State of South Dakota Concurrent Resolution

(No. 1004) 2015

Addressed and Delivered to

The Supreme Court of The United States of America

In 2015, the South Dakota legislature passed a *Concurrent Resolution* to express their grievances with the 1973 opinion of the United States Supreme Court in *Roe v. Wade*, the abortion case in which that Court prohibited the states from protecting the rights of pregnant mothers and their children. The legislature called upon Harold Cassidy to provide legal guidance concerning the precedent and the constitutional issues address by the legislature in that historical *Concurrent Resolution*.

South Dakota's Historic Resolution

This historic resolution of the South Dakota legislature has been called eloquent and inspiring by numerous commentators. Over the past twelve years, South Dakota passed new laws designed to protect the fundamental intrinsic rights of pregnant mothers and their children. While South Dakota has prevailed in successfully defending its law in the Federal Courts, all of its laws were attacked by abortion clinics and abortion doctors based upon the United States Supreme Court's decisions in *Roe v. Wade* and its progeny.

This Concurrent Resolution sets forth the findings of the legislature, expressly lists the rights of the mothers violated as a result of the U.S. Supreme Court decision in *Roe v. Wade* and it's progeny and sets forth all of the state's grievances with those decisions. The legislature declared that it's central mission to preserve and protect the intrinsic rights of its citizens has been diminished and even destroyed by those tragic, flawed and destructive decisions and exercises of power by the United States Supreme Court so that the legislature found it their solemn obligation to point to the errors of that court as part of their duties to protect the rights of its people.

On Thursday, January 29, 2015 this Concurrent Resolution passed the South Dakota House of Representatives by 86 % of the vote, 60 "yes" votes to 10 "no" votes. The resolution passed

South Dakota's Senate on February 5, 2015 by 74% of the vote.

The *Concurrent Resolution* is not only inspirational, but educational as well. Here, is that resolution in its entirety.

State of South Dakota

NINETIETH SESSION
LEGISLATIVE ASSEMBLY, 2015

436W0292

HOUSE CONCURRENT RESOLUTION NO. 1004

Introduced by:

Representatives Hunt, Anderson, Bolin, Brunner, Campbell, Craig, Cronin, Deutsch, DiSanto, Gosch, Greenfield (Lana), Haggar (Don), Haugaard, Hickey, Hunhoff (Jean), Johns, Klumb, Latterell, Mickelson, Munsterman, Novstrup (Al), Qualm, Rounds, Russell, Schoenbeck, Sly, Stalzer, Stevens, Verchio, Westra, Wiik, and Zikmund and Senators Rave, Brown, Greenfield (Brock), Haggar (Jenna), Heineman (Phyllis), Holien, Jensen (Phil), Monroe, Novstrup (David), Olson, Peterson (Jim), Rampelberg, and Van Gerpen

A CONCURRENT RESOLUTION addressed to the United States Supreme Court setting forth certain facts and expressly enumerating the grievances of the People of the State of South Dakota, through their elected representatives, with that Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973), and its progeny and calling for that Court to now protect the intrinsic, natural, fundamental rights of the children of our State and Nation and the intrinsic, natural, fundamental rights of their pregnant mothers in their relationship with

their children, and the mothers' health by reconsidering and overturning the Court's decision in *Roe*.

WHEREAS, we observe that ours was the first great sovereign nation in all of history founded on the precept of Equal Rights and Equal Respect for all human persons subject to its jurisdiction; that our Declaration of Independence declared that all human beings are endowed by their Creator with intrinsic and inalienable rights by virtue of their existence and humanity; that it was the promise of our young nation, that its newly formed government would protect its people against the deprivation of their natural, intrinsic and inalienable rights, which instilled the admiration of the whole world; and that promise to forever strive to further the realization of those ideals inspired the peoples of each of our Sovereign States, including the People of the State of South Dakota, to accept and adopt the Constitution of the United States as their own; and

WHEREAS, in 1868, our young nation ratified the Fourteenth Amendment to the United States Constitution, some twenty-one years before the State of South Dakota joined the Union and adopted that Constitution; that the Fourteenth Amendment was understood and considered by all, both proponents and opponents alike, to be a reaffirmation of the natural and intrinsic rights of mankind; and that the people of the various states, both those already part of the Union before the ratification of the Fourteenth Amendment in 1868, and those which joined the Union thereafter, relied upon this understanding; and

WHEREAS, in the case of *Madison v. Marbury*, 5 U.S. 137 (1803), and subsequent cases, including *Cooper v. Aaron*, 358 U.S. 1 (1958), the United States Supreme Court ruled that that Court reserved to itself the exclusive power as final arbiter of the meaning and construction of the United States Constitution; thus, those rulings place a heavy burden on the Court to correctly interpret the meaning and scope of the Constitution; that beginning at the time of *Marbury*, and at all times since, the members of the United States Supreme Court have striven to faithfully discharge their solemn duty to interpret our Constitution carefully and correctly. It has been that

Court's constant and courageous efforts to fulfill that mission which has brought esteem and respect to the Court; and

WHEREAS, despite the good faith efforts of the members of the Court to interpret our Federal Constitution correctly, the United States Supreme Court has found it necessary to overturn no less than two hundred and thirty-three of that Court's prior decisions because they had been incorrectly decided, thereby underscoring the importance of the United States Supreme Court being open and willing to correct its own errors in its interpretation of our Constitution as all too palpable: only that Court can effectively do so; and

WHEREAS, while the United States Supreme Court found it necessary to reverse itself over two hundred and thirty times, few of the Court's previous errors so violated the intrinsic rights of the people of the various states that they gave rise to an active national resistence to those decisions; yet a small number of the Court's errors that denigrated the great rights of the people could never gain acceptance and inspired national movements to free the people from the tyranny of certain erroneous decisions of the Court. Two such cases which inspired such national movements which resulted in the holdings of those cases being superceded by subsequent action of the people, or by correction by the Court itself, stand out. In 1856, the United States Supreme Court ruled in the case of *Dred Scott v. Sanford*, 17 How. 393, 60 U.S. 393 (1856), that a class of human beings could be bought and sold as property and be enslaved consistent with the Court's interpretation of our Constitution, the Court stating, in part, that African Americans were "considered a subordinate and inferior class of beings, who had been subjugated by the dominant race ..." 17 How 393, 404, 60 U.S. at 404-05. That holding of the Court helped tear apart our nation as people rose up to oppose it and it has been a blemish on the record of the Court ever since, particularly because it was not the Court which corrected its error. In 1896, following, and despite, the passage of both the Thirteenth and Fourteenth Amendments to the Constitution, generally thought to have been in response to the errors of the Court, most notably that of the *Dred Scott* decision, the Court again erred, forcing

a national movement that lasted for three-quarters of a century. In *Plessy v. Furguson*, 163 U.S. 537 (1896), the United States Supreme Court held that it was consistent with the Fourteenth Amendment Equal Protection Clause for a state to force the segregation of a person who has any degree of African American blood from those persons fully of the Caucasian race. It took the Court fifty-eight years – fifty-eight years during which people of the states suffered the deprivation of their God-given liberty and God-given equality – to correct its error in *Plessy*. The Court did so in multiple decisions in 1954, in *Brown, et al. v. Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954); (*See also*, *Brown*, 349 U.S. 294 (1955)); in 1955, in *Mayor and City Council of Baltimore v. Dawson*, 350 U.S. 877 (1955); *Holmes v. Atlanta*, 350 U.S. 879 (1955); and in 1956, in *Browder v. Gayle*, 352 U.S. 903 (1956). Ultimately, after decades of resistence by the Court, the Court acknowledged that its decision in *Plessy* was incorrectly decided at the time it was issued in 1896. The implication of *Brown* was that the argument advanced by the segregationists that whole cultures had relied upon the *Plessy* decision and, therefore, principles of *Stare Decisis* required honoring the legal precedent of *Plessy* for the sake of consistency – even if wrongly decided – could never justify honoring a profoundly unjust decision because no person, and no culture has the right to rely upon the ability to commit an inherently unjust and immoral act; and

WHEREAS, these cases demonstrate that the fact that the United States Supreme Court has held that certain conduct is constitutional or protected by the Constitution, does not mean, in and of itself, that such a decision is correct or beyond subsequent scrutiny or that the conduct in question is just, or moral. The history of the Court in which the Court has admitted to past errors – and especially those cases involving grave injustices – demonstrate that the Court must always be vigilant and introspective in revisiting past decisions when errors are brought to its attention. This is especially true when it becomes evident that a decision fails to be accepted by a large part of our citizenry because it promotes deep injustice, rightly inspiring great criticism over decades. There are no words to describe the importance of the Court correcting its errors in the matters we discuss here; and

WHEREAS, there remains today such a tragic case left on the record of the Court, which, together with its progeny, continues to violate the intrinsic rights of two large classes of human beings, and bars the people of the Sovereign States, and their elected representatives, from taking effective, corrective action to protect the intrinsic rights of those human beings. The decisions of the United States Supreme Court in 1973, in the case of *Roe v. Wade*, 410 U.S. 113 (1973), and its companion case, *Doe v. Bolton*, 410 U.S. 179 (1973), have never been – nor should be – accepted as valid constitutional jurisprudence by most legal experts. *Roe v. Wade* and *Doe v. Bolton* have been the subject of constant criticism from the people of the states, and legal scholars in even measure. They are not – nor should be – accepted by the People of South Dakota and they are not – nor should be – accepted by us, their elected representatives. In short, the errors of the Court in *Roe v. Wade* and its progeny have stood, and still stand, in the way of our ability to discharge our duties to the People of our State; and

WHEREAS, *Roe* and *Doe* have even been rejected by the Plaintiffs themselves in those cases, Jane Roe (Norma McCorvey) and Mary Doe (Sandra Cano); that in an extraordinary, unprecedented, historic fashion, the Plaintiffs in those landmark cases filed Rule 60 motions asking the United States Supreme Court to overturn their own victories. Both Plaintiffs, acting independently, moved the Court to vacate the judgments they each obtained because the Court's decisions were incorrect and led to the legal protection of such extraordinary harm to the women and children of the nation that they felt compelled to ask the Court to correct its errors. *McCorvey v. Hill*, 385 F.3d 846 (5th Cir. 2004), cert. denied 543 U.S. 1154 (2005); *Cano v. Baker*, 435 F.3d 1337 (11th Cir. 2006), cert. denied 549 U.S. 972 (2006); and

WHEREAS, scholarly legal works which disparage the legal reasoning of the Court in *Roe v. Wade* are too vast in number to enumerate in this resolution, but they operate to hold the *Roe* decision and its Court in ill repute, resulting in the realization of the Court's greatest fear – that of significant damage to the perception of the Court's legitimacy. *See, e.g., Planned Parenthood of S.E. PA v.*

Casey, 505 U.S. 833, 864-869 (1992). Scholarly works irrefutably establish that *Roe v. Wade* was fraught with legal and factual errors and wrongly decided. Examples of such works are: Keown, J., Abortion, Doctors and the Law, Cambridge University Press, Cambridge, England, 1988; Dellapenna, J., Dispelling the Myths of Abortion History, Carolina Academic Press, Durham, 2006; Forsythe, C., Abuse of Discretion, Encounter Books, New York, 2013. The incorrect factual and legal analysis of the Court in *Roe*, combined with the powerful evidence now available of the harm that decision has caused the women and children of our state and nation has left a stain on the record of the Court which requires correction and returning the policy issues to the people. If, in fact, the people have a preferred policy, that preference will be known and implemented without it being dictated to them by the Court; and

WHEREAS, lack of respect for the Court's decision in *Roe v. Wade* has been enflamed by a majority of the Court leveling serious criticism against *Roe*, and numerous reliable accounts reporting that a majority of the Court even voted to overturn *Roe* in the 1992 case which reaffirmed *Roe* by a five to four vote, *Planned Parenthood of S.E. PA v. Casey*, 505 U.S. 833 (1992). *See*, Dellapenna, Dispelling the Myths of Abortion History, (2006) at 850 and footnote 124; Lazarus, E., Closed Chambers, Random House, 1998. Associated Press article, Blackmun Papers Reveal Doubts on Abortion Ruling, March 4, 2004. The people of the various states will never have confidence in, or acceptance of, the *Roe* decisions; and will not have confidence in the Court that reaffirmed a decision which a majority of its members knew and admitted was wrongly decided, until the Court corrects its errors of *Roe*; and

WHEREAS, for the past ten years, our legislature has held no less than twenty public hearings on various abortion related matters and legislation. In 2005, we created, by statute, an Abortion Task Force to study abortion, which after many months of study and public hearings, submitted to our legislature a seventy-one page report. Virtually every statute we have passed to protect the interests of pregnant mothers has been attacked in court by an abortion clinic and its physicians claiming that *Roe v. Wade* prohibits our rational and

carefully thought out legislation. Much of that legislation was designed to protect the pregnant mothers against the negligence and dereliction of the abortion providers themselves. Despite clear conflict of interest, the abortion providers claimed in court to represent the rights of the pregnant mothers, and based upon *Roe* and its progeny, the Federal District Court permitted the abortion providers to stand in the place of the very women whose rights they violated. In December, 2012, litigation over South Dakota's 2005 Informed Consent Law was finally concluded. South Dakota prevailed on all of the issues, but the case took seven and a half years to litigate and South Dakota had to prevail in three different decisions of the United States Court of Appeals, including two separate opinions by two *en banc* courts. The defense of the litigation over laws designed to protect the women of our State was time consuming and lower court injunctions prevented the laws from becoming effective for a number of years, robbing the children and their mothers of the Law's protection. The fact that abortion providers know that courts following *Roe* often produce erroneous outcomes to their advantage has operated to encourage ill advised suits. This kind of experience operates to substantially deter most state legislatures from protecting the women and children of their states. The People of South Dakota and its elected officials have stayed true to its mission of protecting its people, but, yet again, find itself embroiled in litigation over its efforts to protect the rights of its pregnant mothers. Another challenge, this time to South Dakota's 2011 Anti-Coercion Statute, is now in the courts; and

WHEREAS, we, the duly elected representatives of the People of South Dakota, who serve the people by discharging the highest duty of government to protect the intrinsic natural rights of its people, are charged with the sacred obligation to enumerate those great intrinsic rights and to take all reasonable measures to preserve and protect them. In our continuing effort to succeed in that sacred endeavor we must now observe and proclaim that:

The right and duty to preserve life cannot co-exist with a right or duty to destroy it. The right and duty to preserve and protect the cherished relationship between mother and child cannot co-exist with a right and duty to destroy it. It is the law, as it represents the

collective interests of the individuals for whom it exists, that must choose which set of interests it must protect, and long ago our law was required to choose life over death; the mother's beautiful interest in her child's life over its destruction; the protection of innocent children over the misguided philosophies and trends in social thought which come and go.

If there are any self-evident and universal truths that can act for the human race as a guide or light in which social and human justice can be grounded, they are these: that life has intrinsic value; that each individual human being is unique and irreplaceable; that the cherished role of a mother and her relationship with her child, at every moment of life, has intrinsic worth and beauty; that the intrinsic beauty of motherhood is inseparable from the beauty of womanhood; and that this relationship, its unselfish nature and its role in the survival of the race is the touchstone and core of all civilized society. Its denigration is the denigration of the human race. This relationship, its beauty, its survival, its benefits to the mother and child, its benefits to society, all rest in the self-evident truth that a mother is not the owner of her child's life – she is the trustee of it; and

WHEREAS, our sacred mission to preserve and protect some of those cherished intrinsic rights has been diminished and even destroyed by those certain tragic, flawed and destructive court decisions and the exercise of power by the United States Supreme Court in *Roe* and *Doe*, so that we find it our sacred and solemn obligation to point to the errors of that Court as part of our duties to protect the rights of our people:

NOW, THEREFORE, BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES OF THE NINETIETH LEGISLATURE OF THE STATE OF SOUTH DAKOTA, THE SENATE CONCURRING THEREIN, THAT OUR FOLLOWING FINDINGS AND OBSERVATIONS OF FACT AND OUR EXPRESSLY ENUMERATED GRIEVANCES WITH THE UNITED STATES SUPREME COURT'S OPINION IN *ROE v. WADE*, 410 U.S. 113 (1973), AND ITS PROGENY, AS SET FORTH HEREIN ON BEHALF OF THE PEOPLE OF SOUTH DAKOTA, AND OUR

CALL TO THAT COURT TO RECONSIDER AND OVERTURN *ROE*, BE DELIVERED TO THE JUSTICES OF THE UNITED STATES SUPREME COURT BY DELIVERY OF THIS CONCURRENT RESOLUTION TO THE CLERK OF THAT COURT:

Section 1. The damage we perceive that the *Roe* decision has caused to the intrinsic rights of children and their mothers and to their persons is too grave and too vast, and the error of the Court too plain for us not to act on behalf of those we serve. The injustice to the child, whose life is terminated by an abortion, has long been easily perceived and readily understood by most. The injustice to their mothers and the harm to the rights, interests and health of their mothers has only more recently become apparent and only now widely appreciated.

A.

The equal right of a human being to live is an inherent, intrinsic, inalienable right of every human being by virtue of his or her existence and humanity. The insight that the equal protection of the laws applies to all living, existing human beings was enunciated and embraced in the United States Supreme Court decision in *Levy v. Louisiana*, 391 U.S. 68, 70 (1968). This right to live surely obtains for every human being at every moment of life. It is now established beyond dispute that the unborn child is a whole, separate, unique, living human being throughout gestation from fertilization to full gestation. *Planned Parenthood, et al. v. Rounds, Alpha Center, et al*., 530 F.3d 724 (8th Cir. 2008) (*en banc*); *Rounds*, 650 F.Supp. 2d 972 (D.S.D. 2009), affirmed 653 F.3d 662 (8th Cir. 2011). It is now widely accepted that the physician, who has a pregnant mother as his patient, has two separate patients, the mother and her unborn child, and the physician owes a professional and legal duty to both patients. American College of Obstetrics & Gynecology, Ethics in Obstetrics and Gynecology, 34 (2nd ed. 2004). The physician who proposes to perform an abortion proposes to terminate the life of one of his patients. The killing by a physician of one of his patients – regardless

of whose request inspires it – is contrary to the basic purpose and ethics of the medical profession and its promotion and protection denigrates a great and noble profession. In South Dakota, the killing of an unborn child at any age of gestation is a criminal homicide. The creation of an exception to that protection of the child, which exception is forced upon the State by *Roe*, thus immunizing the physician who kills the child by abortion, further denigrates that profession. In the strictest sense, a typical abortion is not a true medical procedure which is intended to promote the health of a physician's patient. The abortion procedure is so contrary to accepted principles of medicine and the accepted values of the medical profession and the People of our State, that the lone abortion clinic in South Dakota is unable, despite its continued efforts, to convince a single South Dakota doctor to perform abortions at its clinic, requiring the clinic to recruit physicians from other states. *Roe v. Wade* and its progeny have prevented the people of the states from effectively protecting the lives and rights of these children.

B.

We find that *Roe v. Wade* and its progeny promote and protect the deprivation and destruction of numerous intrinsic rights and interests of the pregnant mothers themselves. The People of our State have an interest in protecting each of these rights and interests. We enumerate some of them here because we have found that the Court's decision in *Roe v. Wade* precludes our ability to discharge our duties to effectively protect them.

(1) *The pregnant mother has a personal intrinsic right to her relationship with her child*. *Lehr v. Robertson*, 463 U.S. 248 (1983); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Quillion v. Walcott*, 434 U.S. 246 (1978); *Planned Parenthood, et al. v. Rounds, Alpha Center, et al.*, 653 F.3d 662 (8th Cir. 2011).

A mother's unique relationship with her child during pregnancy is the most intimate, the most important and the one most worthy of protection. Although the mother and child are two separate persons, their

relationship is so intimate that the unique bond between them, beginning as it does in utero, creates a human relationship which may be the most rewarding in all of human experience;

(2) *Although closely related to the pregnant mother's first interest, the pregnant mother also has both a protectable interest in her child's life and an interest in defending and protecting her child's life and rights*;

(3) *The pregnant mother has an interest in her own health*. The experiences with abortion since *Roe v. Wade* have revealed impressive evidence of profound risk of physical and psychological harm to which the mother is subjected when her child's life is terminated by abortion, including the increased risk of suicide ideation and suicide. *Planned Parenthood, et al. v. Rounds, Alpha Center, et al.*, 686 F.3d 889 (8th Cir. 2012) (*en banc*). The devastating harm to the mother and her fundamental interests is too profound and tragic for us to ignore;

(4) *The pregnant mother has an interest in preserving her personal dignity in her role as mother, a role that does not simply ennoble her, or merely enrich her life, but one which distinguishes her as unique as the mother of the unique person she carries*. A legal policy which denigrates her role in carrying her child is not one which protects her actual interests. It destroys them. A policy which chooses to protect the destruction of her relationship with her child instead of a policy which clearly protects it, is a denigration of women, because a policy which is based upon the assumption that it is a distressing experience to be a mother is a statement that it is bad to be a woman;

(5) *A woman has an interest in not being exploited*. Abortion embodies societal pressures which destroy

her interests as a mother to satisfy the interests of third parties, including, in various cases, the father of the child, her employer, her parents, abortion clinics, segments of society and others, who may have personal interests in conflict with those of mother and child. Abortion exploits women by treating the mother as if she is not a whole woman. It assumes she can be sexually exploited and, when that exploitation results in pregnancy, act as though she is not, in fact, a mother. Abortion demands that she detach herself from her experience and her bond, love, and sense of duty to herself and her child. It expects a mother to prevent the bonding process despite the fact that this natural process is both psychological and physiological. The assumption that the culture and society "relies" upon abortion, is an assumption that the society at large is free to *use* the mother as a sexual object without regard for the harm abortion can cause her. It allocates all of the risk, guilt, psychological and physical pain to her and further isolates her in her circumstance of an unplanned pregnancy by placing the responsibility of killing her child entirely upon her;

(6) *A woman has an interest in having the law extend to her dignity and respect by recognizing that she is capable of living with dignity in the family, and happily competing in the commercial and professional life of this nation, rather than being denigrated by specially and artificially crafted "principles of law" which ingrain the belief that she is inherently inferior because she cannot be happy in life without an exclusive "right" to terminate the life of her own child*.

The mother contemplating an abortion is not *exercising* a right, she is contemplating *waiving* or surrendering the most important intrinsic natural right she possesses in all of life other than

her own right to life itself. That fact, although simple to state, has profound implications. Protection of the integrity of the informed and voluntary nature of that waiver was ignored by *Roe,* and abortion as a method of terminating the mother's relationship with her child has been proven to be unworkable in practice.

The reason the act of a doctor which terminates the life of a human being – whether or not it is cast in terms of rights belonging to the mother of the child – is not protected by Due Process is not simply because history and tradition has not demonstrated that it is a value which underlies society. Surely it is not. But the real reason – one which resonates with the compassion for the welfare of the women – is that the mother possesses liberties fundamental in nature, which the doctor destroys. It is simply impossible for the Constitution to protect the mother's fundamental right to her relationship with her child, and at the same time protect the act of the doctor who terminates that relationship by terminating the life of the mother's child.

These interests of the pregnant mothers and their children were largely or completely ignored by the *Roe* Court, and the Court ignored them in *Planned Parenthood of S.E. PA v. Casey*, 505 U.S. 833 (1992). In fact, *Casey* reaffirmed *Roe* stating that it need not decide this issue (whether terminating the life of the unborn child is protected by the Constitution as a liberty) as if it were before the Court for the first time. The Court's joint opinion emphasized the doctrine of *stare decisis* which requires consistency in the Court's decisions even if a prior decision was wrongly decided unless certain conditions are met. In upholding *Roe*, what the *Casey* Court erroneously observed about *Roe's* error was that:

> "Nor will courts building upon *Roe* be likely to hand down erroneous decisions as a consequence. Even on the assumption that the central holding of *Roe* was in error, that error would go only to the strength of the state interest in fetal protection, not to the recognition afforded by the Constitution to the women's liberty." *Planned Parenthood of S.E. PA v. Casey*, 505 U.S. at 858 (1992) (emphasis added).

While we are disturbed by the dismissal of the profound importance of the protection of the lives of the children, we are even

more greatly disturbed by the Court's assertion that the rights and interests of the mothers themselves are not negatively affected at all by *Roe*. Time, and the evidence it has provided, has proven this statement of *Casey*, like each of the underlying factual assumptions of *Roe*, to be in error. We now find it imperative that we discharge our obligations to the People of our State, by identifying and listing our numerous grievances with the decision of the United States Supreme Court in *Roe v. Wade* and its progeny.

Section 2. Our grievances are not with the Court itself, nor its members, but rather with the tragic errors made by the Court some forty-two years ago in the Court's decision rendered in *Roe v. Wade*, and the Court's subsequent errors in *Planned Parenthood of S.E. PA v. Casey*, which reaffirmed those errors. We issue this solemn resolution in confidence with the knowledge that the Court's history of being open to correct its errors will serve the Court and our People well once more; and that this resolution and the call of the People of South Dakota and their elected representatives will be well received as one issued in good faith, made with respect for the Court and made with humility. It is one made in the highest tradition of our nation's commitment to full-throated expression and discourse on matters of grave public concern.

With that confidence, we list our specific grievances with those decisions:

(1) It is manifestly obvious that the Court should not have attempted to address the constitutional issues it addressed in the cases of *Roe* and *Doe*, first and foremost, because they had no factual record, no discovery, and the Court had no evidence of any kind in the record. The record in *Roe* consisted of an affidavit from Jane Roe, Norma McCorvy, which she testified in her Rule 60 Motion papers that she never read. The record in *Doe* consisted of an affidavit from Mary Doe, Sandra Cano, which she testified in her Rule 60 Motion papers she never signed. Sandra Cano testified that her signature was forged, and that

she neither sought nor wanted an abortion;

(2) Because the Courts were so irrationally anxious to rule on the merits of the academic questions being urged on the Courts in *Roe* and *Doe*, the States of Texas and Georgia were denied discovery, including the opportunity to depose those two Plaintiffs, which would have revealed the facts they both publically disclosed years later. We take issue with the Court deciding so important a constitutional question with a complete lack of knowledge of the facts, discovery and record;

(3) The Court took it upon itself to assume facts, given the lack of a factual record. Every essential "fact" recited by the majority in *Roe* and *Doe* were uneducated assumptions all of which have been proven to be completely or largely false. We include the following among them:

(a) The Court made the false assertion that it could not be determined when the life of a human being began. It is indisputable that the unborn child is a whole, separate, unique, living human being throughout gestation from fertilization to full gestation. *Planned Parenthood, et al. v. Rounds, Alpha Center, et al.*, 530 F.3d 724 (8th Cir. 2008) (*en banc*); *Rounds*, 650 F.Supp. 2d 972 (D.S.D. 2009), affirmed 653 F.3d 662 (8th Cir. 2011). While we conclude this fact was known in 1973, advances in science, particularly molecular biology and genetics, over the past thirty years removes any doubt about that fact. To the extent that the *Roe* Court was primarily concerned with the legal status of those human beings, it was a grave failure of the Court – one which cannot be overlooked – not

to begin such a legal inquiry by observing the very existence of the human being whose life would be terminated. The Court's failure to observe that a whole, separate, unique, living human being is killed by an abortion affects not only the issue of the child's rights, but that failure also doomed any reasonable analysis pertaining to the mother's rights and interests;

(b) We take issue with the fact that this failure of the Court – to acknowledge that the unborn child is a whole, separate human being – has resulted in the courts, and others, using that failure to deny the humanity of those unborn children. To the extent that the Court thought that the state of science in 1973 did not sufficiently illuminate the factual inquiry for the Court at that time, no such impediment exists today. The fact that an abortion terminates the life of a whole, separate, unique, living human being is now resolved. *Planned Parenthood et al. v. Rounds, Alpha Center et al.*, 530 F.3d 724 (8th Cir. 2008) (*en banc*); *Rounds*, 650 F.Supp. 2d 972 (D.S.D. 2009), affirmed 653 F.3d 662 (8th Cir. 2011);

(c) The Court assumed that the decision the pregnant mother faced was primarily a medical question the woman should reach with an abortion doctor; when, in fact, it was primarily a social question about her personal circumstances. We have long concluded that the decision a pregnant mother faces of whether or not to keep her relationship with her child is one of the most important she will make in all of life, and that the abortion doctor and the personnel at an abortion clinic are not the proper persons to assist or counsel in that

decision, because, among other reasons, their pecuniary interests and personal convictions often conflict with the interests of the pregnant mother. The philosophy and interests of abortion clinics, doctors and personnel are hostile to the mother's interest in exercising her right to keep her relationship with her child, rendering them ill-suited to properly counsel the pregnant mother about her personal question of whether she should and can maintain her relationship with her child;

(d) The Court assumed that there would be a normal and healthy physician-patient relationship. Experience has proven that usually no such relationship exists and that abortions, as performed in our state, are among the worst form of itinerant surgery, the kind of surgery which mainstream medicine considers unethical;

(e) The Court assumed that a woman's consent for an abortion would be informed and voluntary. The best evidence available indicates that most abortions are uninformed or not truly voluntary, or both. Evidence now demonstrates that abortion facilities do not make adequate disclosures of the facts and risks of the procedure. Evidence now proves that pregnant mothers are subjected to pressure and coercion to have abortions they do not want. Evidence now shows that there is violence against pregnant mothers to compel them to have abortions of their children they prefer to keep. It is now known that the number one cause of deaths among pregnant mothers is murder, and that most of

those murders are performed by the mother's male partner. There is impressive evidence that women are the victims of violence and even murder when pregnant mothers refuse to abort the children they carry;

(f) The Court assumed that motherhood was somehow inherently distressing. The truth is that motherhood is inherently beneficial to the mother, and motherhood lost is inherently painful and distressing, and leaves an emptiness for the mother;

(g) The Court assumed that what the mother carried was mere potential, when, in fact, she had an existing relationship with her child, a human being already in existence;

(h) The Court assumed that abortion was a very safe procedure. This assumption has proven to be false. It possesses many dangers to the health and life of the mother, including increased risk of suicide ideation and suicide;

(4) One of *Roe's* greatest errors with which we take issue is *Roe's* failure to recognize and account for the pregnant mother's fundamental right and liberty interests in her maintaining her relationship with her child. The Court ignored this right and ignored the enormous loss to the mother which abortion inflicts. The Court's decision treats abortion only as a benefit to the woman, and assumes she loses nothing of value to her. The harmful consequences of this error of the Court are too profound and vast to overestimate;

(5) One tragic consequence of *Roe* was that in one impulsive swoop, the Court wiped away all of the states' carefully created protections for pregnant

mothers designed to insure that a termination of her relationship with her child (in adoption procedures) would be free from coercion and undue or unwelcome influence of others and so that no termination could take place unless it was truly informed and voluntary, was treated as a last option, and was subject to Court review;

(6) One of *Roe's* central errors was its failure to define and characterize the conduct which was asserted to be protected as a liberty under the Fourteenth Amendment. This failure was further compounded by the use of sanitizing language which created the illusion that the conduct was relatively benign. The starting point for any Due Process analysis is for the Court to describe and define the conduct in question. *Washington v. Glucksberg*, 521 U.S. 702, 721-23 (1997). The *Roe* Court violated one of its own basic principles in failing to sufficiently describe the conduct. The conduct was that of a physician terminating the life of one of his patients. Since the conduct has been couched in the abortion providers' terms of the right of a woman, the *Glucksberg* Court would have described it as the right of a mother to terminate the life of her child, which contains within it, the right to have the assistance of a physician in doing so. *See, Glucksberg*, 521 U.S. at 723. This failure of the Court on this initial inquiry played a significant role in the Court reaching an erroneous result;

(7) We agree with the numerous legal authorities and scholars who criticize *Roe* as having made from whole cloth a so-called right or liberty that cannot logically or reasonably be deduced from the Fourteenth Amendment Due Process Clause. The central problem with *Roe* finding such a made-up right is that it frustrates and destroys one of the oldest

rights and liberty interests of the mother ever recognized by the Court. Thus, the abortion doctor's conduct in killing one of his patients is not a liberty protected by the Fourteenth Amendment for the reason that the mother has no recognized rights; rather it is not protected precisely because she does have fundamental rights, rights which are destroyed by the physician's act;

(8) We take issue with *Roe's* failure to account for the child's interests as a human being whose life is terminated;

(9) We find that the Court made certain false assumptions in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), in its *stare decisis* analysis intended to justify the Court's reaffirmation of *Roe*. The Court acknowledged that satisfaction of any one of four different principles would satisfy the requirements of *stare decisis* to justify overturning *Roe*. 505 U.S. at 854-69.

Experience and the facts now available demonstrate that not one, but all four methods of satisfying *stare decisis* can now be met:

(1) Abortion is a completely unworkable method to terminate the mother's constitutionally protected interest in her relationship with her child, and *Roe* has badly compromised the mother's rights in a number of circumstances. Because of *Roe*, the mother's long recognized fundamental rights and interests are frustrated and denied;

(2) It cannot be said that the women of the nation rely upon a right to terminate the lives of their children, and the inherently unjust nature of an act that would be considered criminal if it were not for *Roe v. Wade*, cannot be said to be the kind of act that anyone has a

right to rely upon. Experience has demonstrated that if anyone relies upon the legal availability of abortion, it is the man who exploits a woman and later demands that she have an abortion that he thinks it is her duty to him to obtain;

(3) The evolution of how the courts now understand the legitimacy of the state's protection of the mother's right to her relationship with her child, and protection against violence, coerced and uninformed consents all demonstrate that *Roe* was based on false assumptions and failure to recognize and consider the mother's real rights, all of which flaws have weakened *Roe*, if it ever had any real strength of its own;

(4) Finally, and quite clearly, *Roe's* assumptions of fact have all proven to be either totally or largely false and inaccurate.

Section 3. The errors of *Roe* are too clear, the harm that decision has caused the women in our State and throughout the nation too tragic, the deaths of our children too numerous, and the inherently unjust nature of the conduct too plain for our Supreme Court to fail to act to overturn that decision.

We, the elected representatives of the People of South Dakota, call upon the Supreme Court of the United States to scrutinize abortion cases now in the courts and those which will shortly be so, to select the case that most properly presents the important issues, in order to reassess *Roe* and *Casey*, and overturn them. We suggest that it is now time for the Court to restore to the People of the States and their elected representatives the ability to freely and openly debate what policies they should adopt to protect the women and children of their states free from unjustified interference from the Court's errors of *Roe*.