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SUPREME COURT

No. 2022-CA-0329

## Supreme Court of Kentucky

DANIEL CAMERON,  
APPELLANT,

v.

EMW WOMEN'S SURGICAL CENTER, ET AL.,  
APPELLEES.

ON APPEAL FROM THE JEFFERSON CIRCUIT COURT  
DIVISION THREE, NO. 22-CI-3225; HON. MITCH PERRY, PRESIDING

### AMICUS CURIAE BRIEF OF THE PROLIFE CENTER AT ST. THOMAS MORE UNIVERSITY (MN)

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*Joshua Hershberger*

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## INTRODUCTION

The judgment of the trial court was based in significant part on the testimony of Plaintiff's expert, Dr. Jason Lindo. *EMW Women's Surgical Ctr., P.S.C. et al. v. Cameron et al.* (Ky Cir Ct, Jefferson Cty. July 22, 2022) at 3-4. In the court's consideration of the balance of equities presented by the plaintiffs' claims that court summarized and accepted Dr. Lindo's claims that Kentuckians would suffer economic harms under the laws at issue. *Id.* at 8. "Dr. Lindo also testified that these abortion bans will impose not just serious financial costs, but also educational and professional harms on Kentuckians." *Id.* at 9. "An unplanned pregnancy can also derail a woman's career or educational trajectory." The purpose of this brief is to provide this Court with empirical data regarding women's advancement in the past 50 years, that appears to be independent of the availability of abortion.

National data reported by U.S. government agencies over the 50 plus years intervening since the federal district court ruling in *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970), *aff'd in part, rev'd in part*, 410 U. S. 113 (1973) (*overruled Dobbs*, 142 S. Ct. 2228, 2242 (2022)) fails to show that access to abortion is "essential" to women's increasing economic and political prowess. Data regarding women's participation in the labor market and entrepreneurial activities, as well as their educational accomplishments, professional engagement, and political participation, reveals virtually no consistent correlation with abortion rates or ratios. And, certainly, in the absence of correlation, there can be no causation. *See Tagatz v. Marquette Univ.*, 861 F.2d 1040, 1044 (7th Cir. 1988).

## ARGUMENT

### **I. Women's advances in the past half-century resulted from a complex mix of multiple factors.**

Abortion providers and activists often claim that access to abortion is "essential" for

women's participation in the economic and social life of the country, but this statement ignores legal, cultural, technological, and other events affecting women over at least the last five decades. A special issue of a leading social sciences journal devoted to the question of women's social and economic progress illustrates the complexity of factors involved in women's progress in the 50 years from 1966 to 2016. *A Half-Century of Change in the Lives of American Women*, 2 RUSSELL SAGE FOUND. J. SOC. SCI. (2016). Among the factors that can impact women's progress, the issue discusses personal and familial factors including educational and occupational choices as well as ability and effort in school; cultural and psychological forces; changes in childbearing, marriage, and family structure; technology (including in manufacturing, domestic technology, contraception, and abortion) and myriad laws and policies. Martha J. Bailey & Thomas A. DiPrete, *Five Decades of Remarkable but Slowing Change in Women's Economic and Social Status and Political Participation*, 2 RUSSELL SAGE FOUND. J. SOC. SCI. 1, 3 (2016).

This multitude of factors illustrates the importance of Dr. Lindo's trial testimony that more than half of women obtaining an abortion in the United States had a disruptive life event<sup>1</sup> in the year leading up to the abortion. (Lindo Slides; VR 7-6-2022 at 11:50:10–11:51:07 (discussing 5E25033E-20D3-4368-A56A-6AA77912B46E : 000014 of 00002815 statistical data in slides), Transcript at 101–02).

It is the presence of such events, that are independent of pregnancy, that renders any accurate determination of causation so very difficult to untangle. Other factors include

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<sup>1</sup> Disruptive life events include death of a close friend or family member, separation from partner, having a baby, being unemployed for at least one month, moving two or more times, or being behind on rent or mortgage payments. Lindo Slides; VR 7-6-2022 at 11:50:10–11:51:07 (discussing 5E25033E-20D3-4368-A56A-6AA77912B46E : 000014 of 00002815 statistical data in slides), Transcript at 101–02).

conflicting studies, researchers' use of different methodologies, the widely varying statistical significance of results, and efforts to gauge the potential importance of selection effects using assumptions it declares "*almost impossible to test.*" *Five Decades of Remarkable but Slowing Change, supra* at 6 (emphasis added).

The authors acknowledge the effects of pre-*Roe* cultural changes elevating women's social position, writing that it is "likely that more recent developments are the continuation of an evolution that extends back in time to the first wave of feminism of the late nineteenth and early twentieth centuries, as well as women's empowerment during World War II." *Id.* at 20. Likewise, the simultaneity of cultural and technological changes highly complicates attempts to measure the effects of abortion. *Id.* at 15. Respecting abortion and women's labor force participation they write: "[e]vidence is more limited, however, that changes in abortion access translated into changes in women's labor-force outcomes." *Id.* at 14-15.

In the end, attempts to both aggregate and untangle women's personal stories – reflecting individual values, familial, health, and educational histories, economic and cultural resources, access to opportunities, and the impact of a changing legal and social environment – in order to isolate any effect that access to abortion may have had on women's participation in the economic and social life of their communities, appear doomed from the start.

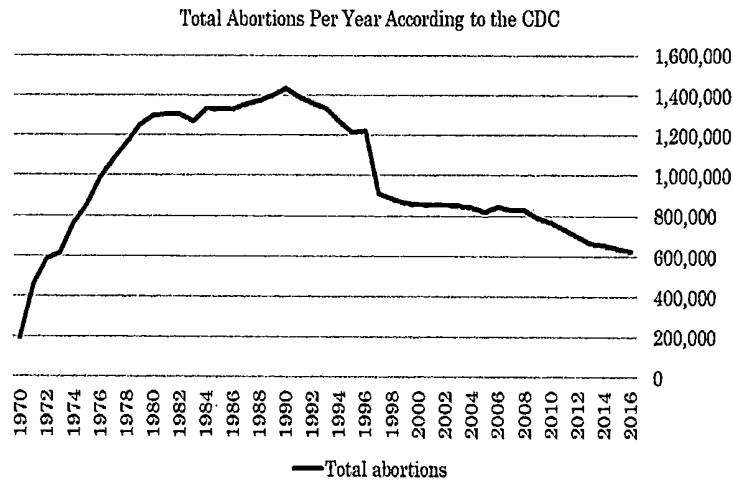
**II. Women's rising participation in the economic and political life in the country is independent of the ratios and rates of abortion.**

The reality is that while women made visible social progress in the years immediately after *Roe* – when abortion rates and ratios were climbing – it is also true, that such progress was already underway in the decades before *Roe* and has continued when abortion rates and ratios have fallen dramatically.



Recognized indicators of women’s economic progress include women’s enrollment in college, women’s earnings compared with men’s, and women’s workforce participation rates. When historical data on these indicators is compared with data on abortion rates and ratios, there is no consistent correlation between changes in the indicators and changes in abortion rates and ratios.<sup>2</sup>

From 1974 to 1989, rates of abortion per 1000 women of childbearing age moved from 242 to 346, a 43% rise; with abortion ratios per 100 pregnancies moved from 17 to 24, a 41% increase.

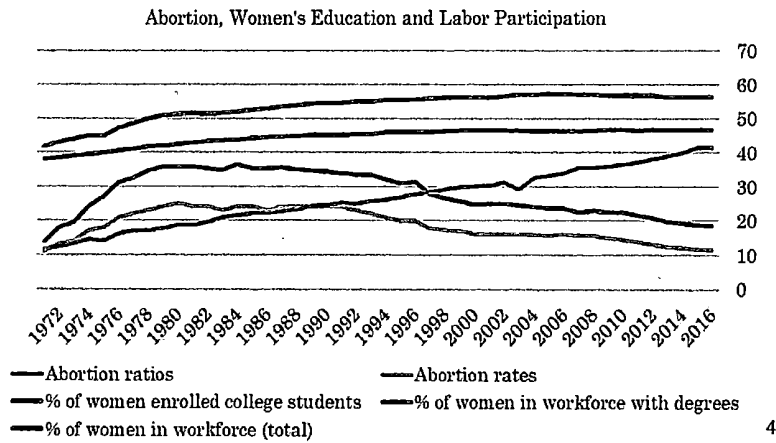


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<sup>2</sup> The relevant data is provided in narrative and chart form in a brief co-authored by counsel for *Amicus* ProLife Center in this case, and referenced by the majority in *Dobbs*, 142 S.Ct. at 2277 (2022). *Amicus Curiae* Brief of 240 Women Scholars and Professionals, and ProLife Feminists Organizations in Support of Petitioners, available at [https://www.supremecourt.gov/DocketPDF/19/19-1392/185366/20210804180314919\\_19-1392%20Brief%20of%20240%20Women%20Scholars%20et%20al%20In%20Support%20of%20Petitioners.pdf](https://www.supremecourt.gov/DocketPDF/19/19-1392/185366/20210804180314919_19-1392%20Brief%20of%20240%20Women%20Scholars%20et%20al%20In%20Support%20of%20Petitioners.pdf).

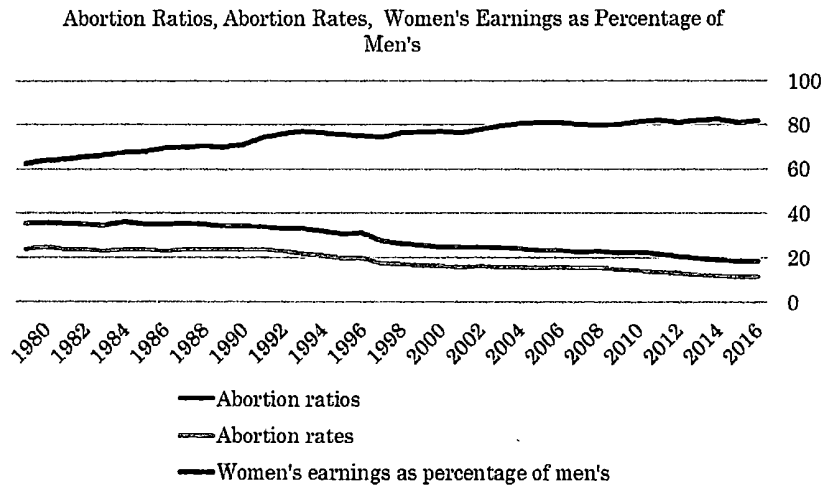
<sup>3</sup> Data from Centers for Disease Control and Prevention, MMWR Abortion Surveillance Reports, available at [https://www.cdc.gov/reproductivehealth/data\\_stats/index.htm](https://www.cdc.gov/reproductivehealth/data_stats/index.htm).

During that time, there was a rise in the percentage of women in the total civilian workforce, from 39.4% to 45.2%, a 14.7% increase, and an increase in the workforce presence of women with a college degree or more, from 14.6% to 24.3%, a 66% rise.



There do not exist reliable measures between 1974 and 1978 for comparing the percentage of men's average income and women's average income. But Bureau of Labor Statistics beginning in 1979 show that from 1979 to 1989 abortion ratios remained steady – 24/100 pregnancies – while abortion rates declined – from 358/1000 to 346/1000 – a 3% decline. Yet there was a 12.5% increase in women's earnings as a percentage of men's. Women moved from earning 62.3 cents on men's dollar, to 70.1 cents.

<sup>4</sup> For women in the workforce and women with college degrees, see *Women's Bureau, Civilian Labor Force by Sex, Chart: 1948-2016 Annual Averages*, U.S. DEPT. LAB., <https://www.dol.gov/agencies/wb/data/facts-over-time/women-in-the-labor-force> (last visited July 22, 2021); U.S. Bureau Lab. Stat., *A Look at Women's Education and Earnings Since the 1970s*, Chart: Percent Distribution of Women in the Civilian Labor Force, 25 to 64 Years of Age, by Educational Attainment, *Econ. Daily* (Dec. 27, 2017), [https://www.bls.gov/opub/ted/2017/a-look-at-womens-education-and-earnings-since-the-1970s.htm?view\\_full](https://www.bls.gov/opub/ted/2017/a-look-at-womens-education-and-earnings-since-the-1970s.htm?view_full).



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During the period between the early 1970s and about 1988, the growth in women's entrepreneurial activity was characterized by a U.S. House of Representatives committee as "exponential." H.R. COMMITTEE ON SMALL BUSINESS, 100TH CONG., NEW ECONOMIC REALITIES: THE RISE OF WOMEN ENTREPRENEURS 1, 2 (1988). Committee Chair John J. LaFalce's transmittal letter noted: "From owning less than five percent of the Nation's businesses prior to the 1970s, women have now [1988] come to own approximately thirty percent of American businesses." *Id.* at iii.

Looking at women enrolled in college programs from 1974 to 1989, when abortion rates increased 43% and ratios increased by 41%, women's college enrollment moved from 45% of college students to 54.3%, an increase of nearly 21%. Women's participation in professional education similarly expanded. Before the 1970s, law schools were almost exclusively male domains. In the academic year of 1973-1974, 84% of all law students were

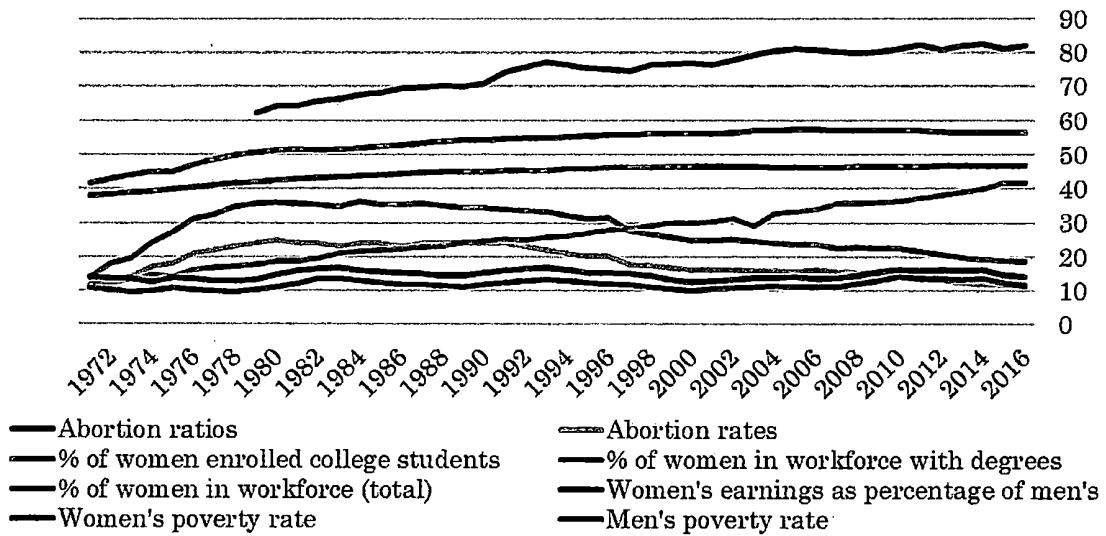
<sup>5</sup> For women's earnings as a percentage of men's see U.S. Bureau Lab. Stat., A Look at Women's Education and Earnings Since the 1970s, Chart: Women's Earnings as a Percentage of Men's, Median Usual Weekly Earnings of Full-Time Wage and Salary Workers, Econ. Daily (Dec. 27, 2017), [https://www.bls.gov/opub/ted/2017/a-look-at-womens-education-and-earnings-since-the-1970s.htm?view\\_full](https://www.bls.gov/opub/ted/2017/a-look-at-womens-education-and-earnings-since-the-1970s.htm?view_full).

men, and only 16% women. But by the 1989-1990 academic year, men occupied only 57.3% of law school seats, and women the remaining 42.7%. First Year and Total J.D. Enrollment by Gender 1947 – 2011, AM. BAR ASSOC., [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/statistics/jd\\_enrollment\\_1yr\\_total\\_gender.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/jd_enrollment_1yr_total_gender.authcheckdam.pdf). The increase in women enrolled in medical school, while smaller, was still impressive. In 1974, women comprised 20.4% of students enrolled in medical school. By 1989, that percentage had increased to 38.4%. Assoc. Am. Med. Coll., Diversity in Medical Education: Facts & Figures 2016, FACTS & FIGURES SERIES (2016), <https://www.aamcdiversityfactsandfigures2016.org/report-section/section-3/#figure-1>.

But women's progress in each of these areas continued and, in some instances, accelerated as abortion rates and ratios started to plummet beginning in 1990 and continuing to very recent years for which we have data. From 1990 to 2016, abortion rates declined 46% from 345 to 186, and abortion ratios fell 52% from 24 to 11.6. *See chart supra* p. 4. During this same period, however, the percentage of women in the workforce with a college degree or more rose from 24.5% to 41.6%. This is a 70% increase. *See chart supra* p. 4. Women also continued to earn an increasing percentage of men's income, rising from 70.9 to 81.9 or a 15.5% increase. *See chart supra* p. 5.

Women's college enrollment also continued to climb during this period of sharply declining abortion rates and ratios, from 54.5 to 56.5, a nearly 4% rise.

Education and Economic Factors as Compared to Abortion Rates and Ratios



Women’s enrollment in law schools grew from 47.4% in 1990 to 52% in 2016, the first year the number of women exceeded the number of men enrolled in ABA-accredited law schools. The number of women enrolled in medical schools grew even more dramatically during this period, increasing from 39.2% in 1990 to 49.8% in 2016. Today enrollment of women exceeds that of men both in law schools and medical schools. ABA Profile of the Legal Profession 2020, 1, 58 (2020), <https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf>.

It is clear from the data that Chief Justice Rehnquist was correct when he dissented in *Casey*, observing “Surely it is dubious to suggest that women have reached their ‘places in society’ in reliance upon *Roe*, rather than as a result of their determination to obtain higher education and compete with men in the job market, and of society's increasing recognition of their ability to fill positions that were previously thought to be reserved only for men.” *Planned Parenthood of S.E. Penn. v. Casey*, 505 U.S. 833, 956-57 (1992) (Rehnquist, C. J., *dissenting*)

(*overruled Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022)) (Rehnquist, J., *dissenting*).

**III. Petitioners claimed harms to women from reduced abortion access rely upon fatally flawed studies.**

Petitioners, their expert, and allies claim certainty about the harms that will be visited upon Kentucky women if abortion is restricted in the state. Citing articles based on a deeply flawed series of studies, known collectively as the “Turnaway Study,”<sup>6</sup> these studies claim to compare the fates of women denied late-term abortions (because of clinic gestational limits) to women who received abortions earlier in their pregnancies. DIANA GREENE FOSTER, *THE TURNAWAY STUDY: TEN YEARS, A THOUSAND WOMEN, AND THE CONSEQUENCES OF HAVING – OR BEING DENIED – AN ABORTION* (2021). Unsurprisingly given the genesis of the studies, researchers conclude that the latter group fares better economically and educationally. But these studies are fatally flawed.

The Turnaway Study was funded by advocates for legal abortion at a research center advocating for legal abortion: the Bixby Center for Global Reproductive Health at the University of California, San Francisco. The studies suffer from high dropout rates resulting in tiny cohorts and low statistical power, the lack of a control group, undefined cohorts. The authors refused requests to publish their complete questionnaires or to make their data available for re-analysis – the usual scientific standard – even though the studies could be published and shared in a manner compromising no one’s identity. David C. Reardon, *The Embrace of the Proabortion Turnaway Study: Wishful Thinking? Or Willful Deceptions?*, 85 *LINACRE Q.* 204, 210 (2018).

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<sup>6</sup> Verified complaint at ¶ 72. and Affidavit of Jason Lindo, Ph. D. at ¶¶ 62-64.

These studies claiming that abortion plays a crucial role in advancing women's progress suffer from numerous flaws. They are regularly conducted by deeply biased researchers who fail to account for confounding variables, fail to facilitate independent verification of their results, employ tiny sample sizes, and/or overgeneralize their results. They also ignore important, contrary explanations and evidence as the next section will illustrate. See Priscilla Coleman, *The Turnaway Study: A Case of Self-Correction in Science Upended by Political Motivation and Unvetted Findings*, *Front. Psych.* (June, 2022), at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9247501/>.

**IV. There is evidence that the judicially created right of abortion disadvantages women.**

Contrary to Plaintiffs' claims, data suggest some correlation between abortion and increasing reproductive coercion, the feminization of poverty, and women's declining levels of happiness, including fewer and less satisfying long-term committed relationships with partners and the birth of fewer children than women desire by the end of their reproductive lives. Helen M. Alvare, *Nearly 50 Years Post-Roe v. Wade and Nearing its End: What is the Evidence that Abortion Advances Women's Health and Equality?*, 34 *REGENT U. L. REV.* 165 (2022).

Robust evidence suggests that relatively easy access to abortion has changed society in several ways disadvantageous to women. First, by acting as a kind of secondary insurance against child-bearing to the primary (but fallible) insurance of contraception, easy access to abortion tends to change sexual behavior in favor of greater sexual risk-taking, which disincentivizes contraceptive use and leads to more uncommitted sexual relations.<sup>7</sup> Over time, increases in risk-taking, coupled with contraceptive failure, misuse,

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<sup>7</sup> Phillip Levine, *SEX AND CONSEQUENCES: ABORTION, PUBLIC POLICY, AND THE ECONOMICS OF FERTILITY* 3-4 (2007) ("[I]f this form of insurance [abortion] is available at a

or nonuse leads to more nonmarital pregnancies, single parenthood and abortion, all of which disproportionately impact women.<sup>8</sup> The availability of abortion does this by severing sex from any idea of a joint future – from children, kin, marriage – and thereby establishing nonmarital sex as the price of a romantic relationship, even as women continue to report that this new sex ethic is undesirable to them,<sup>9</sup> and that many are having fewer children than they would like.<sup>10</sup> Perhaps it's no surprise that women's reported happiness has declined in recent decades, despite the enormous gains outlined above. Betsey Stevenson & Justin Wolfers, *The Paradox of Declining Female Happiness*, 1 AM. ECON. J.: ECON. POL'Y 190 (2009).

There is also some evidence that viewing abortion as necessary for women's advancement implicitly confirm public and private actors' inclinations to avoid expensive accommodations for women with children in educational and work settings. Ironically, under

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very low cost, it may lead to changes in behavior that increase the likelihood of its being needed [altering] decisions regarding sexual activity and contraception that would affect the likelihood of becoming pregnant . . . . Since using contraception or abstaining from sexual activity may be viewed as costly, women/couples may choose to do so less frequently, in essence substituting abortion for contraception, as abortion becomes even more accessible."

<sup>8</sup> Richard Posner, SEX AND REASON 143 (1994) ("[I]f abortion is cheap, [] intercourse will be more frequent and . . . may generate more unwanted pregnancies, not all of which will be aborted. This should help us to understand the combination of cheap contraceptives, frequent abortions, and yet a high rate of unwanted births in our society.").

<sup>9</sup> LISA WADE, AMERICAN HOOK UP (2017); Peter Arcidiacono et al., *Terms of Endearment: An Equilibrium Model of Sex and Matching*, 7 QUANTITATIVE ECON. 117 (2016) (finding that, when compared to women, high school men have a much stronger preference for relationships with sex).

<sup>10</sup> Lyman Stone, *American Women Are Having Fewer Children Than They'd Like*, N.Y. TIMES (Feb. 13, 2018), <https://www.nytimes.com/2018/02/13/upshot/american-fertility-is-falling-short-of-what-women-want.html?smid=em-share>

("[T]he gap between the number of children that women say they want to have (2.7) and the number of children they will probably actually have (1.8) has risen to the highest level in 40 years.").



the guise of women's rights, equality arguments for abortion suggest that females are intrinsically blighted by their reproductive capacity to bear children. These arguments tend, unwittingly perhaps, to promote the male childless norm in educational and employment settings. See Erika Bachiochi, *Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights*, 34 HARV. J.L. PUB. POL'Y 889 (2011).

Given *Roe*'s unscientific description of the dependent human being nurtured by a woman in pregnancy as "potential life," and *Roe*'s creation of a license to dispense with that life should she so choose, it is unsurprising that complaints of "rampant" pregnancy and caregiver discrimination persist.<sup>11</sup> After all, it's a woman's "choice" to take on such caregiving.

## CONCLUSION

The claims by Petitioners and their allies that unrestricted access to abortion is "essential" to women's economic and social advances simply cannot be demonstrated. As fifty years of data shows, there is not even a consistent correlation between abortion rates and ratios and women's participation in the economic and social life of the nation. In the absence of such correlation and given the wide array of other possible factors fostering women's success, it is impossible to show that abortion is the cause of women's economic and social success. It is more likely, in fact, that widely available abortion harmed women in the realms of personal relationships as well as in the development of law and policy accommodating women's

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<sup>11</sup> Stephanie Bornstein, Joan Williams & Genevieve Painter, *Discrimination against Mothers Is the Strongest Form of Workplace Gender Discrimination: Lessons from U.S. Caregiver Discrimination Law*, 28 INT'L J. COMPAR. LAB. L. INDUS. REL. 45 (2012); Natalie Kitroeff & Jessica Silver-Greenberg, *Pregnancy Discrimination Is Rampant Inside America's Biggest Companies*, N.Y. TIMES (February 8, 2019), <https://www.nytimes.com/interactive/2018/06/15/business/pregnancy-discrimination.html> (reporting that many of the nation's largest companies sideline pregnant woman as a matter of course, and sometimes even recommend abortion).

childbearing and parenting.

Respectfully submitted,

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