IN THE COURT OF APPEALS

STATE OF GEORGIA

Daniel E. McBrayer, Sr., Alpha OB GYN Group, PC and the McBrayer Family Limited Partnership,	:	
Appellants,	:	**Appeal No.: A21A0262**
v.	:	
The Governors Ridge Property Owners Association, Inc., Executive Data Systems, Inc., Governors Ridge, LLC, KOA Properties, LLC, and Portfolio Properties,	:	
Appellees.	:	

Brief *Amici Curiae* of Georgia Abortion Clinics, American College of Obstetricians and Gynecologists, National Abortion Federation, Abortion Care Network, and Society of Family Planning

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Interest of Amici Curiae

The abortion clinic *Amici* constitute almost all of the abortion clinics in the state of Georgia. They are as follows: A Preferred Women's Health Center of Atlanta, A Preferred Women's Health Center of Augusta, Atlanta Comprehensive Wellness Clinic, Atlanta Women's Medical Center, Columbus Women's Health Organization, FemHealth USA (doing business as "carafem" in Atlanta), Feminist Women's Health Center (Atlanta), Old National Gynecology, Planned Parenthood Southeast (located in Dekalb, Gwinnett, Cobb, and Chatham counties), and Summit Medical Associates (Atlanta).

The four organizational *Amici* are the American College of Obstetricians and Gynecologists (ACOG), the National Abortion Federation (NAF), the Abortion Care Network (ACN), and the Society of Family Planning (SFP):

- ACOG is the nation's leading group of physicians providing health care for women. With more than 60,000 members—representing more than 90% of all obstetricians-gynecologists in the United States—ACOG advocates for quality health care for women, maintains the highest standards of clinical practice and continuing education of its members, promotes patient education, and increases awareness among its members and the public of changing issues facing women's health care. ACOG is committed to defending the right of physicians to practice the full scope of obstetrics and gynecology and to ensuring access to the full spectrum of evidence-based quality reproductive health care, including abortion, for all women.

- NAF is the professional association of abortion providers with a mission to unite, represent, serve, and support abortion providers in delivering patient-centered, evidence-based care. NAF's members include over 400 private and non-profit clinics, Planned Parenthood affiliates, women's health centers, physicians' offices, and hospitals. For over 40 years, NAF has ensured the

safety and high quality of abortion practice by providing standards of care, protocols, and accredited continuing medical education.

- Founded in 2008, ACN is the national association for independent community-based, abortion care providers and their allies. Together ACN works to ensure the rights of all people to experience respectful, dignified abortion care. Independent abortion providers care for the majority of people seeking abortion in the U.S. -- often serving individuals and families with the fewest resources and in the most rural parts of our nation.

- SFP is the source for science on abortion and contraception. SFP represents approximately 1000 scholars and academic clinicians united by a shared interest in advancing the science and clinical care of family planning. The pillars of our work are: 1) building and supporting a multidisciplinary community of scholars and partners who have a shared focused on the science and clinical care of family planning, 2) supporting the production of research primed for impact, 3) advancing the delivery of clinical care based on the best available evidence, and 4) driving the uptake of family planning evidence into policy and practice.

Summary of Argument

Appellees' argument before this Court boils down to an argument that an abortion clinic can be held liable in nuisance just because of the negative opinions some people have to the medical care provided there. Allowing this verdict to stand would unconstitutionally threaten the financial viability of every reproductive healthcare provider in Georgia and provide an incentive to abortion opponents to create a nuisance in order to financially punish clinics and cut off access to constitutionally-protected reproductive healthcare. Such a rule would not only impact abortion clinics but would also allow anyone to have a "heckler's veto" over any institution that someone finds controversial.

Amidst the "entire complex of deleterious effects" Appellees cite to support the nuisance verdict below, almost all[1] have to do with the realities of providing reproductive healthcare in the face of widespread abortion opposition. Appellees' Br. at 24. In addition, abortion clinics in Georgia and elsewhere in the United States face the threat of harassment, violence, and other criminal activity from certain anti-abortion extremists. To hold abortion clinics liable for the consequences of their opponents' actions would be cruel and unjust.

It would also violate the United States Constitution. The United States Supreme Court has long held that a jury award in a civil lawsuit based on state tort law is a form of state action subject to constitutional limitations. One such constitutional limitation is the long-recognized right to terminate a pregnancy prior to viability. If abortion clinics can be subject to million-dollar civil nuisance verdicts for nothing more than the realities of providing this specialized medical care, then these clinics will never survive financially. Clinics will thus close as a direct result of this state action. Under a long line of Supreme Court cases starting with *Roe v. Wade*, this unduly burdens the patient's right to choose and is unconstitutional.

[1] This Brief makes no argument about the alleged, vague "quality of life issues" Appellees also highlight in their brief, Appellees' Br. at 24, other than to comment that the verdict below should be reversed because the entirety of the claimed nuisance cannot be separated from the abortion-related claims discussed in this Brief.

The practical reality of subjecting abortion clinics to nuisance verdicts like the one in this case is that abortion clinics will close and patients will be denied abortion care. Abortion is a safe and common medical procedure that is important to people's health, well-being, and self-determination. For patients who are denied the abortion care they seek, the consequences can be devastating. Their emotional and physical health will be at risk, their financial stability suffers, their family well-being is worse off, and other aspects of their life deteriorate. These consequences, well documented in medical and social science literature, are even worse for women of color and indigent women, groups who are already suffering from a devastating maternal mortality crisis in Georgia.

If the verdict below is allowed to stand, Georgia will be adopting an unprecedented rule that will punish abortion providers for the actions of their opponents, violate the United States Constitution, and harm the people of Georgia who need constitutionally-protected medical care. For these reasons, Amici urge this Court to reverse the verdict below.

Argument

I. Holding Abortion Clinics Liable for Anti-Abortion Protests and Crimes Would Subject Almost All Abortion Clinics to Virtually Unlimited Civil Judgments.

Everyone has the First Amendment right to protest, regardless of their views. Georgians who oppose abortion may express those views through peaceful protest,

but disruptive action in support of their position, including criminal activity directed toward clinics or those who work in them, is a frequent reality. Certainly, not every clinic faces this type of opposition, but many do, including many in Georgia. If this Court affirms the nuisance verdict in this case, every Georgia clinic that is picketed or targeted by criminal activity would be at risk of being held liable for millions of dollars in a nuisance lawsuit. And every Georgian opposed to abortion would now know that one way they could harm abortion clinics would be by creating enough of a disturbance that the *clinic* -- not the *abortion opponent* -- would be liable for millions.

A. Many protesters intentionally and strategically create conflict outside abortion clinics in order to shut them down.

Appellees contend that the regular protesters outside Dr. McBrayer's clinic constituted a nuisance because their "presence created some emotional harm [and] constantly reminded [Appellees] of these things that were going on in the park that offended them greatly." Appellees' Br. at 30 n.21. If protesters can be the basis for a nuisance verdict against an abortion clinic, almost every clinic would face multi-million-dollar liability because protest at abortion clinics is frequently a reality in Georgia and elsewhere.

There is nothing unique about the protesters that Dr. McBrayer faced. Rather, this type of protest is common in other parts of Georgia as well as around the country. According to the Feminist Majority Foundation's most recent biannual

survey of clinics around the country, 88% of clinics experience some sort of on-site anti-abortion protest activity. Feminist Majority Foundation, *2018 National Clinic Violence Survey*, 7, http://www.feminist.org/anti-abortion-violence/images/2018-national-clinic-violence-survey.pdf. Just over 60% of clinics around the country face this kind of anti-abortion protest on a weekly (23.2%) or daily (38.9%) basis. *Id.* A smaller study of clinics around the country found similar numbers, with 85% to 90% of clinics reporting that they have regular protesters that are visible to their patients. Diana Greene Foster et al., *Effect of Abortion Protesters on Women's Emotional Response to Abortion*, 87 *Contraception* 83 (2013). Neither study broke down their reporting data by state so there is no specific data about Georgia abortion clinic protests, but this second study did find that protesters in the South are the most aggressive and frequent of anywhere in the country. *Id.*

Dr. McBrayer's clinic was the site of this kind of protest activity. Appellees say the picketers "displayed large placards of terminated fetuses," Appellees' Br. at 6, that resulted in their being "constantly subjected to images of 'terminations,'" *id.* at 24. These protests were "carried out over a span of years," *id.* at 27, by "harassing and haranguing protesters," *id.* at 29. These descriptions are in no way unique to Dr. McBrayer's clinic as they are consistent with descriptions of anti-abortion protest activity in front of other clinics in Georgia operated by Amici and

clinics throughout the country. *See generally* David S. Cohen & Carole Joffe, *Obstacle Course: The Everyday Struggle to Get an Abortion in America* 110-29 (2020) (describing the panoply of protest tactics outside clinics).

While many people protest outside clinics as a lawful way to peacefully express their anti-abortion beliefs, as is their First Amendment right, some may try to cause a disturbance in the area surrounding the clinic. If there is enough of a disturbance, neighbors and landlords will complain, some using the legal system to do so. *See, e.g.*, David S. Cohen & Krysten Connon, *Living in the Crosshairs: The Untold Stories of Anti-Abortion Terrorism* 104, 118 (2015). This organized effort appears to be an intentional tactic to pressure the community where the clinic provides medical care to turn against the clinic and try to drive it out of business. *See* Joseph M. Scheidler, *Closed: 99 Ways to Stop Abortion* 229 (1985) (Chapter 56: Keep the Abortionists Out of Your Community). The nuisance lawsuit at issue accomplishes what the protesters themselves cannot do directly by using the power of the courts to shut down an abortion clinic and thereby deny access to patients seeking lawful abortion. Thus, the nuisance verdict below, if affirmed, would create dangerous precedent targeting abortion clinics and incentivize even more frequent -- and more disruptive -- clinic protest, because the courts would be telling some abortion opponents that the more disruptive they are outside a clinic, the more likely the clinic would be liable for nuisance damages.

Moreover, the broader danger is that, if affirmed, this verdict would also harm other types of businesses that also face protests from those who disagree with them, such as Black churches or synagogues that have been subject to violence in the past. *See Brief Amici Curiae of Law Professors, the Firearms Policy Coalition, and the Georgia First Amendment Foundation*, 4-10 (providing examples of protest at synagogues, mosques, churches, gun stores, bookstores, political organizations and political leaders' homes, fur stores, food stores, businesses with employees who are targets of stalkers, and government agencies). As a result, this verdict could affect any business or non-profit in Georgia that relates to sensitive, charged, or controversial topics. Everyone has the First Amendment right to speak out on controversial topics in public, but the targets of such speech cannot be punished for the actions of their opponents. Affirming the verdict below would bestow a "heckler's veto" on any group hoping to shut down abortion clinics or any other organization they oppose.

B. Many abortion clinics and providers in Georgia and around the country have been victims of crimes at the hands of anti-abortion extremists.

Appellees' nuisance claim also rests on their perception of the risk of crime and violence Dr. McBrayer's clinic faced. They worry that they too will be subject to intimidation, threats, crime, and/or bodily harm. Summarizing these concerns, Appellees claim that Dr. McBrayer "knowingly brought [] a substantial risk of physical harm and property damage to Appellees and others in the Park, instilled a

fear that a clinic of Dr. McBrayer might be bombed again, and their physical safety, lives and buildings might be threatened." Appellees' Br. at 5 (internal citations omitted). The presence of the clinic and its protesters, Appellees contend, resulted in Appellees being "reminded of the prospects of death, injury, and property damages." *Id.* at 30.

Crime and violence directed at abortion clinics and providers, though less common and predictable than the regular protest described in the previous section, is nonetheless a risk clinics and providers face because of the actions of anti-abortion extremists in Georgia and around the country. According to the most recent statistics from the National Abortion Federation, the leading source of data about anti-abortion violence,[2] since 1977 there have been 11 murders, 26 attempted murders, 42 bombings, 189 arsons, 100 attempted bombings or arsons, 449 clinic invasions, 100 butyric acid attacks, 314 physical attacks or batteries, 4 acts of kidnapping, and 311 burglaries. There have also been 663 anthrax or bioterrorism threats, 662 bomb threats, 756 death threats or threats of harm, 620 acts of stalking, over 21,600 incidents of hate mail or harassing phone calls, and over 128,500 incidents of hate email or internet harassment against abortion providers or clinics. National Abortion Federation, *2019 Violence and Disruption Statistics* 11 (2020),

[2] NAF's data is the best in the field, but it is based on clinics reporting to NAF. Accordingly, the real numbers are most likely "significantly higher, because not all providers report to NAF and not all incidents are reported." *Brief of National Abortion Federation et al. as* Amici Curiae *in Support of Respondents and Affirmance in* McCullen v. Coakley, 134 S. Ct. 2518 (2014), at 8 n.3.

https://5aa1b2xfmfh2e2mk03kk8rsx-wpengine.netdna-ssl.com/wp-content/uploads/NAF-2019-Violence-and-Disruption-Stats-Final.pdf.

The first acts of anti-abortion violence and extremism date from the mid-1970s when anti-abortion extremists began invading and bombing clinics. James Risen & Judy L. Thomas, *Wrath of Angels: The American Abortion War* 61-62 (1998); Jennifer Jefferis, *Armed for Life: The Army of God and Anti-Abortion Terror in the United States* 22-23 (2011); Patricia Baird-Windle & Eleanor J. Bader, *Targets of Hatred: Anti-Abortion Terrorism* 54-57 (2001). In the 1980s, mass clinic blockades emerged as a common tactic, as large numbers of anti-abortion extremists would refuse to move from in front of a clinic, thereby shutting it down. *Id.* at 88-89. Even more violent groups surfaced at the time, with some advocating extreme actions against abortion providers, including murder. *See* Scheidler, *Closed*, *supra*; *Army of God Manual*, https://bit.ly/37nZZhc.

In the 1990s, anti-abortion extremism became even more violent when abortion providers faced gun violence for the first time. Jefferis, *supra*, at 30. In 1993, Dr. David Gunn was the first abortion provider to be murdered, as he was shot and killed while walking from his car to the entrance of a Pensacola, Florida abortion clinic. Liam Stack, *A Brief History of Deadly Attacks on Abortion Providers*, N.Y. Times (Nov. 29, 2015). Since then, there have been at least ten other anti-abortion murders in this country (the most recent three occurring during

a mass shooting at a Colorado Planned Parenthood in 2015) as well as twenty-six attempted murders. See Abortion Rights Coalition of Canada, *Anti-choice Terrorism: Murders and Attempted Murders* (May 2016), https://bit.ly/2qBxH28. Violence and criminal activity continue to this day.

See NAF, *2019 Violence and Disruption Statistics*, *supra*; *see, e.g.*, Dan Scanlan, *Man Sentenced for Bomb Threat to Jacksonville Abortion Clinic*, Florida Times-Union (Sept. 23, 2020); Johnny Diaz, *Man Charged With Throwing Lit Incendiary Device at Planned Parenthood*, New York Times (Jan. 7, 2020).

The behavior Appellees point to as the basis of their lawsuit is not unique to Dr. McBrayer's clinic, as other abortion clinics and providers around the country, including those in Georgia, face similar opposition. To be clear, not every clinic and provider faces these threats and violence. "In a war of attrition, anti-abortion extremists strategically target a vulnerable minority of clinics, aiming to force them to close their doors before moving on to the next set of targets. Thus, a majority of clinics experience no violence, while a smaller number report numerous acts of violence, threats, or harassment." *See* Feminist Majority Foundation, 2016 National Clinic Violence Survey, at 6 (2017), https://www.feminist.org/anti-abortion-violence/images/2016-national-clinic-violence-survey.pdf.

However, even though not every clinic is targeted in these ways, because of the nature of anti-abortion extremism, every clinic and provider faces the risk of an anti-abortion extremist choosing to target that clinic or that provider. That risk has been present for over forty years and continues to this day. Affirming the nuisance verdict below would incentivize certain abortion opponents to move their disruptive and sometimes violent tactics to more clinics. Moreover, every abortion provider in the state would be left with no option other than to, as Appellees admit, "cease [their] operation," Appellees' Br. at 28, because the only thing a clinic would be able to do to prevent a multi-million-dollar nuisance verdict directed against it, if this nuisance verdict is affirmed, is to shut down and stop providing legally protected abortion care.[3]

II. Subjecting Abortion Clinics that Provide Constitutionally-Protected Medical Care to Multi-Million Dollar Liability for the Actions of Non-Party Abortion Opponents Violates the United States Constitution.

Although this is a civil lawsuit between private parties, it is Georgia state action that would enforce the verdict against Dr. McBrayer's abortion clinic if affirmed. As such, long-standing U.S. Supreme Court jurisprudence mandates that this lawsuit is subject to the constraints imposed by the Supreme Court's interpretation of the Fourteenth Amendment's Due Process Clause. This includes

[3] Abortion clinics around the country have tried various tactics to address anti-abortion protest and crime, but have met with mixed success. *See generally* Cohen & Joffe, *Obstacle Course*, *supra*, at 129-45; Cohen & Connon, *Living in the Crosshairs*, *supra*, at 205-34.

an individual's right to terminate a pregnancy prior to viability as long recognized by the Supreme Court. Forcing abortion clinics to shut down to avoid multi-million-dollar verdicts poses a substantial obstacle for patients choosing to terminate their pregnancy and is therefore unconstitutional.

A. Georgia's application of the law of nuisance to abortion clinics is state action subject to the restrictions of the United States Constitution.

For decades, the U.S. Supreme Court has recognized that civil lawsuits grounded in state tort law are a form of state action subject to constitutional constraints. In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court applied First Amendment free speech doctrine to a state common law defamation lawsuit. The Court roundly rejected the assertion that the case was a private matter that did not involve state action:

> We may dispose at the outset of two grounds asserted to insulate the judgment of the Alabama courts from constitutional scrutiny. The first is the proposition relied on by the State Supreme Court—that 'The Fourteenth Amendment is directed against State action and not private action.' That proposition has no application to this case. Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press. *It matters not that that law has been applied in a civil action and that it is common law only*, though supplemented by statute. The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.

Id. at 265 (emphasis added) (internal citation omitted); *see also Cohen v. Cowles Media Co.*, 501 U.S. 663, 668 (1991) ("Our cases teach that the application of state

rules of law in state courts in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment.").

Though free speech cases, *Sullivan* and its progeny apply equally to the Fourteenth Amendment's Due Process Clause.[4] The Supreme Court has in fact applied substantive Fourteenth Amendment law to state tort actions. In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the Court further developed its line of cases applying substantive due process doctrine to a state's award of punitive damages. *Id.* at 562 ("The Due Process Clause of the Fourteenth Amendment prohibits a State from imposing a 'grossly excessive' punishment on a tortfeasor."). In holding in *BMW* that the Due Process Clause prohibits a state from imposing punitive damages with the intent to change conduct in other states, the Court wrote that "[s]tate power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute." *Id.* at 572 n.17. Thus, in *BMW*, the Supreme Court made clear that the *Sullivan* principle applies to substantive Due Process Clause claims regarding state tort law just as much as it applies to free speech claims incorporated through the Due Process Clause.

[4] *Sullivan* itself is technically a case about applying the Due Process Clause to state common law actions. As everyone knows, the right to free speech is specifically guaranteed in the First Amendment. However, this right applies to *states* (as opposed to the federal government) via incorporation through the Fourteenth Amendment's Due Process Clause. *See Gitlow v. New York*, 268 US. 652 (1925) (incorporating the First Amendment via the Fourteenth's Due Process Clause); *see generally McDonald v. City of Chicago*, 561 U.S. 742, 759-66 (2010) (explaining the general parameters of the Fourteenth Amendment Due Process Clause incorporation doctrine). Thus, the principle of *Sullivan* is technically a principle that the Fourteenth Amendment's Due Process Clause limits state common law tort claims.

The Supremacy Clause requires Georgia courts to apply these principles to Georgia tort claims. Georgia courts have recognized as much by repeatedly applying *Sullivan* to Georgia defamation lawsuits. *See, e.g.*, *Mathis v. Cannon*, 573 S.E. 2d 376, 380-81 (Ga. 2002) (applying *Sullivan* to a libel lawsuit brought by the director of a solid waste management facility); *Ellerbee v. Mills*, 422 S.E. 2d 539, 540 (Ga. 1992) (determining the outer limits of *Sullivan*'s defamation holding by considering its meaning for lawsuits brought by high school principals); *ACLU v. Zeh*, 845 S.E. 2d 698, 703 (Ga. App. 2020) (applying *Sullivan* to a defamation lawsuit by a public defender). Thus, as required by the Supreme Court, Georgia courts have long applied constitutional limitations to state common law tort actions.

B. State action that shuts down abortion clinics violates a long line of precedent from the Supreme Court that protects an individual's right to terminate a pregnancy.

The U.S. Supreme Court has held for almost half a century that the Fourteenth Amendment's Due Process Clause protects the right to choose to terminate a pregnancy prior to viability. Applying this doctrine to the tort claim at issue in this case, as the previous section indicates is required, mandates reversal of the court below. Neither the actions of third parties nor neighbors' personal opposition to abortion justifies awarding a multi-million-dollar nuisance verdict

against an abortion clinic; doing so constitutes a substantial obstacle to obtaining an abortion and thus violates this long-standing Supreme Court precedent.

The Constitution protects the right to choose to terminate a pregnancy prior to viability. First announced in 1973, the right to terminate a pregnancy is among the protected rights under the Fourteenth Amendment's Due Process Clause. *Roe v. Wade*, 410 U.S. 113, 153 (1973). In 1992, the Supreme Court held that state action that restricts pre-viability abortion is unconstitutional if it constitutes an "undue burden." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876 (1992). The Court further explained what an "undue burden" is: "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877.

When the effect of a state action is to shut down abortion clinics, these principles apply with full force.[5] In 2016, the Supreme Court applied *Casey*'s undue burden standard to evaluate the constitutionality of two states' abortion restrictions that resulted in clinic shutdowns. In *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), the Court held that a Texas law that would shut down over three-quarters of the state's clinics constituted an undue burden

[5] Abortion regulations that lead to clinic closures are just one of many restrictions on abortion that impact patient care. *See generally* American College of Obstetricians and Gynecologists, *Committee Opinion: Increasing Access to Abortion* (Dec. 2020), https://tinyurl.com/y6p8okop.

because the burdens imposed by the law on women trying to obtain an abortion were not outweighed by the laws' virtually non-existent benefits. *Id.* at 2300 ("We conclude that neither of these provisions confers medical benefits sufficient to justify the burdens upon access that each imposes."). Most recently, in *June Medical Services v. Russo*, 140 S. Ct. 2103 (2020), evaluating a Louisiana law that would close two of the state's three clinics, a fractured Supreme Court majority similarly applied *Casey*'s undue burden test. *Id.* at 2120 (Breyer, J., plurality); *id.* at 2135 (Roberts, C.J., concurring in judgment).

Applying the *Casey* undue burden test here results in the conclusion that imposing a multi-million-dollar nuisance verdict on an abortion clinic simply for being an abortion clinic is an unconstitutional undue burden on the right to receive abortion care prior to viability. The reality of the verdict below is that, although it is couched in terms of the protesters and criminals, Dr. McBrayer is being punished by the state of Georgia for nothing more than the realities of operating an abortion clinic in an environment where people oppose the medical care he provides. *See supra* Section I.

In fact, Appellees pepper their brief to this Court with indications that the nuisance verdict is based, in part, not on the protesters but rather on the fact that the medical care the clinic provides is abortion. Appellees begin their brief indicating that the basic theory of their lawsuit was that "Appellants created and

maintained a nuisance by opening and operating a women's health clinic that specialized in terminating human pregnancies," something that was "totally out of character for the [business complex] and highly embarrassing, discomforting, and offensive." Appellee Br. at 2. They continue by arguing that, referring to the provision of abortion care, "the activities of Appellants in the clinic were discomforting, annoying and offensive." *Id.* at 5. They state clearly that the "nuisance was *the clinic itself, and its activities*." Id. at 8 (emphasis on "and its activities" added). They support their argument with testimony about the clinic's abortion practice causing "discomfort of what is a sensitive subject [that] kind of rattled people," *id.* at 21; the "unpleasant feelings about the clinic" some Appellees had, *id.*; and "the emotional impact . . . of the clinic," *id.* Put succinctly, Appellees' argument boils down to this: merely performing constitutionally-protected abortions is a nuisance.

Imposing liability on Dr. McBrayer's clinic constitutes an unconstitutional undue burden under either of these theories -- that protesters at an abortion clinic can be the basis of a nuisance claim or the clinic's mere provision of abortion services can be the basis of a nuisance claim. Both theories attach liability based on nothing more than the reality of providing constitutionally-protected abortion care in this country, whether because of the nature of the procedure itself or because of

the intense opposition it generates. Under both theories the state of Georgia would be imposing liability because the clinic performs abortions.[6]

As Appellees themselves admit, the only way for Dr. McBrayer to escape multi-million-dollar liability was for the clinic "to cease its operation." *Id.* at 28. Imposing the choice of a crippling jury verdict or closing down on an abortion clinic -- for no reason other than that it is an abortion clinic -- would result in a substantial obstacle for women choosing to terminate their pregnancies. Either way, patients would suffer. Either the clinic closes preemptively to avoid the nuisance or it closes after being imposed with crippling (and repeatable) financial liability. With clinic closures, patients face greater difficulties, sometimes insurmountable, finding and obtaining an abortion, difficulties that have been repeatedly found to be a substantial obstacle and undue burden. *See Whole Woman's Health*, 136 S. Ct. at 2318; *June Medical*, 140 S. Ct. at 2128-30 (Breyer, J., plurality); *id.* at 2140 (Roberts, C.J., concurring in judgment). Even if the interests behind a nuisance action were somehow deemed a valid state interest (which Amici assert they cannot be), *Casey* mandates that state action, "while furthering the interest in potential life or some other valid state interest, [that] has the effect of placing a substantial obstacle in the path of a woman's choice cannot

[6] Amici certainly are not arguing that abortion clinics can *never* be liable for a civil nuisance. Rather, the entirety of Amici's argument is that this case would impose liability *simply for performing abortions*, something that can never constitutionally be the basis for civil nuisance.

be considered a permissible means of serving its legitimate ends." 505 U.S. at 877. Thus, the nuisance verdict below is unconstitutional.

III. The Impact of Closing Clinics Will be Devastating to the People Who Need Them, Particularly Women of Color.

Abortion clinics saddled with nuisance verdicts like the one at issue here are at a high risk of closing. When abortion clinics close, the consequences for abortion patients are severe.[7] In 2016, the Supreme Court well captured the effect that closing clinics would have on abortion care. It explained that the facilities that are able to remain open would have great difficulty in accommodating the increased demand. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2318 (2016). Patients, who would now be forced to travel increased distances to get to a clinic, would face "crammed-to-capacity superfacilities" where they are "less likely to get the kind of individualized attention, serious conversation, and emotional support that doctors at less taxed facilities may have offered." *Id.* Ultimately, the "quality of care declines" in a way that "would be harmful to, not supportive of, women's health." *Id.*

Moreover, when clinics close, some patients are ultimately unable to obtain abortion care at all because they are unable to travel to a different abortion clinic to

[7] For a variety of reasons, 95% of abortions take place in clinics, with only 4% being performed in hospitals and just 1% in private doctors' offices. Rachel K Jones, Elizabeth Witwer, & Jenna Jerman, *Abortion Incidence and Service Availability in the United States, 2017* at 3 (2019), https://www.guttmacher.org/sites/default/files/report_pdf/abortion-incidence-service-availability-us-2017.pdf.

receive care. *See generally* Caitlin Myers et al., *Predicted Changes in Abortion Access and Incidence in a Post-Roe World*, 100 Contraception 367 (2019) (extrapolating the large effect on the abortion rate if abortion clinics closed); Stefanie Fischer et al., *The Impacts of Reduced Access to Abortion and Family Planning Services: Evidence From Texas*, 167 J. Pub. Economics 43 (2018) (finding increased birth rate in Texas following clinic closures); Joanna Venator & Jason Fletcher, *Undue Burden Beyond Texas: An Analysis of Abortion Clinic Closures, Births, and Abortions in Wisconsin*, https://doi.org/10.1002/pam.22263 (2020) (finding same in Wisconsin). Patients unable to access abortion care will lose the benefits that wanted abortions bring to people's lives. They will also face devastating consequences, both during their continued pregnancy and after birth. Moreover, these devastating consequences fall disproportionately on women of color and indigent women. *See generally* American College of Obstetricians and Gynecologists, *Committee Opinion: Increasing Access to Abortion* (Dec. 2020), https://tinyurl.com/y6p8okop

A. When clinics close, patients lose access to medical care that is safe, common, and important to self-determination.

Contrary to the negative portrayal of abortion throughout Appellees' briefing, abortion is a safe and common medical procedure that is important to people's well-being and self-determination. As the Supreme Court noted in 2016, "abortions taking place in an abortion facility are safe--indeed, safer than

numerous procedures that take place outside hospitals." *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2315 (2016). The Court supported its conclusion with evidence that the rate of major complications for abortion was less than one-quarter of 1% and that other, less serious complications for abortion patients rarely require hospital admission. *Id.* at 2311. Childbirth, colonoscopies, and liposuction are all much riskier medical procedures than abortion. *Id.* at 2315.

Since that decision, there has been even more evidence demonstrating just how safe abortion is. In 2018, the National Academies of Sciences, Engineering, and Medicine released a report entitled *The Safety and Quality of Abortion Care in the United States*. This comprehensive study of all existing research into abortion care concluded that "[t]he clinical evidence clearly shows that legal abortions in the United States -- whether by medication [or other procedures] -- are safe and effective. Serious complications are rare." National Academies of Sciences, Engineering, and Medicine, *The Safety and Quality of Abortion Care in the United States*, 10 (2018) ("NASEM, *Safety*"), https://www.nap.edu/catalog/24950/the-safety-and-quality-of-abortion-care-in-the-united-states. Looking particularly at the risk of death, the study found that death "is an exceedingly rare event," much rarer than for childbirth, colonoscopies, plastic surgery, dental procedures, or adult tonsillectomies. *Id.* at 74-75. To put the safety of abortion another way, the risk of being struck by lightning is ten times higher than the risk of dying from an

abortion. Brief of Social Science Researchers, *June Medical Services v. Russo*, 140 S. Ct. 2103 (2020), at 7.

This safe medical procedure is also extremely common. One in four women will have an abortion during their lifetime. Rachel K. Jones & Jenna Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008–2014*, 107 Am. J. Pub. Health 1904 (2017). Across the country, about one in five pregnancies end in abortion, resulting in just over 850,000 abortions in 2017 (the latest year for which there is complete data for the entire country). Rachel K Jones, Elizabeth Witwer, & Jenna Jerman, *Abortion Incidence and Service Availability in the United States, 2017* (2019), https://www.guttmacher.org/sites/default/files/report_pdf/abortion-incidence-service-availability-us-2017.pdf. In Georgia, there were just under 34,000 abortions in 2018, a rate of just under 16 abortions per 1000 women aged 15 to 44. Katherine Kortsmit et al., *Abortion Surveillance -- United States, 2018*, 69 MMWR Surveillance Summaries 1, 15 (2020). Women from every race, religion, and socioeconomic group have abortions, and the majority of women who have abortions are already parents. Jenna Jerman, Rachel K. Jones, & Tsuyoshi Onda, *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008*, Guttmacher Inst. (2016).

Abortion is an important part of people's control over their own lives. Being able to control when and how a person has children is important to people being able to achieve their own goals regarding education and career. Adam Sonfield et al., *The Social and Economic Benefits of Women's Ability to Determine Whether and When to Have Children* (2013), https://www.guttmacher.org/sites/default/files/report_pdf/social-economic-benefits.pdf. Moreover, controlling when to have a child reduces the pay gap between working women who have and do not have children, decreases conflict in relationships, and increases levels of overall mental health. *Id.* As Justice Ginsburg has written, abortion access is important to "a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature." *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting).

B. Denying patients wanted abortions harms their physical and mental health, financial stability, family well-being, and life plans.

Through meticulous longitudinal research over the past decade by researchers at the University of San Francisco, we now know the full extent of the effect of being denied a wanted abortion. *See generally* Diana Green Foster, *The Turnaway Study* (2020). The information presented here just scratches the surface of the voluminous data this researched has created regarding the impacts of abortion denial.

Women who are forced to carry their pregnancies to term because they are unable to obtain a wanted abortion are at risk of serious physical and mental health problems. The risk of death is fourteen times higher for carrying a pregnancy to term than it is for abortion. *Whole Woman's Health*, 136 S. Ct. at 2315. Short of death, continued pregnancy poses other physical health risks, such as permanent disability, weakened immune system, threats to every major organ in the body, exacerbation of pre-existing conditions, and life-threatening medical conditions such as preeclampsia and eclampsia. Caitlin Gerdts et al., *Side Effects, Physical Health Consequences, and Mortality Associated with Abortion and Birth after an Unwanted Pregnancy*, 26 Women's Health Issues 55 (2016). Carrying an unwanted pregnancy to term also increases the risk that a woman will suffer more chronic pain and have worse overall health. Lauren J. Ralph, *Self-Reported Physical Health of Women Who Did and Did Not Terminate Pregnancy After Seeking Abortion Services: A Cohort Study*, 171 Annals Internal Medicine 238 (2019).

Continuing an unwanted pregnancy also threatens women's mental health, as pregnancy and childbirth can lead to increased vulnerability to mental health issues.[8] In particular, denying a wanted abortion can result in women suffering

[8] To the contrary, systematic reviews by the American Psychological Association in 2008 and the National Academies of Sciences, Engineering, and Medicine in 2018 have found that *having* an abortion does not have a negative effect on women's mental health. Brenda Major et al., *Report of the APA Task Force on Mental Health and*

severe psychological distress because they are forced to handle the emotional impact of continuing an unwanted pregnancy. *See generally* Affidavit of Sarah C. Noble, *Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services* (filed Jan. 16, 2019), https://womenslawproject.org/wp-content/uploads/2019/05/Sarah-Noble-declaration.pdf (collecting peer-reviewed evidence about continued pregnancy's effects on mental health). Moreover, the very act of being denied an abortion increases the likelihood that a woman suffers short-term mental health problems. Being denied an abortion is associated with increased anxiety and stress and lower self-esteem and life satisfaction. M. Antonia Briggs et al., *Women's Mental Health and Well-being 5 Years After Receiving or Being Denied an Abortion: A Prospective, Longitudinal Cohort Study*, 74 JAMA Psychiatry 169 (2017). These negative effects tend to improve over the first year following being denied an abortion, *id.*, but they are real consequences for the initial period after unsuccessfully seeking an abortion.

There is clear evidence that people denied wanted abortions also suffer financially for years as a result of continuing their pregnancy to term. Compared to similarly-situated individuals who were able to obtain an abortion, these women are less likely to be employed in the years following giving birth, more likely to

Abortion, Am. Psychological Assoc., 89 (2008), https://www.apa.org/pi/women/programs/abortion/mental-health.pdf; NASEM, *Safety*, *supra*, at 149-52.

receive welfare, had a higher rate of food assistance, and were more likely to be living in poverty. Diana Green Foster et al., *Socioeconomic Outcomes of Women Who Receive and Women Who Are Denied Wanted Abortions in the United States*, 108 Am. J. Pub. Health 407 (2018). Being denied a wanted abortion also increases the risk of debt, bankruptcies, and evictions. Sarah Miller et al., *The Economic Consequences of Being Denied an Abortion*, National Bureau of Economic Research, https://www.nber.org/papers/w26662.pdf (2020).

These negative consequences have ripple effects that go well beyond the person denied the abortion, as her family also suffers. Because of the financial distress they face, women denied abortions are less likely to have enough resources to provide for their children's basic needs. Foster, *Socioeconomic Outcomes*, *supra*. These financial consequences are not merely the effects shared by anyone who gives birth to a child; rather, research indicates that these negative financial outcomes for women denied wanted abortions are likely caused by women being unable to time their pregnancies as they wish. Miller, *Economic Consequences*, *supra* ("This exploratory analysis suggests that the more optimally timed births may have fewer economic consequences.").

Family well-being also suffers in other ways when women are denied wanted abortions. Child development and poverty is worse for women who are denied abortions than for women who obtain one. Diana Green Foster et al., *Effects*

of Carrying an Unwanted Pregnancy to Term on Women's Existing Children, 205 Journal of Pediatrics 183 (2019). When women are able to plan their pregnancies and have children when they want, they are better able to bond with their children. Diana Green Foster et al., *Comparison of Health, Development, Maternal Bonding, and Poverty Among Children Born After Denial of Abortion vs After Pregnancies Subsequent to an Abortion*, 172 JAMA Pediatrics 1053 (2018). Women who receive abortions are also more likely to have intended pregnancies in the years following their abortion than women who are denied. Ushma Upadhyay et al., *Intended pregnancy after receiving vs. being denied a wanted abortion*, 99 Contraception 42 (2019). Moreover, women in an abusive relationship who are denied an abortion are more likely to remain with their partner than had they obtained the abortion they sought. Sarah C.M. Roberts et al., *Risk of Violence From the Man Involved in the Pregnancy after Receiving or Being Denied an Abortion*, 12 BMC Medicine 144 (2014).

Another consequence of being denied a wanted abortion is that women's life plans and education suffer. For the first year after seeking an abortion, women who are denied an abortion are six times less likely to have positive life plans and achieve them than those who obtain an abortion. Ushma Upadhyay et al., *The Effect of Abortion on Having and Achieving Aspirational One-Year Plans*, 15 BMC Women's Health 102 (2015). Achievement between the two groups tends to

even out after five years, though women who were denied an abortion continue to have somewhat lower aspirational plans for their lives. Molly A. McCarthy, *The Effect of Receiving Versus Being Denied an Abortion on Making and Achieving Aspirational 5-Year Life Plans*, 46 BMJ Sexual & Repro. Health 177 (2020). While the two groups are just as likely to graduate from school, women denied abortions are less likely to attain an advanced degree. Lauren J. Ralph et al, *A Prospective Cohort Study of the Effect of Receiving Versus Being Denied an Abortion on Educational Attainment*, 29 Women's Health Issues 455 (2019).

C. These harms will fall particularly harshly on indigent women and women of color in Georgia.

If the verdict below is upheld and Georgia abortion clinics close as a result, the harms described above will fall especially hard on Georgia's indigent women and women of color. Nationwide, indigent women face unintended pregnancies at a rate five times higher than those who are not indigent. Heather D. Boonstra, *Abortion in the Lives of Women Struggling Financially: Why Insurance Coverage Matters*, 19 Guttmacher Policy Review 46, 47 (2016). As a result, women at or below the poverty line account for about half of abortions across the country, and women between 100% and 199% of the poverty line account for another quarter. Rachel Jones & Jenna Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008-2014*, 107 Am. J. Pub. Health 1904, 1904 (2017).

In Georgia and nationwide, people of color are disproportionately represented among those who obtain abortions. Although white women account for the highest percentage of abortions in the country, Black women have the highest abortion rate (27.1 per 1000 women) followed by Hispanic women (18.1 per 1000 women). *Id.* at 1906. In Georgia in 2016, there was a similar over-representation, with 67.8% of the state's 31,868 abortions obtained by Black women. Tara C. Jatlaoui et al., *Abortion Surveillance -- United States, 2016*, 68 MMWR Surveillance Summaries 1 (2019) (Table 13) (the most recent data, for 2018, does not include Georgia's breakdown by race). This is more than double the percentage of Black people in Georgia for the same year (32% in 2016). State of Georgia Census 2020, *County Population by Race 2016*, https://census.georgia.gov/census-data/population-estimates. Black women are also over-represented in the number of patients who obtain abortions later in pregnancy. Sarah Roberts et al., *Implications of Georgia's 20-Week Abortion Ban*, 105 Am. J. Pub. Health e77 (2015). These disparities are rooted in systemic racism, which results in Black women being more likely to live in poverty, be unemployed, or work in low-wage jobs with insufficient or non-existent health insurance. Heidi Williamson et al., *Our Bodies, Our Lives, Our Voices: The State of Black Women & Reproductive Justice Policy Report*, 22-23 (2017), http://blackrj.org/wp-content/uploads/2017/06/FINAL-InOurVoices_Report_final.pdf.

Because of these disparities, the troubling effects of the closure of abortion clinics explained in the previous section will fall disproportionately on Georgia's indigent women and Black women. In some ways, this is already happening in Georgia with maternal mortality and Black women. Nationwide, Black women have a three to four times higher maternal mortality rate than white women; in Georgia, Black women have a two and a half times higher maternal mortality rate than Georgia's white women and five times higher than white women throughout the country (62.1 per 100,000 live births for Georgia Black women compared to 27.1 for Georgia white women and 12.7 for white women nationwide). Yale Global Health Justice Partnership, *When the State Fails: Maternal Mortality & Racial Disparity in Georgia*, 5-6 (2018), https://law.yale.edu/sites/default/files/area/center/ghjp/documents/ghjp_2018_when_the_state_fails-_maternal_mortality_racial_disparity_in_georgiarev.pdf. These troubling statistics would likely be much worse if Georgia's abortion clinics were to close. *Id.* at 26 (indicating one reason for maternal mortality rates is delayed prenatal care which is associated with seeking an abortion but not obtaining one).

Conclusion

Allowing the verdict below to stand would implicate the State of Georgia in curtailing access to constitutionally protected medical care, with the brunt of the resultant harm borne by low-income women of color. It would also open a

Pandora's box full of future nuisance lawsuits targeting other health care providers and lawful businesses. Far from preventing nuisances, it would likely incentivize protesters to engage in offensive and disruptive conduct to incite neighbors to sue the target of the protest. For these reasons, as well as those in appellants' brief, this Court should vacate the judgment below.

This submission does not exceed the word count limit imposed by Rule 24.

Respectfully submitted, this 11th day of January 2021.

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CERTIFICATE OF SERVICE

I certify that I have filed this *Amicus* Brief with the Court's eFast system, which will distribute the Brief to the Court, the Clerk, and those registered with the Court's platform.

I have also served via first class mail this *Amicus* Brief on the following counsel of record:

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I have also served each of the listed counsel at their respective email address with a PDF version of this brief.

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