE AND PROCEDURE “Jurisdiction” § 2865 at 225-226 (West 1973) (stating it is well-settled that one who was not a party lacks standing to bring a Rule 60(b) motion).

therefore, she has met all procedural requirements for a Rule 60 Motion.

**B. The Rule 60 Motion Was Denied After a Mere Two Days Without Careful Consideration of the 5,347 Pages of Sworn Evidence Submitted with the Motion.**

The United States Court of Appeals for the Fifth Circuit has criticized district courts that fail to hold post-judgment hearings and carefully consider each motion on its merits.<sup>82</sup> Recently, the court admonished the lower courts to “*carefully consider each such motion on its merits. . .*”<sup>83</sup> In the present case, the district court ignored the court of appeal’s directive for careful consideration. The district court candidly admitted that it denied “McCorvey’s motion for relief from judgment without considering the substance of her criticism of *Roe*.” App. at 17-18.

In addition, the district court ruled on this unusual case of national importance in a mere two days without giving careful consideration to 5,347 pages of affidavit evidence. This rapidity does not suggest even the appearance of impartiality and a due regard for justice.

The appellate panel correctly held that the district court erred in denying the Rule 60 Motion based on timeliness. The panel stated: “Essentially, the district court concluded that a 30-year delay, regardless of the circumstances, is too long as a matter of law. We disagree.”<sup>84</sup> The panel correctly reasoned that there is not a set period of time but that the motion must be brought within a reasonable time based on the particular facts and circumstances.<sup>85</sup> However, the panel erred in its decision

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<sup>82</sup> *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 494 (5th Cir. 2000).

<sup>83</sup> *Id.* at 502 (emphasis added).

<sup>84</sup> Panel Opinion, App. at 6.

<sup>85</sup> *Id.* See Petitioner’s Motion For Reconsideration for detailed timeliness analysis. App. at 213-243. Federal courts have allowed relief decades after judgment under a Rule 60 Motion. See, e.g., *Agostini v. Felton*, 521 U.S. 203 (1997) (12 years); *Rufo v. Inmates of the Suffolk* (Continued on following page)

on mootness because Texas has consistently banned or restricted abortion to the full extent allowed by the Court.

**C. By Ignoring the Clear Intent of Texas Abortion Law to Protect Women and Children to the Full Extent of the Constitution, the Decision Below Constitutes Blatant Federal Court Nullification of State Abortion Law.**

In *Leavitt v. Jane L.*,<sup>86</sup> this Court summarily reversed the court of appeals' interpretation of state abortion law, explaining that while the Court normally does not "grant petitions for certiorari solely to review what purports to be an application of state law;" it did so and should do so "where the alternative is allowing blatant federal court nullification of state law."<sup>87</sup> As the Petitioner's mootness argument will show, it is clear even to the leading pro-abortion advocacy group, that Texas would ban abortion except to save the life of the mother if it could.<sup>88</sup> What stops Texas is not its own legislative intent, as the panel below incorrectly opined, but the judgment in *Roe v. Wade* itself. Of course, if this Court gave each state the opportunity to do so, each state could decide to what extent, if at all, they would regulate or ban abortion.

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*County Jail*, 502 U.S. 367 (1992) (10 years); *Railway Employees v. Wright*, 364 U.S. 642 (1961) (12 years); *Charter Township of Muskegon v. City of Muskegon*, 303 F.3d 755 (6th Cir. 2002) (28 years); *United States v. Board of School Commissioners*, 128 F.3d 507 (7th Cir. 1997) (30 years); *NAACP v. Duval County School*, 273 F.3d 960 (11th Cir. 2001) (41 years).

<sup>86</sup> *Leavitt v. Jane L.*, 518 U.S. 137, 144-145 (1996).

<sup>87</sup> *Id.*

<sup>88</sup> "Given the current composition of the [Texas] legislature and the State's history of regulating abortion heavily, it is likely that Texas would enact a new statute banning abortion." Center for Reproductive Rights, *What If Roe Fell? The State-by-State Consequences of Overturning Roe v. Wade* 78 (Sept. 2004) Attached to supplemental briefing letter with Fifth Circuit. App. at 270-275.

#### D. The Case Is Not Moot.

The panel held that “because the statutes declared unconstitutional in *Roe* have been repealed, McCorvey’s 60(b) motion is moot.”<sup>89</sup> McCorvey submits that the Texas abortion statutes have not been repealed expressly or by implication.

After *Roe*, the Penal Code was revised, but the abortion provisions were expressly *not* repealed. The Disposition Table made it clear that certain articles were *unrepealed* even though they were placed into a different part of the new Code.<sup>90</sup> The historical note states they are unconstitutional because of *Roe v. Wade*. Thus, contrary to the Court of Appeals, the Legislature has directly stated that the abortion articles are unrepealed.

In 1974, the Attorney General outlined the types of regulations permitted under *Roe*.<sup>91</sup> He said that “sponsors . . . should be guided by the principles discussed herein. . . .”<sup>92</sup> Subsequently, the Texas Legislature passed legislation restricting abortion as much as possible based on the constitutional limitations of *Roe v. Wade* and the Attorney General’s guidelines after the decision.

It is not reasonable to assume that the Legislature would repeal by implication what it expressly refused to

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<sup>89</sup> Panel Opinion, App. at 6. *See also* Petition For Rehearing En Banc for more complete mootness discussion. App. at 244-269.

<sup>90</sup> In fact, the Table was entitled “Disposition of **Unrepealed** Articles of the Texas Penal Code of 1925 and Vernon’s Texas Penal Code.” (emphasis added) The instructions for that Disposition Table stated the Legislature was giving new official citations of unrepealed articles. The instructions for the Disposition Table stated in relevant part: “Pursuant to the authority granted by Section 5 of Chapter 399, Acts of the 63rd Legislature, the Texas Legislative Council has compiled the following table showing the new official citations of **unrepealed** articles of the 1925 Texas Penal Code and the new classifications of unrepealed statutes compiled as articles of Vernon’s Texas Penal Code.” (emphasis added)

<sup>91</sup> OP. TEX. ATTY GEN. No. H-369 at 4-13 (1974).

<sup>92</sup> *Id.* at 13.

repeal. More logical is the interpretation that the Legislature has followed the guidelines of the Attorney General since 1974 in regulating abortion and providing administrative, civil, and criminal penalties to the full extent of the Supreme Court's new cases interpreting the Constitution.<sup>93</sup> One author criticizing the Fifth Circuit's approach stated: "[T]hey [post-*Roe* statutes] should generally be viewed as measures intended to fill a gap created by *Roe* rather than as impliedly repealing pre-*Roe* legislation."<sup>94</sup>

This Court "weighs in favor of revival."<sup>95</sup> Several state courts have explicitly addressed revival, and with one exception, they have concluded that invalidated statutes are immediately enforceable when the invalidating decision is overturned.<sup>96</sup> Prior to the overruling decision, an invalidated statute "is dormant, but not dead."<sup>97</sup> One court has stated:

There are comparatively few cases dealing squarely with the question before us, but they are unanimous in holding that a law once declared unconstitutional and later held to be constitutional does not require reenactment by the legislature in order to restore its operative force. They proceed on the principle that a statute declared

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<sup>93</sup> Texas regulates abortion in many ways, as correctly noted below. App. at 5. These provisions show a desire to allow abortions only to the absolute minimum as required by *Roe* and its progeny.

<sup>94</sup> See generally Smolin, *The Status of Existing Abortion Prohibitions in a Legal World Without Roe: Applying the Doctrine of Implied Repeal to Abortion*, 11 ST. LOUIS U. PUB. L. REV. 385, 402 (1992) (stating overwhelming consensus is that statutes automatically revive).

<sup>95</sup> Treanor & Sperling, *Prospective Overruling and the Revival of "Unconstitutional" Statutes*, 93 COLUM. L. REV. 1902, 1911 (1993); see also Benjamin, *Stepping into the Same River Twice: Rapidly Changing Facts and the Appellate Process*, 78 TEX. L. REV. 269, n.63 (1999) ("an invalidated statute simply becomes dormant, ready to be enforced as soon as a court finds that it is no longer invalid").

<sup>96</sup> Treanor & Sperling, *Prospective Overruling and the Revival of "Unconstitutional" Statutes*, 93 COLUM. L. REV. 1902, 1913-1914 n.50 (citations omitted).

<sup>97</sup> *Jawish v. Morlet*, 86 A.2d 96, 97 (D.C. 1952).

unconstitutional is void in the sense that it is inoperative or unenforceable, but not void in the sense that it is repealed or abolished; that so long as the decision stands the statute is dormant but not dead; and that if the decision is reversed the statute is valid from its first effective date. (citations omitted).<sup>98</sup>

By statute, Texas presumes that the intention of its Legislature is to be in “compliance with the constitutions of this state and the United States . . .”<sup>99</sup> and that “a just and reasonable result is intended.”<sup>100</sup> If *Roe* is vacated on the grounds that it is no longer just, the just result would be to revive the dormant Texas law, not penalize Texas for following this Court.

There is no irreconcilable conflict between the older and new statutes. The dormant “pre-*Roe*” statutes allowed abortions to save the life of the mother.<sup>101</sup> If *Roe* is vacated, allowable abortions to save the life of the mother under the “revived” statutes would still be governed by the newer statutes which are silent on the purpose for abortions.<sup>102</sup>

The repeal of a statutory provision by implication will not be declared unless the legislative intent to repeal is so clear and apparent as to leave no room for either doubt or

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<sup>98</sup> *Id.*; see also 39 OP. ATT’Y GEN. 22 (1937) (stating unconstitutional statute remains on the “statute books” and is valid from the date it became effective).

<sup>99</sup> TEX. GOV’T CODE § 311.021.

<sup>100</sup> *Id.* § 311.021(3).

<sup>101</sup> Penal Code art. 1196 stating: “Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother.” TEX. PENAL CODE art. 1196 (1925), App. at 29.

<sup>102</sup> Unlike the statute in *Weeks v. Connick*, 733 F. Supp. 1036 (E.D. La. 1990), Texas had an exception to save the life of the mother. *Weeks* which was cited by the panel below has been criticized for its flawed analysis. See generally Smolin, *The Status of Existing Abortion Prohibitions in a Legal World Without Roe: Applying the Doctrine of Implied Repeal to Abortion*, 11 ST. LOUIS U. PUB. L. REV. 385 (1992).

speculation.<sup>103</sup> Here, the Legislature is responding to what the Supreme Court has done, and not to what the Legislature itself has done in prior sessions. This is a significant difference.

There are several exceptions to the mootness doctrine. The panel itself noted an exception to mootness applies “where there is evidence, or a legitimate reason to believe, that the state will reenact the statute or one that is substantially similar.”<sup>104</sup> Yet the panel ignored all the subsequent legislation Texas adopted whenever subsequent Supreme Court interpretations allowed restrictions.<sup>105</sup>

Petitioner McCorvey further contends that the case is not moot because it comes within other exceptions to the mootness rule. The first exception is “capable of repetition, yet evading review.” This Court specifically addressed this issue in the original *Roe* case.<sup>106</sup> In 1973, McCorvey’s case was arguably moot because she was no longer pregnant.<sup>107</sup> This Court rejected the argument stating “pregnancy provides a classic justification for a conclusion of nonmootness” and “capable of repetition, yet evading review.”<sup>108</sup> Harm to pregnant women from abortion injuries is similar. Judge Jones and Petitioner believe that unless the Court uses its own *Roe* exception to the mootness doctrine, as it did in this case originally to reach this important social issue, “the Court will never be able to examine its factual assumptions on a record made in Court . . . No ‘live’

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<sup>103</sup> *Samaniego v. Arguelles*, 737 S.W.2d 88, 89 (Tex. App. – El Paso 1987); see also *Allen v. Mauro*, 733 S.W.2d 228, 234 (Tex. App. – El Paso 1984).

<sup>104</sup> Panel Opinion, App. at 5, n.3.

<sup>105</sup> See also note 88.

<sup>106</sup> *Roe*, 410 U.S. at 125.

<sup>107</sup> *Id.* at 124.

<sup>108</sup> *Id.* at 125.

controversy will arise concerning this framework, consequently I cannot conceive of any judicial forum in which McCorvey's evidence could be aired."<sup>109</sup> Thus, substantial changes in factual and legal conditions would evade review, contrary to *Roe*'s mootness exception previously established in this case. In essence, such a ruling also completely undermines Rule 60.<sup>110</sup>

The second exception to mootness is "voluntary cessation of the challenged practice."<sup>111</sup> The holding in *Roe* is a continuing quasi-injunctive order. In *Roe*, this Court did not grant injunctive relief because the decision would and did have the same effect as an injunction. The Court said "[w]e assume the Texas prosecutorial authorities will give full credence to this decision that the present criminal abortion statutes are unconstitutional."<sup>112</sup> Prosecutors in the State of Texas have since respectfully, and voluntarily, given credence to this Court's decision. Prosecutors could change their mind and prosecute abortionists. The only way to get relief from a quasi-injunctive order is Rule 60 relief, and therefore, McCorvey's Rule 60 Motion is not moot.

The third exception to mootness is collateral consequences.<sup>113</sup> "[I]f there are collateral consequences to one of the parties – even if they are quite minor – the controversy is not moot."<sup>114</sup> As McCorvey has proved, there are tremendous collateral consequences. McCorvey has suffered guilt, shame, public humiliation, anguish of soul, and what she believes is complicity in murder knowing that her case has

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<sup>109</sup> Panel Opinion (Jones, J., concurring opinion). App. at 11.

<sup>110</sup> See *Agostini v. Felton*, 521 U.S. 203 (1997).

<sup>111</sup> See John E. Nowak & Ronald D. Rotunda, CONSTITUTIONAL LAW § 2.12 at 72 (7th ed. 2004).

<sup>112</sup> *Roe v. Wade*, 410 U.S. 113, 166 (1973).

<sup>113</sup> See John E. Nowak & Ronald D. Rotunda, CONSTITUTIONAL LAW § 2.12 at 74 (7th ed. 2004).

<sup>114</sup> *Id.* at 75.

caused the death of over 43 million babies.<sup>115</sup> She has also shared in the pain of post-abortive women. The State of Texas has suffered the consequences of not being able to ban abortion except to save the life of the mother, which it had done since 1854. The women have suffered collateral consequences of *Roe* through physical, emotional, and psychological harm. The nation has suffered the collateral consequences – as *Roe* has polarized Americans, influenced the political process and even the appointment of judges. Justice never sleeps, and it demands re-evaluation in light of changed conditions. Therefore, McCorvey’s Rule 60 Motion is not moot.

### CONCLUSION

This a case of national importance that can only be decided by this Court. As one of the post-abortive women testified, “Listen to the voices of those who have experienced the physical and emotional consequences.”<sup>116</sup> Because it goes to the heart of the balance struck in *Roe* and involves substantial changes in the factual and legal conditions since 1973 that make *Roe* no longer just or equitable for prospective application, the petition for writ of certiorari should be granted.

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<sup>115</sup> See Affidavit of Norma McCorvey, App. at 31-42; see also Affidavit of Sandra Cano, “Doe” of *Doe v. Bolton*, attached as Exhibit E to original Rule 60 Motion.

<sup>116</sup> Shirley (R. 89).

Respectfully submitted,

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