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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

OKLAHOMA CALL FOR REPRODUCTIVE JUSTICE, on behalf of itself and its members, *et al.*,

Petitioners,

v.

JOHN O'CONNOR, in his official capacity as Attorney General for the State of Oklahoma, *et al.*,

Respondents.

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Case No. PR-120,543

PETITIONERS' RESPONSE TO AMICI CURIAE BRIEFS OF (1) ELLIOTT INSTITUTE AND OKLAHOMA FAITH LEADERS, (2) GATEWAY WOMEN'S RESOURCE CENTER, INC. AND (3) LORA COLLIER, M.D., ET AL.

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IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

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TABLE OF CONTENTS

I. INTRODUCTION

Petitioners submit this brief in response to amici Elliott Institute and Oklahoma Faith Leaders ("Elliot Amici"), Gateway Women's Resource Center, Inc. ("Gateway"), and Lora Collier, MD et al ("Collier Amici").[1] These amici aim to refute Petitioners' evidence that abortion is safer than pregnancy, and they suggest that the State's purported interest in potential fetal life should outweigh any harms from pregnancy that pregnant Oklahomans may face. But their evidence is derived from studies that have been widely refuted by the mainstream medical community, and their argument, as applied in the context of the total abortion bans at issue, would completely erase pregnant persons from the equation—contrary to the Collier Amici's aims, Amicus Br. of Lora Collier et al. ("Collier Br.") at 2–3—and give more rights to fetuses than to any other group of Oklahomans, who do not have full, nonconsensual access to another person's body in any other context.

II. ARGUMENT

A. Abortion Is Safe, and Far Safer than Carrying a Pregnancy.

1. All mainstream medical organizations recognize that pregnancy is more dangerous than abortion.

As Petitioners have clearly established in their briefing, abortion is extraordinarily safe, and far safer than carrying a pregnancy to term and giving birth. The Elliot Amici's argument to the contrary is a mere recitation of arguments Petitioners have already refuted, and it does not provide any basis for denying Oklahomans access to needed medical care. *See generally* Pet'rs' Reply Br. at 25–29; Rebuttal Aff. of Ushma Upadhyay, PhD, MPH ("Upadhyay Rebuttal").

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[1] Though the Collier Amici have made their objections to the Oklahoma State Medical Association's Amicus brief known, they do not dispute any of the medical or scientific data underlying it.

Reputable studies show that maternal mortality is much higher than the mortality rate associated with abortions.[2] In addition to much greater maternal mortality, continued pregnancy and childbirth also entail other substantial health risks for women, which Elliot Amici completely disregard. Even an uncomplicated pregnancy causes significant stress on the body and involves physiological and anatomical changes, and continuing a pregnancy to term can exacerbate underlying health conditions or cause new conditions.[3] Labor and delivery are likewise not without significant risk, including that of hemorrhage, placenta accreta spectrum, hysterectomy, cervical laceration and debilitating postpartum pain, among others.[4] Approximately one in three women who give birth in the United States do so by cesarean delivery, a major surgical procedure that carries increased risk of complications.[5]

The Elliot Amici falsely argue, without any citation, that "[e]ach additional abortion increases the risk of an early death by approximately 50%." Amicus Br. of Elliot Inst & Okla. Faith Leaders ("Elliot Br.") at 3. Petitioners are aware of no reputable study that supports this. Amici's only actual contention is that the Raymond and Grimes publication cited by Petitioners

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[2] Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 Obstetrics & Gynecology 215, 216 (2012) (U.S. mortality rate associated with live births from 1998 to 2005 was 8.8 deaths per 100,000 live births, while mortality rate associate with abortions during the same time period was 0.6 deaths per 100,000 procedures).

[3] *See, e.g.*, ACOG, Practice Bulletin No. 190, *Gestational Diabetes Mellitus*, 131 Obstetrics & Gynecology e49 (2018); ACOG, Practice Bulletin No. 222, *Gestational Hypertension and Preeclampsia*, 135 Obstetrics & Gynecology 237 (2020).

[4] ACOG, Practice Bulletin No. 183, *Postpartum Hemorrhage*, 130 Obstetrics & Gynecology e168 (2017); ACOG, Obstetric Care Consensus No. 7, *Placenta Accreta Spectrum*, 132 Obstetrics & Gynecology e259 (2012, reaff'd 2021); ACOG Practice Bulletin No. 198, *Prevention and Management of Obstetric Lacerations at Vaginal Delivery*, 132 Obstetrics & Gynecology e87 (2018); ACOG, Clinical Consensus No. 1, *Pharmacologic Stepwise Multimodal Approach for Postpartum Pain Management*, 138 Obstetrics & Gynecology e507 (2021).

[5] Joyce A. Martin, et al., Ctrs. for Disease Control & Prevention, *Births: Final Data for 2019* (2021); ACOG, Obstetric Care Consensus No. 1, *Safe Prevention of the Primary Cesarean Delivery*, 123 Obstetrics & Gynecology 693 (2014, reaff'd 2016).

is unreliable. However, as Dr. Upadhyay explained in her affidavit in response to the same arguments raised by Respondents, that publication is a high-quality study using CDC pregnancy-related mortality data, which the CDC has long collected and has become more reliable over time. Upadhyay Rebuttal ¶ 14. Indeed, the CDC investigates every pregnancy-related death. *Id.* Unlike the CDC data, the "record-linkage" studies on which the Elliot Amici rely simply aggregate general, undifferentiated data, from far more limited populations, many of which are international. In other words, they simply capture the number of deaths from any cause, whether or not the death was related to abortion or childbirth.[6] This data is insufficient to draw the broad conclusions Amici propose and cannot outweigh the reliable research to the contrary.

2. All mainstream medical organizations recognize that abortion does not cause mental health problems.

The Elliot Amici are wrong again in claiming that abortion contributes to a decline in mental health. There is significant empirical research, including several rigorous scientific reviews, that have specifically examined the question of whether having an abortion increases the risk of adverse mental health outcomes. The most recent and robust scientific reviews of the literature—including reports by the American Psychological Association ("APA"), the National Academies of Sciences, Engineering and Medicine ("Nat'l Acads."), and the Royal College of

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[6] David Reardon, one of the authors of the cited "linkage-record" study is the founder and director of the Elliot Institute, which exists for the sole purpose of advocating against abortion. Dr. Reardon's scholarship has been widely criticized as ideologically motivated and lacking in scientific validity. See, e.g., Gail Erlick Robinson et al., *Abortion and Mental Health: Guidelines for Proper Scientific Conduct Ignored*, 200 Brit. J. Psychiatry 78 (2012) ("These authors have a clear agenda and publish a steady stream of papers, based on faulty methodology, designed to prove their point."); Julia H. Littell & James C. Coyne, *Abortion and Mental Health: Guidelines for Proper Scientific Conduct Ignored,* 200 Brit. J. Psychiatry 75 (2012) ("Reardon is quite explicit about his agenda to instill fear of abortion as a way of facilitating passage of anti-abortion legislation."). *See also* Pet'rs' Resp. to Brs. of Amici Curiae Okla. Business Leaders, Prolife Ctr. at the Univ. of St. Thomas, and Frederick Douglass Found. & Nat'l Hispanic Christian Leadership Conf., at 11–12.

Psychiatrists in the United Kingdom—have all concluded that abortion does not negatively impact women's mental health.[7]

Amici ask this Court to completely ignore this wealth of reliable evidence and instead point to two publications analyzing data from the National Longitudinal Study of Adolescent to Adult Health (the "Add Health" studies).[8] But this evidence suffers from a range of methodological flaws. The Add Health study from which Amici's statistics originate uses an inappropriate comparison group, comparing women who had an abortion to those with wanted pregnancies ending in childbirth or miscarriage.[9] As the NCCMH Report recognizes, studies that fail to properly take account of important factors such as whether the pregnancy that was aborted was wanted, have significant limitations.[10] This Court, thus, should not credit Amici's bold assertions regarding abortion and mental health, which rest on repeatedly discredited and flawed

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[7] Brenda Major et al., Am. Psych. Ass'n, *Report of the APA Task Force on Mental Health and Abortion* 5 (2008) [hereinafter "APA Task Force Report 2008"]; Brenda Major et al., *Abortion and Mental Health: Evaluating the Evidence*, 64 Am. Psych. 863 (2009) (update to APA Task Force Report 2008, which included a review of six additional studies that met inclusion criteria but that were published after the completion of the 2008 Report); Nat'l Acads., *The Safety and Quality of Abortion Care in the United States* (2018) [hereinafter, "National Academies Report"]; Nat'l Collaborating Ctr. for Mental Health (NCCMH), *Induced Abortion and Mental Health: A Systematic Review of the Mental Health Outcomes of Induced Abortion, Including Their Prevalence and Associated Factors* (2011) [hereinafter "NCCMH Report"]; *see also* Vignetta E. Charles et al., *Abortion and Long-term Mental Health Outcomes: A Systematic Review of the Evidence*, 78 Contraception 436 (2008).

[8] Amici also refer to unidentified "case studies," which as a general matter, lack scientific design, have no control group, and are especially vulnerable to selection bias. Miguel Porta, *A Dictionary of Epidemiology* 33 (5th ed. 2008), available at http://www.academia.dk/BiologiskAntropologi/Epidemiologi/PDF/Dictionary_of_Epidemiology__5th_Ed.pdf.

[9] Donald Paul Sullins, *Abortion, substance abuse and mental health in early adulthood: Thirteen-year longitudinal evidence from the United States*, 4 SAGE Open Med. (2016), https://doi.org/10.1177/2050312116665997. Amici also cite a second study by Sullins, but do not appear to use it as a source of statistical evidence. Donald Paul Sullins, *Affective and Substance Abuse Disorders Following Abortion by Pregnancy Intention in the United States: A Longitudinal Cohort Study*, 55 Medicina 741 (2019).

[10] NCCMH Report, *supra* note 5, at 7.

science. And nowhere do the Add Health studies suggest that denying a patient a wanted abortion results in better mental health outcomes.

Indeed, recent studies have shown that women experiencing barriers to abortion care and those denied abortion care have increased negative mental health symptoms in the short-term.[11] For example, people who are denied abortions because of gestational age limits are more likely to report symptoms of anxiety, stress[12] and low self-esteem than people who receive an abortion.[13] Eliminating access to abortion therefore has no positive effect on people's mental health and emotional well-being, and, in fact, worsens it.

B. Abortion Patients Report High Levels of Decision Rightness.

Elliot Amici's claims that "abortion is often imposed on women" and "result in forced abortion" are also wholly unsupported by any credible evidence, and, in fact, rigorous research on women's decision-making around abortion undermine their claims. Elliot Br. at 8. Specifically, the U.S. Turnaway study—which followed nearly 1,000 women who sought abortions at 30 facilities across the country, some of whom obtained an abortion and some of whom were denied an abortion due to gestational limits—found that over 95% of women who obtained an abortion feel that it was the right decision for them in the weeks, months, and years after; this is true even for women who reported it was difficult to decide whether to have an

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[11] M. Antonia Biggs 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, 174 (2017); M. Antonia Biggs et al., *Developing and validating the Psychosocial Burden among people Seeking Abortion Scale (PB-SAS)*, 15 PLOS ONE (2020), https://doi.org/10.1371/journal.pone.0242463.

[12] Laura F. Harris, *Perceived stress and emotional social support among women who are denied or receive abortions in the United States: a prospective cohort study*, 14 BMC Women's Health, at 6 (2014), https://doi.org/10.1186/1472-6874-14-76.

[13] Biggs et al., *Women's Mental Health, supra* note 11, at 173–174.

abortion.[14] Indeed, studies consistently find that most women seeking an abortion in the United States are already certain of their decision by the time they present for the initial abortion counseling visit.[15] Moreover, a recent study of women at family planning facilities found that levels of decisional certainty around abortion were the same or even higher than those observed in studies of patients making decisions about various other treatments, such as mastectomy after a breast cancer diagnosis, prenatal testing after infertility, antidepressant use during pregnancy, reconstructive knee surgery, or prostate cancer treatment options.[16]

Despite this overwhelming evidence, Amici baselessly insinuate that most abortions are involuntary because "[p]ressure typically comes from [abortion patients'] male partners, parents, employers" *and even* "social services officials." *Id.* These claims are riddled with evidentiary and logical inconsistencies. Amici also fail to cite a *single source* for their claims that "40-65% of women undergoing an abortion feel great ambivalence about their decision," and that "the majority of women considering abortion have mixed feelings of attachment, including desires to keep the pregnancy 'if only' they were able to receive support from others." *Id.* Their claim that

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[14] Corinne H. Rocca et al., *Emotions and decision rightness over five years following an abortion: An examination of decision difficulty and abortion stigma*, 248 Social Science & Medicine (2020), https://doi.org/10.1016/j.socscimed.2019.112704; Corinne H. Rocca et al., *Decision rightness and emotional responses to abortion in the United States: a longitudinal study*, 7 PLOS ONE (2015), https://doi.org/10.1371/journal.pone.0128832; Corinne H. Rocca et al., *Women's emotions one week after receiving or being denied an abortion in the United States*, 45 Persps. on Sexual and Reprod. Health 122 (2013).

[15] *See e.g.*, Lauren J. Ralph et al., *Measuring Decisional Certainty Among Women Seeking Abortion*, 95 Contraception 269, 276 (2017); Sarah C.M. Roberts et al., *Do 72-Hour Waiting Periods and Two-Visit Requirements for Abortion Affect Women's Certainty? A Prospective Cohort Study*, 27 Women's Health Issues 400, 404 (2017); Sarah C.M. Roberts et al., *Utah's 72-Hour Waiting Period for Abortion: Experiences Among a Clinic-Based Sample of Women*, 48 Persps. on Sexual & Reprod. Health 179, 185 (2016); Heather Gould et al., *Predictors of Abortion Counseling Receipt and Helpfulness in the United States*, 23 Women's Health Issues e249, e254 (2013); Diana Greene Foster et al., *Attitudes and Decision Making Among Women Seeking Abortions at One US Clinic*, 44 Persps. on Sexual & Reprod. Health 117, 122 (2012); *see also* Ushma Kumar et al., *Decision Making and Referral Prior to Abortion: A Qualitative Study of Women's Experiences*, 30 J. Fam. Plan. & Reprod. Health Care 51 (2004).

[16] Ralph et al., *supra* note 15, at 276.

"64% of American women acknowledging a history of abortion report having felt pressured to abort by others," *id.*, is also unsupported, but appears to come from a paper supporting the widely debunked theory that abortion causes post-traumatic stress disorder, *id.* at 7.[17]

Putting aside the obvious evidentiary problems posed by these dubious propositions, all best medical practices—and certainly those followed by Petitioners—emphasize ensuring that patients provide their full informed and voluntary consent. In addition, Oklahoma law requires a physician to obtain informed and voluntary consent, with which Petitioners have complied for decades, and Amici have not presented any evidence to the contrary. *See* 63 Okla. Stat. Ann. § 1-738.2. Nor do Elliot Amici explain how the range of "pressures" experienced by pregnant persons renders their decisions involuntary—or how forcing them to carry pregnancies to term will alleviate these "pressures." A total abortion ban does not eliminate the life and societal circumstances (what Petitioners refer to as "pressures") that Oklahomans may experience that may lead them to decide that having an abortion is the best decision for them; it just coerces everyone to carry a pregnancy to term.

C. Amici's Spurious Claims About "Fetal Pain" Have No Place in This Court's Analysis.

Amici Gateway would have this Court ignore leading medical organizations—including the Society for Maternal-Fetal Medicine ("SMFM"), the American College of Obstetricians and

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[17] Notably, the author of that study, Vincent Rue, *id.* at 7, has been found and described as not credible and unqualified. *See Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 680 n.3 (W.D. Tex. 2014) (noting that Rue's involvement with the State's expert witnesses negatively impacted their credibility); *Planned Parenthood of Se. Pa. v. Casey*, 744 F. Supp. 1323, 1333–34 (E.D. Pa. 1990) (concluding that "[b]ecause Dr. Rue lacks the academic qualifications and scientific credentials possessed by plaintiffs' witnesses," his testimony was "not credible"); *Hodgson v. Minnesota*, 648 F. Supp. 756, 768 (D. Minn. 1986) ("Dr. Vincent Rue possesses neither the academic qualifications nor the professional experience of plaintiffs' expert witnesses. More importantly, his testimony lacked the analytical force of contrary testimony offered by plaintiffs' witnesses."), *rev'd on other grounds*, 853 F.2d 1452 (8th Cir. 1988); *see also* Irin Carmon, *Who is Vincent Rue?*, MSNBC News (June 10, 2014, 5:34 PM), https://www.msnbc.com/msnbc/who-vincent-rue-msna346471.

Gynecologists ("ACOG"), the U.S. Association for the Study of Pain ("USASP"), and the Royal College of Obstetricians and Gynecologists ("RCOG")—which all agree that a pre-viable fetus cannot experience pain. Amici instead ask this Court to uphold the abortion bans on the basis of discredited pseudo-science that claims fetal pain is a real and widely accepted phenomenon. As Petitioners explain further below, this Court should not credit Amici's position.

The consensus of leading medical authorities is clear: prior to at least viability, a fetus lacks the neural circuitry and pathways that are essential to experience pain.[18] Amici contend that "the fetus is extremely sensitive to painful stimuli," Amicus Br. of Gateway Women's Resource Ctr. at 7 (citation omitted), but they inappropriately equate pain to nociception—e.g., unconscious reflexes to hormonal responses. As the International Association for the Study of Pain ("IASP")—a leading global organization whose members study and practice pain relief—has explained, "pain and nociception are different phenomena."[19] ACOG and RCOG have also both concluded that the mere occurrence of reflexive, involuntary, or hormonal changes do not indicate pain.[20] The wider medical community, including SMFM and USASP, agrees.[21]

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[18] *Facts are Important: Gestational Development and Capacity for Pain*, ACOG, https://www.acog.org/advocacy/facts-are-important/gestational-development-capacity-for-pain (last visited Oct. 12, 2022) [hereinafter *Facts*]; RCOG, *Fetal Awareness: Review of Research and Recommendations for Practice*, 7 (2010), https://www.rcog.org.uk/media/xujjh2hj/rcogfetalawarenesswpr0610.pdf [hereinafter *Fetal Awareness*].

[19] *See, e.g.*, Susan Lee et al., *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, 294 JAMA 947, 949 (2005); *Fetal Awareness*, *supra* note 18, at 7, 9; SMFM Consult Series #59, *The use of analgesia and anesthesia for maternal-fetal procedures*, 225 Am. J of Obstetrics & Gynecology PB2, PB7–8 [hereinafter SMFM Consult #59] (until the cortex is developed, a fetus does not have the integrated anatomical structures necessary to experience pain); Fetal Awareness, *supra* note 18, at viii–x, 3, 7, 11 (cortex is required to experience pain, and the necessary development of the cortex does not occur before at least 24 weeks of gestation and concluding that "fetal pain" is "not possible" before the cortex is developed).

[20] *Facts*, *supra* note 18, at 1; *Fetal Awareness*, *supra* note 18, at 5.

[21] *See, e.g.*, SMFM Consult #59, *supra* note 19.

Rather, the evidence is incontrovertible that a developed cortex is necessary to achieve conscious awareness and thus experience pain.[22] Amici claim that advances in medical knowledge since *Roe* was decided support their position, but extensive peer-reviewed data and brain imaging studies conducted in the decades since have shown that until at least the cortex is developed, a fetus does not have the integrated anatomical structures necessary to experience pain.[23] For example, in 2005, expert scientists and researchers published a peer-reviewed article in the Journal of the American Medical Association that found certain functional regions in the cortex are required to experience pain.[24] And in 2010, RCOG issued a peer-reviewed report stating that the cortex is required to experience pain, and the necessary development of the cortex does not occur before at least 24 weeks of gestation.[25] The report concluded that "fetal pain" is "not possible" before the cortex is developed.[26] These findings were reaffirmed just last year in a study conducted by SMFM, with other leading groups of experts, which was also supported by both ACOG and RCOG.[27]

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[22] Lee et. al., *supra* note 19, at 949.

[23] *See, e.g., id.*; *Fetal Awareness*, *supra* note 18, at 7, 9; SMFM Consult #59, *supra* note 19, at 7.

[24] Lee et. al., *supra* note 19, at 949.

[25] *Fetal Awareness*, *supra* note 18, at viii–x.

[26] *Id.* at 3, 7, 11.

[27] SMFM Consult #59, *supra* note 19, at 7; Melanie Boly et al., *Are the Neural Correlates of Consciousness in the Front or in the Back of the Cerebral Cortex? Clinical and Neuroimaging Evidence,* 37 J. of Neuroscience 9603, 9603–9613 (2017); Laure Mazzola et al., *Stimulation of the human cortex and the experience of pain: Wilder Penfield's observations revisited,* 135 Brain 631, 635–639 (2012) (study of behavioral responses to cortical responses in epilepsy patients to electrical stimulation showed that electrical stimulation of a specific region of the cortex, the posterior insula, gave rise to the experience of pain); *see also*, Choong-Wan Woo et al., *Quantifying cerebral contributions to pain beyond nociception,* 14 Nature Commc'ns (2017), https://doi.org/10.1038/ncomms14211 (reinforcing the consensus view of all authoritative medical organizations that a functional cortex is essential to experience pain); Choong-Wan Woo et al., *Separate neural representations for physical pain and social rejection,* 17 Nature Commc'ns (2014), https://doi.org/10.1038/ncomms6380 (same); Tor Wager et al., *An fMRI-based neurologic signature of physical pain,* 368 New Eng. J. Med. 1388 (2013) (same).

Simply put, not one leading medical organization accepts Amici's position. Amici's debunked studies should thus not be taken as evidence that there is a "separate life" at issue.[28]

III. CONCLUSION

Although Amici accuse Petitioners of leaving out large swaths of potential Oklahomans in their constitutional analysis, Collier Br. at 2–3, it is they who ignore the health, lives, and rights of pregnant Oklahomans—and on the basis of evidence that has been widely refuted. Siding with amici would require this Court to disagree with all major medical organizations in favor of fringe science. As Petitioners have made clear, a total abortion ban can never successfully balance the interests of pregnant Oklahomans with those of the fetus, to the extent such an interest is legitimate, because it ignores the interests of pregnant Oklahomans wholesale exclusively in favor of potential future life. This result is untenable under the Oklahoma Constitution.

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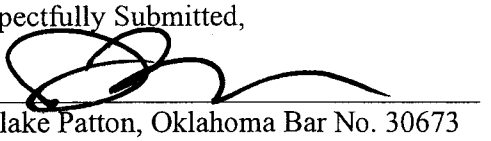
[28] "Viability is the capacity of the fetus for sustained survival outside the woman's uterus. Whether or not this capacity exists is a medical determination, may vary with each pregnancy and is a matter for the judgment of the responsible health care provider." *Abortion Policy*, ACOG, https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2020/abortion-policy (last visited Oct. 13, 2022) (Each pregnancy is unique and requires access to individualized care; decisions should be between the patient and care provider.).

Dated: October 13, 2022

Respectfully Submitted,



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The undersigned hereby certifies that on this 13th day of October, 2022 a true and correct copy of the foregoing was served via email to the following:

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