

No. _____

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

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SANDRA CANO, FORMERLY KNOWN AS
“MARY DOE” OF *DOE V. BOLTON*,

Petitioner,

v.

THURBERT E. BAKER, Attorney General of the
State of Georgia, PAUL L. HOWARD, JR., District
Attorney of Fulton County, Georgia, RICHARD
PENNINGTON, Chief of Police of the City of Atlanta,

Respondents.

◆

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

◆

PETITION FOR A WRIT OF CERTIORARI

◆

THE JUSTICE FOUNDATION
(Formerly Texas Justice
Foundation, and still doing
business in Texas as Texas
Justice Foundation)

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QUESTIONS PRESENTED FOR REVIEW

Sandra Cano, the “Mary Doe” of *Doe v. Bolton* comes before this Court as an original party asking that her judgment be vacated pursuant to FRCP Rule 60(b). Since *Doe*, significant changes in the factual conditions surrounding abortion demonstrate that abortion hurts women as shown by: the sworn testimony of women harmed by abortion; medical articles and studies since 1973 documenting abortion injuries; and, sworn evidence that abortion clinics in fact do not provide the normal doctor-patient relationship anticipated by *Roe v. Wade* and *Doe v. Bolton*. Significant changes also occurred in legal conditions, including changes in the law of forty-six states that have enacted “Baby Moses” laws which transfer the burden of unwanted child care to society, and this Court’s Federalism jurisprudence restoring more autonomy to the states. *Doe* is also a case of great national importance, and therefore, the questions presented are:

1. Should the original judgment in *Doe v. Bolton* be vacated under Rule 60 due to the substantially changed factual and/or legal conditions that make it no longer just or equitable for prospective application?
2. Is Petitioner Sandra Cano entitled under Rule 60 to any relief, substantive or procedural?
3. Should the Court, at a minimum, require the district court to hold a hearing to afford fundamental due process that would lead to determining whether *Doe v. Bolton* and *Roe v. Wade* should be re-examined?
4. Does the district court have a role in preparing the factual basis in a Rule 60 motion based on *Agostini*?

PARTIES TO THE PROCEEDINGS

Petitioner is Sandra Cano, the original “Mary Doe” of *Doe v. Bolton*.

Respondent is Thurbert E. Baker, Attorney General of the State of Georgia, as successor in office to Arthur Bolton; Lewis R. Slaton, as District Attorney of Fulton County, Georgia, through his successor in office, Paul L. Howard, Jr.; and, Herbert T. Jenkins, as Chief of Police of the City of Atlanta, through his official successor in office, Richard Pennington.

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PETITION FOR A WRIT OF CERTIORARI
OPINIONS BELOW

The opinion of the court of appeals is reported at 435 F.3d 1337 (11th Cir. 2006). App. at 1. The original opinion of the district court was not published, but its opinion upon reconsideration is found at 2005 U.S. Dist. LEXIS 41702, 2005 WL 3881370 (N.D. Ga., Feb. 23, 2005). App. at 12.

JURISDICTION

The judgment of the court of appeals was decided on January 11, 2006. A timely petition for rehearing en banc was denied on March 17, 2006. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

The pertinent 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

On August 25, 2003, Petitioner Sandra Cano (hereinafter “Cano”), known to this Court as “Mary Doe,” of *Doe v. Bolton*, filed a Rule 60 Motion for Relief from Judgment of her 1970 judgment¹ declaring the Georgia abortion statute² unconstitutional which this Court affirmed on January 22, 1973.³ On the same day, this Court also ruled in *Roe v. Wade*,⁴ the companion case to *Doe*.

Petitioner Cano filed a Rule 60(b) Motion for Relief from Judgment based on changed factual and legal conditions pursuant to the procedure in *Agostini v. Felton*⁵ for overturning one of this Court’s own decisions. App. at 176. Cano met all justiciability and jurisdictional requirements and was an original “party” to bring the Motion under Rule 60. No independent jurisdiction is needed.⁶ The Motion and Supporting Memorandum of Law included over 5,000 pages of evidence including affidavits from Sandra Cano, Norma McCorvey (the original “Roe” of *Roe v. Wade*), over 1,000 post-abortive women, former abortion clinic personnel, and numerous medical experts. App. at 176.

¹ *Doe v. Bolton*, 319 F. Supp. 1048 (N.D. Ga. 1970).

² GA. CODE ANN. §§ 26-1201 through 26-1203.

³ *Doe v. Bolton*, 410 U.S. 179 (1973) (hereinafter “*Doe*”).

⁴ 410 U.S. 113 (1973) (hereinafter “*Roe*”).

⁵ *Agostini v. Felton*, 521 U.S. 203 (1997) (hereinafter “*Agostini*”).

⁶ *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.”).

On September 8, 2003, the Georgia Attorney General filed a Response based on procedural challenges which the district court did not sustain. The only evidence consisted of Cano's over 5,000 pages of uncontroverted affidavit evidence. After considering the evidence, the district court denied the Rule 60 Motion on March 26, 2004 (App. at 21) stating that it "makes no judgment as to the importance or veracity of the information."⁷ The district court made no findings of fact. On April 9, 2004, Cano timely filed a Motion for Reconsideration based on errors of law and facts and manifest injustice. App. at 239. The district court denied the Motion for Reconsideration on February 23, 2005 stating that it "lacked the authority" to grant the Motion. App. at 12. For the first time, the district court attempted to distinguish this Court's lead case of *Agostini v. Felton*.⁸

Cano appealed to the United States Court of Appeals for the Eleventh Circuit, but on January 11, 2006, the court of appeals affirmed the district court's decision⁹ and stated:

Even assuming all the proffered scientific or clinical evidence about the effects of abortion submitted by Cano in support of her Rule 60(b) are true, it does not change the fact that the *district court did not have the authority to reverse the Supreme Court's decisions in Doe or Roe, nor do we*.¹⁰

⁷ Order Denying Rule 60(b) Motion (March 26, 2004). App. at 26.

⁸ 521 U.S. 203 (1997).

⁹ 435 F.3d 1337 (11th Cir. 2006). App. at 1-11.

¹⁰ *Id.* at 1342 (emphasis added).

Petitioner Cano sought reconsideration en banc, however, it was denied on March 8, 2006.¹¹ An extension of time to file for certiorari was granted to July 31, 2006.

◆

INTRODUCTION

This case involves questions of exceptional national importance that can only be decided by the Supreme Court of the United States. In addition, the *Doe* health exception is at the heart of the partial birth abortion cases which are presently before this Court.

By accepting this case also, the Court would have squarely before it the question of whether prospective application of *Doe v. Bolton* remains just and equitable given the changed factual and legal conditions surrounding abortions since 1973. The evidence in this case goes to the heart of the balance that was struck in *Roe v. Wade* and *Doe v. Bolton*. *Doe* and *Roe* effectively foreclosed any other branch of federal or state government, and even lower courts as this case demonstrates, from addressing the substantial medical evidence that abortion hurts women. As the lower courts held, only this Court can reverse one of its own precedents based on changed factual and legal conditions.

Petitioner Cano, the original plaintiff in *Doe v. Bolton*, seeks relief from judgment under Rule 60(b) because her judgment 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.

¹¹ App. at 32-33.

There have been substantial changes in *both* the factual and legal conditions in the last thirty years of experience with legalized abortion and its effect on women. Petitioner respectfully requests a writ of certiorari in this case of great national importance.



REASONS FOR GRANTING THE PETITION FOR CERTIORARI

I. THE COURTS BELOW HELD UNDER *AGOSTINI* THAT ONLY THIS COURT CAN REVERSE ITS OWN *DOE V. BOLTON* PRECEDENT, AND THEREFORE, CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER CHANGED FACTUAL AND LEGAL CONDITIONS MAKE *DOE* NO LONGER JUST FOR PROSPECTIVE APPLICATION UNDER RULE 60(b).

In 1973, the Court substantially limited the regulation of abortion by the medical and legislative process; therefore, the Court is the only entity that can truly consider the factual and legal changes concerning abortion since 1973.¹² The court of appeals was very clear that only the Supreme Court could make the decision under an

¹² *Cano v. Baker*, 435 F.3d 1337, 1342 (11th Cir. 2006) (stating neither the district or appellate court can reverse a Supreme Court decision because only it has the prerogative to overrule one of its own decisions); *McCorvey v. Hill*, 385 F.3d 846, 853 (5th Cir. 2005) (Jones, J., concurring) (stating: “One may fervently hope that the Court will someday acknowledge such developments and re-evaluate *Roe* and *Casey* 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. . . .”).

Agostini-type Rule 60(b) motion.¹³ The court of appeals stated:

Even assuming all the proffered scientific or clinical evidence about the effects of abortion submitted by Cano in support of her Rule 60(b) are true, it does not change the fact that the district court did not have the authority to reverse the Supreme Court’s decisions in *Doe* or *Roe*, nor do we.¹⁴

The district court concluded on reconsideration that the “*Agostini* opinion specifically affirms the long-standing principle that only the Supreme Court may overrule its own precedent. In fact, the *Agostini* Court noted that the trial court had acted properly in refusing to reinterpret directly binding precedent. Thus, this court did not err. . . .”¹⁵ In short, Cano has no place else to go but to this Court with this legally sufficient and compelling evidence because no one else has the authority to act.

It is important for this Court to review an area of law that it has constitutionalized because it is the only court that can. In 2003, Norma McCorvey, the “Roe” of *Roe v. Wade*, filed a similar Rule 60(b) Motion asking the court to overturn her case.¹⁶ One of the things that make this case so important and unusual is that both women whose cases brought abortion on demand and the gruesome partial birth abortion procedure to America are asking this Court

¹³ *Cano v. Baker*, 435 F.3d 1337, 1342 (11th Cir. 2006).

¹⁴ *Id.* at 1342.

¹⁵ *Cano v. Baker*, 2005 U.S. Dist. LEXIS 41702 at 8.

¹⁶ *McCorvey v. Hill*, 385 F.3d 846 (5th Cir. 2004), *cert. denied*, 543 U.S. 1154 (2005).

to overturn their cases. Judge Jones discussed the “perverse result”¹⁷ that an issue that affects millions of women and unborn babies cannot be heard or effectively debated:

... 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. . . .¹⁸

The facts do matter. What this Court did not know in 1973 is now knowable through advances in medicine, science, and technology. The Supreme Court has frozen abortion law based on obsolete 1973 assumptions and prevented the normal regulation of the practice of medicine. 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. This Court is 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 *Doe v. Bolton* and its companion case *Roe v. Wade*.

¹⁷ *Id.* at 852 (Jones, J. concurring).

¹⁸ *Id.*

II. 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.

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.”¹⁹ This is especially true where changed circumstances have turned the law into an “instrument of wrong.”²⁰ There have been significant changes in both factual circumstances and law since the original judgment in *Doe*. In the Record,²¹ there is legally sufficient and substantial evidence of changed factual and legal conditions, which establishes that *Doe* has become an “instrument of wrong”

¹⁹ *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)) (emphasis added).

²⁰ *Railway Employees v. Wright*, 364 U.S. 642, 647 (1961). The purpose of Rule 60 is to achieve justice. *Charter Township of Muskegon v. City of Muskegon*, 303 F.3d 755, 760 (6th Cir. 2002). As the prophet Isaiah stated: “I will make justice the measuring line. . . .” Is. 28:14-22 at 17.

²¹ Substantial portions of which have already been filed with the Clerk due to the importance of this case. 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 216.

because it results in injuries to many innocent victims.²² Accordingly, it is no longer just or equitable to give *Doe* prospective application. Application of the doctrine of *stare decisis* does not lead to a contrary result.²³

Petitioner’s evidence met the established legal standard in *Agostini v. Felton*.²⁴ In *Agostini*, this Court held that it had sole jurisdiction and authority to overrule its prior twelve-year-old decision and a companion case.²⁵ Based on *Agostini*, the threshold issue is “whether the factual or legal landscape has changed since . . . [the prior ruling of the Court].”²⁶ Petitioner believes that both the factual and legal landscape have significantly changed thereby warranting certiorari.

²² See *Railway Employees v. Wright*, 364 U.S. 642, 647 (1961).

²³ *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.” *Agostini v. Felton*, 521 U.S. 203, 235 (1997). In constitutional cases, “correction through legislative action is practically impossible,” *Payne v. Tennessee*, 501 U.S. 808, 828 (1991), thus leading to what Judge Jones called the “perverse results.” *McCorvey v. Hill*, 385 F.3d 846, 852 (5th Cir. 2004) (Jones, J., concurring), *cert. denied*, 543 U.S. 1154 (2005).

²⁴ 521 U.S. 203, 235 (1997).

²⁵ *Agostini v. Felton*, 521 U.S. 203 (1997). Norma McCorvey, the “Roe” of *Roe v. Wade*, also filed an Affidavit in this case supporting reversal of *Doe* and her own case. App. at 44.

²⁶ *Agostini v. Felton*, 521 U.S. 203, 216 (1997) (emphasis added).

A. Significantly Changed Factual Conditions Since *Doe* and *Roe* Demonstrate that Abortion as Practiced Results in Extensive Psychological and Physical Harm to Women.

Because abortion was illegal in most states and relatively rare in 1973,²⁷ 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.²⁸ Based on an affidavit from Norma McCorvey, the “Roe” of *Roe v. Wade*, the Court knew that unwanted pregnancies could put severe pressure on women and that women needed help and compassion in such situations.²⁹ Petitioner’s substantial evidence outlines the changed factual conditions regarding the physical and psychological consequences of abortion to women. The evidence from post-abortive women now shows abortion is a short-term “solution” with long-term negative consequences.³⁰

²⁷ *Roe v. Wade*, 410 U.S. 113, 118, n.2 (1973).

²⁸ *Id.* at 149-50.

²⁹ *Id.* at 153.

³⁰ For example, 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. 1351). 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. 314). L.M.C., “[I]t hurts women physically and emotionally! That it does not end when you leave the clinic.” (R. 305). Dianne, “I didn’t know that the hurt would never go away.” (R. 398). *See also* App. at 64-65, 80, 87, 93, 97, and 127 (hereinafter, references to

(Continued on following page)

A subsequent abortion decision, *Planned Parenthood v. Casey*,³¹ 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.”³² 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. . . .”³³ 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.”³⁴ Contrary to the non-evidence based assumption in *Casey*, the decision in *Bell* and the Women’s Affidavits refute the assumption that abortion enhances female dignity, self-esteem, and autonomy.³⁵

Abortion has negative psychological effects on women.³⁶ As Petitioner Cano’s Affidavit and the testimony of more than 1,000 women³⁷ who have experienced

Women’s Affidavits not in the Appendix use R. and the date stamp number attached to the original Rule 60 Motion, which is the easiest way to find individual affidavits that are not in the Appendix).

³¹ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

³² *Id.* at 851.

³³ *Women’s Medical Center v. Bell*, 248 F.3d 411, 418 (5th Cir. 2001).

³⁴ *Id.*

³⁵ 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 133.

³⁶ For example, Nicole, “Abortion is so devastating that I would never do it again – even at the cost of my own life.” App. at 83.

³⁷ R. 13-1705, hereinafter referred to as “Women’s Affidavits.” Petitioner submitted over 1,000 affidavits with her original Rule 60(b) Motion which are on file with the Clerk. However, at the present time, Counsel for Petitioner has over 2,000 affidavits from women all across the United States and that number continues to grow.

abortion demonstrate there is a vast gulf between supporting the idea of an abortion and experiencing one. These Affidavits of more than 1,000 women constituted at the time of filing the largest body of direct, sworn evidence in the world on the adverse effects of abortion on women.³⁸ Ironically, the abortion itself often causes a destructive cycle which may lead to more abortions.³⁹ Women are overwhelmed with the guilt and depression of abortion for years after having an abortion.⁴⁰ In the Women's Affidavits, post-abortive women were asked: "How has your abortion affected you?"⁴¹ The women's responses show the Court the devastation caused by their abortions.⁴² The Affidavit of Dr. David Reardon, one of the world's leading

³⁸ Excerpts from one hundred Women's Affidavits are included for the Court's general review in the Appendix. App. at 56-175. All of the more than 1,000 Women's Affidavits are filed with the Clerk of the Supreme Court under Rule 32.1 and are in the Record at R. 13-1705. In addition, Petitioner has requested to lodge as non-Record materials under Rule 32.3 another approximately 1,000 Affidavits subsequently received by counsel for Petitioner and more Affidavits continue to be received from women hurt by abortion.

³⁹ See generally Affidavit of Theresa Burke, Ph.D. filed with the Clerk under Rule 32.1. (R. 1723-1973).

⁴⁰ For example, Brandy, "No one told me that I would hear cries in the middle of the night." (R. 1407). Beverly, "It's not a quick and easy solution. Don't do it! It will haunt you the rest of your life." App. at 97. See generally, the Women's Affidavits (R. 13-1705); the Affidavit of Theresa Burke, Ph.D. (R. 1723-1973); the Affidavit of David Reardon, Ph.D. (R. 1975-2108) and Exhibits to Affidavit of David Reardon, Ph.D. (R. 2109-4515); the Client Intake Records From Pregnancy Care Centers (R. 4516-5388); the Affidavit of Carol Everett, former abortion provider (R. 5390-5396).

⁴¹ "Women's Affidavits." R. 13-1705.

⁴² 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. 1302).

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.⁴³

Abortion has also had negative physical effects on women. As the women's testimony and the medical evidence demonstrate, there are many physical complications that can result from abortion.⁴⁴ 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,

⁴³ See the Affidavit of David Reardon, Ph.D., filed with the Clerk of the Court under Rule 32.1 (R. 1975-2108), Exhibits to Affidavit of David Reardon, Ph.D. (R. 2109-4515) (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 commit suicide, abuse drugs or alcohol, and have higher rates of divorce.") (footnotes omitted); the Affidavit of Theresa Burke, Ph.D. (R. 1723-1973). The Rule 32.1 filing letter with a Summary of the Evidence is in App. at 216-235.

⁴⁴ Physical complications from all types of abortions, as described in 1 GALE ENCYCLOPEDIA OF MEDICINE 12 (2002), 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."

placenta previa, and retention of placenta.⁴⁵ These complications are not only hazardous to the immediate well being of the mother, but they can also have lasting devastating effects on her health and the health of her subsequent children.

In addition, suicide is one of the effects of abortion.⁴⁶ The suicide rate for women who have had an abortion is significantly higher than for those who carry their pregnancies to term.⁴⁷ Abortion can lead to depression, anxiety, and other mental disorders, and ultimately many women turn to suicide. As the women's testimonies repeatedly demonstrate, many women feel they do not deserve to live after an abortion. Dangerously, the shame and guilt women feel often prevents them from seeking help. The resulting feeling of isolation leads to severe depression and to search for a "way out," such as suicide.⁴⁸ The Record includes compelling scientific and medical evidence since 1973 that clearly demonstrates that human life begins at conception,⁴⁹ and therefore, many women express great

⁴⁵ See Affidavit of David Reardon, Ph.D. (R. 1975-2108 at 2065-2066), Exhibits to Affidavit of David Reardon, Ph.D. (R. 2109-4515); *see also* the Women's Affidavits (R. 13-1705).

⁴⁶ 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. 560). Women specifically testified of suicidal thoughts. App. at 85, 105, 120, 122, 128, 133, 164, and 166 among many others.

⁴⁷ See Affidavit of David Reardon, Ph.D. (R. 1975-2108), Exhibits to Affidavit of David Reardon, Ph.D. (R. 2109-4515).

⁴⁸ See the Women's Affidavits (R. 13-1705); the Affidavit of Theresa Burke, Ph.D. (R. 1723-1973); the Affidavit of David Reardon, Ph.D. (R. 1975-2108), Exhibits to Affidavit of David Reardon, Ph.D. (R. 2109-4515).

⁴⁹ See Scientific and Medical Analysis. (R. 5397-5546).

remorse over the “murder” of their own child.⁵⁰ In theory, abortion is supposed to be free and voluntary, but like assisted suicide, the “knowing and responsible mind is harder to assess,”⁵¹ than one would anticipate. The Court may come to believe after reviewing the evidence that abortion should be left to the states as the Court did with the issue of assisted suicide.⁵²

B. Significantly Changed Legal Conditions Since *Doe* and *Roe*, Including Changes in the Law of Federalism and “Baby Moses” Laws in Forty-Six States, Make *Doe* No Longer Just.

In recent years, significant changes in the law of federalism justify returning to the states the decision whether to allow or prohibit abortion. Before *Doe* and *Roe* constitutionalized abortion, health and safety issues and specifically abortion were traditional state and local concerns.⁵³ Beginning in 1995 with *United States v. Lopez*,⁵⁴

⁵⁰ For example, Wilma, “ . . . you feel like you have committed murder.” App. at 66. For further references by the women to “murder” see App. at 56, 73, 76, 82, 85, 87, 89, 90, 92, 93, 99, 107, 112, 113, 116, 117, 126, 132, 134, 138, and 141 among many others.

⁵¹ *Washington v. Glucksberg*, 521 U.S. 702, 784 (1997) (Souter, J., concurring).

⁵² *Washington v. Glucksberg*, 521 U.S. 702 (1997) (finding no constitutional right to assisted suicide). This issue was discussed in greater detail in Petitioner’s Rule 60 Motion. App. at 205-206 and Memorandum of Law at 34-44. (Doc. 1).

⁵³ *Roe*, 410 U.S. at 139-40 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”).

⁵⁴ 514 U.S. 549 (1995).

there has been a renewed emphasis on the judicial enforcement of federalist boundary lines.⁵⁵ While the Court has largely 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.”⁵⁶ The common thread among the line of federalism cases involves the Court’s restriction of the expansion of national power into traditional state law matters such as education, crime, family law and health issues, the area where abortion clearly falls. *Doe* and *Roe* are contrary to these new federalism cases which arose after *Casey*, and therefore, these cases have made *Doe* and *Roe* “obsolete.”⁵⁷ The Court’s application of *Lopez* federalism to *Doe* and *Roe* would not only properly return this traditional state law matter to the states, but it would also restore the democratic processes to this issue of great controversy, which has not been resolved as the plurality in *Casey* hoped.⁵⁸

⁵⁵ 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).

⁵⁶ J. Harvie Wilkinson III, *The 2000 Justice Lester W. Roth Lecture: Federalism for the Future*, 74 S. CAL. L. REV. 523, 536 (2001).

⁵⁷ 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.

⁵⁸ The *Casey* plurality unsuccessfully “call[ed] the contending sides to end their national division. . . .” *Casey*, 505 U.S. at 867.

In addition, there have been significant changes in the statutory law since *Roe*. In 1999, Texas pioneered legislation whereby a parent can leave a child who is less than sixty days old with a hospital or emergency medical service provider.⁵⁹ Since 1999, forty-five other states have enacted similar legislation called “Baby Moses” or “safe haven” laws.⁶⁰ Forty-six states are now willing to completely relieve the burden of childcare for all women. For example, Georgia passed the Safe Place for Newborns Act

⁵⁹ TEX. FAM. CODE ANN. § 262.302.

⁶⁰ 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); § 325 ILL. COMP. STAT. 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. § 38-15,100 (2000); KY. REV. STAT. ANN. § 405.075 (Michie 2002); LA. CH. CODE art. 1149 et seq. (West 2004); ME. REV. STAT. ANN. tit. 17-A § 553 (West 2004); MD. CODE ANN. CTS. & JUD. PROC. § 5-641 (2002); MASS. GEN. LAWS ch. 119, § 39 1/2 (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.630 (2001); N.H. REV. STAT. ANN. § 132-A:1 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. § 48.195 (West 2001); WYO. STAT. ANN. § 14-11-101 et seq. (Michie 2003).

of 2002⁶¹ whereby a mother may place her baby in the custody of the staff at a medical facility after birth.⁶²

In *Roe*, the Court was concerned with imposing upon the mother “a distressful life and future . . . associated with the unwanted child.”⁶³ 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 physical and psychological damage to herself.

Similarly in *Casey*, the 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.”⁶⁴ A woman’s “destiny” can still be shaped by her own conception of her place in society because she can separate herself from the child if the child is still “unwanted” at birth. She has the liberty to separate herself from the child without the guilt and shame that comes from what many women later perceive as the intentional killing of the woman’s own child.⁶⁵ 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

⁶¹ GA. CODE ANN. § 19-10A-1 et seq. (2002).

⁶² *Id.* § 19-10A-4.

⁶³ The 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.

⁶⁴ *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992).

⁶⁵ For example, Shawn, “ . . . constant (almost daily) thought about the tragic manner in which my baby was killed, and extreme guilt.” App. at 90. *See also* App. at 95, 99, 102, 112, 113, and 115 among many others.

decision that she cannot care for the child is now reversible, not irrevocable as with abortion. Her range of “destiny shaping choices” has expanded, her “spiritual imperatives” are enhanced, and her liberty is now greater. She is no longer limited to the *Roe* choice of a “distressful life and future” or killing her child through abortion.

If *Doe* and *Roe* were vacated, some states would allow abortion and some states would restrict abortion to some degree.⁶⁶ This would more accurately reflect the democratic diversity of America, yet women would not be without alternatives. Because of Baby Moses laws, a social compromise between the concept of a productive life in society without the child and avoidance by the woman of the consequential damage that killing the child can cause her is now possible. If society is willing to bear the burden of childcare, it should be able to restrict abortion. Unwanted “pregnancies” no longer mean unwanted “children.”

C. The Underlying Assumptions in *Doe*, *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.⁶⁷ The changed factual conditions go to the heart of *Doe*’s and *Roe*’s assumptions and support Cano’s Rule 60(b) Motion

⁶⁶ For example, Hawaii has passed a bill to keep abortion legal if *Roe* were overturned. HAW. REV. STAT. § 453-16 (2006). South Dakota has passed a ban on abortion except to save the life of the mother. S.D. CODIFIED LAWS §§ 22-17-7 to 22-17-12 (Michie 2006). Louisiana has passed a ban if *Roe* were reversed. LA. REV. STAT. § 40:1299.30 (2006).

⁶⁷ *Casey*, 505 U.S. at 854.

because the 1973 judicial assumptions are not the reality of abortion practice today.

1. Abortion as Practiced Does Not Involve a Normal Doctor-Patient Relationship nor a Truly 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 clinics since 1973 show that there is not usually a normal doctor-patient relationship and that the abortion industry does not adequately protect women.⁶⁸ As the women's testimony demonstrates, most women never see their abortionist until the procedure is being performed.⁶⁹

At the heart of *Doe* and *Roe* is the assumption that the abortion decision should be between a woman and her doctor.⁷⁰ The sworn testimony of post-abortive women and personnel in abortion clinics shows that the abortion industry (1) fails to adequately provide women with the

⁶⁸ 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. 013). *See also* Rule 60 Motion, paragraph 24, App. at 194 and Affidavit of Norma McCorvey, App. at 44-55; Affidavits of more than one thousand Post-Abortive Women (R. 13-1705); Affidavit of Theresa Burke, Ph.D. (R. 1723-1973); Affidavit of David Reardon, Ph.D. (R. 1975-2108); Client Intake Records for Pregnancy Care Centers (R. 4516-5388); Affidavit of Carol Everett, former abortion provider (R. 5390-5396); and, the Report of the South Dakota Task Force to Study Abortion at App. 289-411.

⁶⁹ R. at 128, 174, 228, 235, and 2163 among many others.

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

protections of a true doctor-patient relationship; (2) fails to provide women with the information necessary to truly make an informed decision regarding the procedure; (3) fails to maintain the normal standards of health, safety, and professionalism required of medical personnel; (4) fails to protect the mental and physical safety of women; (5) fails to fully and fairly inform patients about the nature of the abortion procedure – that the unborn child is a baby and not just a mass of cells; and, (6) regularly misleads or deceives women regarding the nature and development of their unborn children.⁷¹

2. Abortion Is Often the Result of Coercion from Relatives, Sexual Partners, or Circumstances.

Doe 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,

⁷¹ Women were also asked, “Were you adequately informed of the nature of abortion?” Typical responses demonstrate that they were not. For example, Paula, “I was not told about the years of emotional torment I would experience.” (R. 81). Tina, “No, I was not told anything about abortion. . . . No one told me of the risks I was taking.” (R. 164). See Affidavit of Norma McCorvey, App. at 44-55; the Affidavits of more than 1,000 Post-Abortive Women (R. 13-1705); the Affidavit of Theresa Burke, Ph.D. (R. 1723-1973); the Affidavit of David Reardon, Ph.D. (R. 1975-2108), Exhibits to Affidavit of David Reardon, Ph.D. (R. 2109-4515); the Client Intake Records From Pregnancy Care Centers (R. 4516-5388); the Affidavit of Carol Everett, former abortion clinic worker (R. 5390-5396). Women were also asked: “Were you adequately informed of the consequences of abortion?” Typical responses demonstrate that they were not. (R. at 24, 32, 34, 55, 85, 99, 124, and 137 among many others).

voluntary, dignity-enhancing woman's choice, the women's testimonies reveal that abortion is almost always the result of pressure or coercion from sexual partners, family members, abortion clinic workers or abortionists, or circumstances.⁷² 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.⁷³

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 typical responses to guilt: punishment, including self-punishment, forgiveness, and denial. Denial is a psychological coping mechanism, which can be effective in the short-run, but eventually leads to problems.⁷⁴ Whatever

⁷² Women's Affidavits show pressure or coercion when asked, "Did anyone pressure you into having an abortion?" For example, Jennifer, "Yes, my family and the counselor at the clinic." (R. 614). Janet, "Yes. Mostly my parents but also my then boyfriend." (R. 677). Cori Elizabeth, "Yes, my fiancé at the time." (R. 825). *See also* R. at 325, 338, 395, 415, and 433 among many others.

⁷³ 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 96.

⁷⁴ *See* Affidavit of Theresa Burke, Ph.D. 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 32.1 Filing Letter, App. at 216. (R. 1723-1973).

the legal status of the “fetus,” “millions of Americans believe that life begins at conception. . . .”⁷⁵ 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 itself has not “resolve[d] the difficult question of when life begins.”⁷⁶

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 all children.⁷⁷ Petitioner’s evidence demonstrates the actual figure is 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.⁷⁸ Because of *Doe*, *Roe*, and *Casey*, normal social controls and investigations, experiments,

⁷⁵ *Stenberg v. Carhart*, 530 U.S. 914, 920 (2000); see also Women’s Affidavits. R. 13-1705.

⁷⁶ *Roe*, 410 U.S. at 159.

⁷⁷ Care Net and other pregnancy resource centers attest that their organizations had over 100,000 women in post-abortion recovery programs in 2004 alone. Brief of Amici Curiae of Nurturing Network, Heartbeat International, Care Net, National Institute of Family and Life Advocates, and Abortion Recovery International Network supporting Petitioner Norma McCorvey in her Rule 60(b) Motion, 2005 WL 319933.

⁷⁸ See Affidavit of Theresa Burke, Ph.D., Rule 32.1 Filing Letter at App. 216. (R. 1723-1973).

and consumer protection cannot occur. The *Roe* Court has frozen the abortion debate around what it knew in 1973. If a medical procedure this Court once thought beneficial in fact hurts women, certiorari should be granted.

III. FOR JUDICIAL ECONOMY AND THE GOOD OF THE NATION, THIS CASE SHOULD BE HEARD WITH THE PARTIAL BIRTH ABORTION CASES IN WHICH THE COURT HAS ALREADY GRANTED CERTIORARI BECAUSE TOGETHER THOSE CASES AND THIS ONE GO TO THE HEART OF THE HEALTH EXCEPTION ESTABLISHED IN *DOE V. BOLTON*.

Abortion issues are very complex, fact intensive medical issues involving national and state policy best left now to the legislative branches of state and federal government. Prior to *Roe* and *Doe*, health issues such as abortion were traditionally state issues.⁷⁹ This Court should grant certiorari and re-evaluate *Doe v. Bolton* and its health exception considering the extensive evidence that Congress heard and its findings of fact before enacting the Partial Birth Abortion Ban Act of 2003.⁸⁰ It is clear Congress recognizes problems with the health exception.⁸¹

As a co-equal branch of government, deference should be given to Congress' findings which were based on extensive

⁷⁹ See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 204 (1824) recognized that under what was later called the state's "police power" the states could regulate "health laws of every description." *Id.* at 203.

⁸⁰ Partial Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531.

⁸¹ See *id.*

hearings and evidence.⁸² Congress has drawn reasonable inferences based on substantial evidence and post-abortive women testify based on their real life experiences that abortion hurts women physically, emotionally, and psychologically. Congressional findings should particularly be given deference in medical or health issues.⁸³ Congress is “an institution better equipped to amass and evaluate the vast amounts of data bearing on such an issue.”⁸⁴

In addition, state legislatures are examining the effects of abortion on women. South Dakota recently banned abortion based on the negative health consequences to women⁸⁵ and several other state legislatures are considering or have considered similar legislation.⁸⁶

⁸² *Turner Broadcasting System, Inc. v. FCC (Turner II)*, 520 U.S. 180, 195 (1997) (stating “‘courts must accord substantial deference to the predictive judgments of Congress . . .’” and that its “sole obligation is ‘to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence’”).

⁸³ See, e.g., *Jones v. United States*, 463 U.S. 354, 365 (1983) (stating courts should “pay particular deference to reasonable legislative judgments” in a case where congressional findings that individuals acquitted by reason of insanity were likely to be dangerous); *Marshall v. United States*, 414 U.S. 417, 427 (1974) (stating “courts should be cautious not to rewrite legislation” in case where Congress determined that drug addicts were less likely to be rehabilitated); *Lambert v. Yellowley*, 272 U.S. 581, 294-95 (1926) (deferring to Congress that alcohol had no medicinal uses).

⁸⁴ *Walters v. National Ass’n of Radiation Survivors*, 473 U.S. 305, 330 (1985) (rejecting procedural due process challenge on statutory limitation of fees paid to attorneys who represent veterans on veteran benefit claims).

⁸⁵ S.D. CODIFIED LAWS §§ 22-17-7 to 22-17-12 (Michie 2006).

⁸⁶ For example, Alabama, Indiana, Georgia, Kentucky, Louisiana, Missouri, Michigan, Mississippi, Ohio, Oklahoma, Tennessee, and West Virginia.

Louisiana passed legislation indicating that it would ban abortion if *Roe* were overturned.⁸⁷

South Dakota recently made substantial and detailed findings on the effects of abortion after hearing extensive evidence from both sides.⁸⁸ This led to a ban on abortion except to save the life of the mother. After hearing all of the evidence from experts and post-abortive women, the Task Force stated:

Further, the Task Force finds that the pre-abortion counseling provided often does not prepare women who have abortions for the psychological outcomes they may experience after their abortions. In addition, women who receive little or no information about possible emotional health risks of this procedure may significantly compromise their mental health and the quality of their lives for years to come. Due to the very limited information disclosed by abortion providers, women are not fully aware that abortion carries with it the potential to damage their physical, emotional, interpersonal, and spiritual well-being.⁸⁹

Based on all of the evidence, the Task Force concluded “that to fully protect the rights, interests, and health of the mother and the life of her unborn child, a ban on abortions is required.”⁹⁰ In this case, the Court now has the benefit of fact-finding by Congress, the states, and the

⁸⁷ In June 2006, Louisiana enacted S.B. 33. LA. REV. STAT. § 40:1299.30 (2006).

⁸⁸ Report of the South Dakota Task Force to Study Abortion. *See* complete Report at App. 289-411.

⁸⁹ *Id.* at 368-369.

⁹⁰ *Id.* at 407.

real life experiences of post-abortive women that abortion hurts women.

◆

CONCLUSION

This is a case of national importance that can only be decided by this Court. Because it goes to the heart of the balance struck in *Doe* and *Roe*, involves substantial changes in the factual and legal conditions since 1973 that make *Doe* no longer just for prospective application, and seeks justice, the petition for writ of certiorari should be granted.

Respectfully submitted,

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