

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, *et al.*,
Petitioners,

v.

PLANNED PARENTHOOD ASSOCIATION OF UTAH,
Respondent.

On Interlocutory Appeal from the Third Judicial District Court,
Hon. Andrew H. Stone, Dist. Ct. No. 220903886

BRIEF OF LEAGUE OF WOMEN VOTERS OF UTAH AND 39 BUSINESS LEADERS

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AS AMICI CURIAE IN SUPPORT OF PLANNED PARENTHOOD AND AFFIRMANCE

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INTEREST OF AMICI CURIAE

The League of Women Voters of Utah (LWV-Utah) and select business leaders in Utah are submitting this brief. LWV-Utah is the state league of the League of Women Voters of the United States (LWVUS or League) which was founded in 1920, just six months before the 19th Amendment to the U.S. Constitution was ratified, giving all women in our country the vote. LWVUS was founded by the members of the National American Woman Suffrage Association as a “mighty political experiment” designed to help women carry out their new responsibilities as voters. Over the next 100+ years the League has empowered voters and defended democracy while maintaining commitment to nonpartisanship and an informed electorate.

Over the past twenty years the League has advocated for health care policy solutions, working to provide Americans with objective information about health care systems and proposed reforms. LWVUS has partnered with Planned Parenthood Action Fund to advocate for reproductive justice, filed an amicus brief with Lawyers’ Committee for Civil Rights Under the Law in *Dobbs. v. Jackson Women’s Health Organization*, 597 U.S. ___ (2022), and has filed amicus briefs in earlier cases *June Medical Services, LLC v. Russo*, 591U.S. ___ (2020) and *Whole Woman’s Health v. Jackson*, 595 U.S. ___ (2021).

Amici 39 business leaders have an average of over 25 years' experience in business, hold 34 bachelor degrees, 8 MBAs, 8 other masters degrees, and 2 PhDs.

The LWV-Utah and the business leaders have a strong interest in women being able to participate fully in political and civil society and in women having access to all appropriate health care to do so. The LWV-Utah and the business leaders respectfully submit this brief in support of Planned Parenthood Association of Utah and affirmance of the district court's decision below.

NOTICE, CONSENT, AUTHORSHIP, AND FUNDING

LWV-Utah has given timely notice to the parties' counsel and they have consented. No party or counsel of a party authored any part of this amicus brief or contributed money to fund preparing or submitting the brief. No other person contributed money to fund preparing or submitting this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Utah's Criminal Abortion Ban violates the Equal Rights provision of the Utah Constitution by preventing women from "enjoy[ing] equally all civil . . . rights and privileges" by denying them abortion care, standard reproductive health care, in most circumstances. This denial will prevent many women from participating equally in civil society. It prohibits pregnant women (but not men) from obtaining certain medical care. It forces most women who become pregnant

to carry the fetus to term and to give birth, despite greater risks to her health (while not forcing men or nonpregnant women to devote their bodies to giving life to another). In requiring most pregnancies to result in motherhood it circumscribes and limits women’s ability to participate as equal citizens in society.

I. EQUAL RIGHTS PROVISION OF THE UTAH CONSTITUTION
GUARANTEES WOMEN SUBSTANTIAL RIGHTS

[Article IV Section 1 of the Utah Constitution](#) states:

The rights of citizens of the State of Utah to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this State shall enjoy equally all civil, political and religious rights and privileges.

This provision is broader and more robust than the U.S. Constitution’s Equal Protection Clause which prohibits states from “deny[ing] to any person . . . equal protection of the laws.” It explicitly identifies “sex” as a protected category, it provides positive rights, and it protects not only “political” rights, but “civil” and “religious rights and privileges.” In providing women with the positive right to “enjoy equally all civil, political and religious rights and privileges” the Utah Constitution comports with many other state constitutions that go beyond the U.S. Constitution’s negative protections.¹ Based on the text alone, the rights afforded

¹ See EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES* (2013) reviewed by Jeffrey S. Sutton, *Courts as Change Agents: Do We Want More—Or Less?* 127 HARV. L. REV. 1419 (2014).

under the Utah Constitution’s Equal Rights provision should accordingly be understood as more robust than those afforded under the U.S. Constitution’s Equal Protection Clause.

In interpreting the Utah Constitution, this Court has recommended various sources of authority:

We have encouraged parties briefing state constitutional issues to use historical and textual evidence, sister state law, and policy arguments in the form of economic and sociological materials to assist us in arriving at a proper interpretation of the provision in question. . . .*Soc’y of Separationists Inc. v. Whitehead* 870 P.2d 916, 921 fn. 6 (1993).

A. Historical Evidence Shows Why the Concept of Equal Rights for Women Resonated at the Time of Statehood

The concept of women’s equality and autonomy in founding-era Utah was deeper, richer, and broader than it was among contemporaries in other American states.

Women were a more dominant presence in Utah than in other western states, with their numbers almost equaling the male population.² While all frontier women took on many traditionally male jobs, “[u]pon the Mormon women fell greater

² “By the end of July 1847 there were almost as many women as men in the Salt Lake Valley As Utah’s population increased with the influx of Mormon emigrants . . . males never substantially outnumbered females, a fact that distinguished Utah from much of the American West in the midnineteenth century.” Ann Vest Lobb & Jill Mulvay Derr, *Women in Early Utah* in UTAH’S HISTORY, 337 (Poll, Alexander, Campbell, Miller, eds. 1978).

responsibilities than those typical for other pioneer women. Husbands and father were frequently away from home on missions or other church assignments, or were attending to plural families located elsewhere.”³ When income from farming was insufficient, women often pursued other economic endeavors (teaching, midwifery, spinning, weaving, sewing, taking in laundry).⁴

In the late 1860s women began to have a presence outside the home. “The Mormon church president advocated education and training ‘without distinction of sex,’ and when the University of Deseret opened in 1869 eighty-eight women registered along with ninety-nine men.”⁵ Brigham Young remarked:

Women are useful not only to sweep houses, wash dishes, make beds, and raise babies . . . they should stand behind the counter, study laws of physics, or become good book-keepers and be able to do the business of any counting house, and all this to enlarge their sphere of usefulness to the benefit of society.⁶

Young also asked that the Relief Society be reconstituted around that time. It became the “principle charitable institution in Utah,” raised tens of thousands of dollars, bought real estate, built Relief Society halls, and established cooperatives

³ *Id.* at 338. The authors cite the diary of a woman who recounts helping to build the home, plowing, planting, fertilizing, digging irrigation ditches, cutting and stacking wild hay, shearing sheep, and grubbing brush.

⁴ *Id.*

⁵ *Id.* at 341.

⁶ *Id.*

for trade.⁷ “Young offered male help to manage the financial transactions, but the ladies ignored his offer and proved themselves able to manage.”⁸

The 1870s and 1880s “marked the emergence of Utah’s professional women—particularly in the fields of law, medicine, journalism and education.”⁹ Medicine became a major calling of Mormon women whose “efforts centered on the primary occupational hazard of nineteenth-century women: childbearing.”¹⁰ The Relief Societies sponsored study for lay midwives. In 1882 the Deseret Hospital opened, staffed by female Mormon doctors educated at Eastern medical schools and managed by a female board of directors, with the dual goals of providing care and training midwives.¹¹

Women also asserted themselves in support of polygamy, and in their agency to choose or to abandon that lifestyle. Protesting proposed federal legislation that would deny citizenship to anyone practicing plural marriage, between five and six thousand women congregated in the Salt Lake City Tabernacle, a gathering referred to as the “Great Indignation Meeting.”¹² Eliza R.

⁷ *Id.* at 342-43

⁸ *Id.* at 343.

⁹ *Id.* at 341.

¹⁰ *Id.* at 344 Historian Dean May studied Kanab in 1874, finding eighty-one women bore an average of nine children each, almost 5% died in childbirth, and 10% of their children died before the age of one.

¹¹ *Id.*

¹² *Id.* at 349. See also *Minutes of “Great Indignation Meeting”* (January 13, 1870) available at <https://www.churchhistorianspress.org/the-first-fifty-years-of-relief-society/part-3/3-13?lang=eng>

Snow, later to become president of the Relief Society, spoke movingly of the independence of the Mormon wives:

Our enemies pretend that in Utah, woman is held in a state of vassalage—that she does not act from choice, but by coercion—that we would even prefer life elsewhere, were it possible for us to make our escape. What nonsense! We all know that if we wished, we could leave at any time—either to go singly or we could rise *en masse*, and there is no power here that could or would ever wish to prevent us.¹³

In 1870, less than a month after this rally, the Utah territorial legislature granted Utah women the right to vote,¹⁴ fifty years before women in the United States achieved that right.¹⁵ At that time “Mormon women had identified themselves with the suffrage movement . . . and enjoyed the support and attention of the National Woman Suffrage Association.”¹⁶ Their Relief Societies sponsored “local suffrage associations throughout the territory; and these associations carefully generated grassroots, bipartisan support for giving women the vote.”¹⁷

¹³ *Minutes of “Great Indignation Meeting” supra* note 15.

¹⁴ Carrie Hillyard, *The History of Suffrage and Equal Rights Provisions in State Constitutions*, 10 *BYU J. PUB. L.* 117, 125 (1996).

¹⁵ Lobb & Durr, *supra* note 2 at 351.

¹⁶ *Id.*

¹⁷ *Id.* at 352.

Polygamous couples could seek divorce only through the church, and while President Young strongly opposed men divorcing their wives, he was especially generous in freeing women from unhappy marriages.¹⁸

As Professor Hendix-Komoto has explained, Utah women also accessed medication to bring on menstruation, stopped due to pregnancy, malnutrition or illness.¹⁹ “[A]bortion was once fairly common and unremarkable. Until recently there was no way for a woman to know for certain that she was pregnant until she felt the baby quicken or move.”²⁰ Utah newspapers advertised abortion pills widely and a drug store owned by Reed Smoot, a future senator and member of the Quorum of the Twelve Apostles, and another owned by a recent English convert, offered them for sale.²¹ Speaking of her patients, Latter-day Saint physician Hannah Sorenson noted that “many believe it is no sin to produce abortion before there is life [meaning quickening].”²² Although abortion had been criminalized in

¹⁸ Eugene E. Campbell & Bruce L. Campbell, *Divorce Among Mormon Polygamists: Extent and Explanations* 46 UTAH HISTORICAL QUARTERLY No. 1 (1978) available at: https://issuu.com/utah10/docs/uhq_volume46_1978_number1/s/129529

¹⁹ Amanda Hendrix-Komoto, *The Other Crime: Abortion and Contraception in Nineteenth and Twentieth-Century Utah* Vol. 53 No. 1 DIALOGUE 33, 35 (2020). <https://www.dialoguejournal.com/articles/the-other-crime-abortion-and-contraception-in-nineteenth-and-twentieth-century-utah/?fbclid=IwAR3GNbtbOrOk4-fRq-J2sjbFdcPtVuyRaxlfhKry0kXF3CFN01ja5x0NemE>

²⁰ *Id.* at 35.

²¹ *Id.* at 41. Hendix-Komoto’s newspaper search revealed “advertisements in a long list of Utah newspapers.”

²² *Id.* at 40. Dr. Sorenson did not agree as to the morality of abortion, and the year of statehood published an obstetrical textbook to teach women about their bodies. HANNAH SORENSON, WHAT WOMEN SHOULD KNOW (1896).

Utah in 1867 and church leaders preached against abortion²³ as well as against contraception, “what men said and what women did were rather different” and drugstores owned by Mormon leaders and a Methodist leader were selling products designed to end a pregnancy.²⁴

Utah women’s independence in caring for their own bodies, in the frontier homestead, in out-of-home careers, and in charitable work amply demonstrates why, at the time of statehood, the concept of civil and political equality for women and men sufficiently resonated in Utah so as to be included in the Constitution. It is against this backdrop Utah Constitution’s Equal Rights provision must be understood.

B. The Rights of Women Were Understood to Be Expanding at the Time of Statehood.

This Court’s analysis should not be limited by the rights that existed in 1896. This Court has stated that if, at the time of ratification, the public would have understood the scope of a particular right to be “expanding in use and purpose,” the meaning of that right may evolve over time. *Patterson v. State*, 2021 UT 52, ¶ 122,

²³ “Abortion referred to measures after these flutters of life were first detected, and it was this late-term intervention that jurists were explicitly decrying.” E.M., *Nineteenth-Century Abortion in Utah Part 1 and Part 2*, The Exponent (June 24, 2022) <https://www.the-exponent.com/nineteenth-century-abortion-in-utah-part-1/>

²⁴ *Id.*

504 P.3d 92 (regarding the scope of the writ of habeas corpus expanding after statehood.)

In this case the Utah Constitution gave women the right to vote, but they were not permitted to vote to ratify that Constitution. *Anderson v. Tyree*, 12 Utah 129, 147 (Utah, 1895) (Enabling Act of Congress governed the ratification and that only allowed for male voters). Thus, it was understood that women’s rights as citizens and equal participants in civil society would be “expanding” after statehood.

C. This Court Has Relied Upon Contemporary Economic and Sociological Factors and Sister-State Law in Interpreting the Equal Rights Provision

This Court has interpreted the Equal Rights provision of the Utah Constitution on few occasions. In *Beehive Medical Electronics v. Industrial Commission*, 583 P.2d 53, 60 (Utah, 1978) this Court upheld a pay discrimination award under Utah’s Antidiscrimination Act which the employer claimed violated its constitutional rights to due process and to contract. This Court noted that the Act “is in harmony and in fulfillment of” the Equal Rights provision of the Utah Constitution, stating:

And this constitutional declaration is the matrix for achieving the goal of abolishing discriminatory practices which ought to be abolished though at times they may have the seemingly appealing aspect of benignity. *Id.*

In *Pusey v. Pusey*, 728 P.2d 117, 119 (Utah, 1986) this Court overturned its precedent that, “all other things being equal” the mother should receive custody in a divorce. This Court held:

In the unlikely event that a case with absolute equality “of all things” concerning custody is presented to us, the provisions of [article IV, section 1 of the Utah Constitution](#) and of the fourteenth amendment of the United States Constitution would preclude us from relying on gender as a determining factor. *Id.*

This Court’s analysis looked to a New York case based on the Fourteenth Amendment to the U.S. Constitution which relied on “several studies” about the needs of children. [728 P.2d at 120](#). The Court further commented that the maternal preference “lacks validity because it is unnecessary and perpetuates outdated stereotypes,” noting changed economic and sociological circumstances:

The development of the tender years doctrine was perhaps useful in a society in which fathers traditionally worked outside the home and mothers did not; however, since that pattern is no longer prevalent, particularly in post-separation single-parent households, the tender years doctrine is equally anachronistic. *Id.*

In *Hamby v. Jacobson*, 769 P.2d 273, 277 (Ut. App., 1989) the Utah Court of Appeals held that “under the rationale of *Pusey*, a paternal preference for a child's surname is improper, just as would be a preference for the maternal surname.” In reaching this conclusion the court noted that “traditionally, legitimate children in the United States have borne their father’s surname” but “this tradition

has eroded in more recent times” and “women have, with increasing frequency, opted to retain their birth names after marriage.” *Id.*

In these cases our courts have relied upon contemporary sociological and economic facts as well as sister-state law in reaching their decisions under the Equal Rights provisions. They did not limit their decisions by the state of the law regarding employee discrimination or child custody or child naming protocols at the time of statehood. This Court should similarly take into account sister-state constitutional holdings as well as contemporary economic and sociological facts in analyzing the Equal Rights provision in this case.

II. THE CRIMINAL ABORTION BAN UNCONSTITUTIONALLY DISCRIMINATES AGAINST WOMEN.

The Criminal Abortion Ban discriminates against women by directly limiting the medical care they can receive and by indirectly impairing women’s ability to “enjoy equally all civil, political and religious rights and privileges.” Just like the maternal preference for custody, the Criminal Abortion Ban “perpetuates outdated stereotypes” about women’s roles in society and should be declared unconstitutional.

This Court should subject the Criminal Abortion Ban to strict scrutiny because it directly controls a woman’s fundamental right to form a family and to be able to care for her existing children when she faces another pregnancy. This

Court struck down a statute allowing the termination of parental rights when that would serve the “best interests” of a child. *In re: JP*, 648 P.2d 1364, 1374 (Utah, 1982). Exalting the state’s view of what is “best” for children violated a fit parent’s constitutional right—“a fundamental right . . . to sustain his relationship with his child.” 648 P.2d at 1372. This Court stated:

A residuum of liberty reposes in the people. That liberty is not limited to the exercise of rights specifically enumerated in either the United States or Utah Constitutions . . . The rights inherent in family relationships—husband-wife, parent-child, and sibling—are the most obvious examples of rights retained by the people. 648 P.2d at 1372-73.

Because the Criminal Abortion Ban directly controls a woman’s familial relations—requiring her to become a mother against her will and thus negatively impacting the children in her existing family—it affects her fundamental rights and must be evaluated with strict scrutiny.

The highest courts of other states have applied strict scrutiny under their state constitutions in striking down statutes that limit a woman’s right to abortion, finding fundamental rights were at stake. *See: Valley Hosp. Ass’n, Inc. v. Mat-Su Coal. for Choice*, 948 P.2d 963, 968-9 (Alaska 1997) (reproductive rights are fundamental and encompassed in the right to privacy), *Am. Acad. of Pediatrics v. Lundgren*, 940 P.2d 797, 810, 813 (Cal. 1997) (right to abortion within autonomy privacy right), *In re T.W.*, 551 So. 2d 1186, 1243, 1253, 1192 (Fla. 1989) (right to abortion protected by constitutional right to privacy), *Hodes & Nauser, MDs, PA v.*

Schmidt, 440 P.3d 491, 491-92, (Kan. 2019)(per curiam) (natural rights provision protects personal autonomy and right to abortion), *Women of Minn. v. Gomez*, 542 N.W.2d 17, 26-27, 31 (Minn. 1995) (right of privacy encompasses right to terminate pregnancy), *Armstrong v. State*, 989 P.2d 364, 374, 377 (Mont. 1999) (procreative autonomy protected by right of privacy), *Right to Choose v. Byrne*, 450 A.2d 925, 934 (N.J. 1982) (right to abortion is within fundamental right to control body and destiny under natural and unalienable right provision) and *Planned Parenthood South Atlantic v. South Carolina* <https://www.sccourts.org/opinions/HTMLFiles/SC/28127.pdf> (2023) (restrictions on abortion violate right to privacy).

Applying this strict level of scrutiny, the Ban must advance a compelling interest in the least restrictive means possible in order to be constitutional. *In re: Adoption of J.S.*, 358 P.3d. 1009, 1027 (2014). Amici urge this Court find that the Criminal Abortion Ban fails this test on both prongs.

This Court has not yet clearly addressed whether strict scrutiny should apply in this setting. In analyzing the Equal Rights provision, this Court and the Utah Court of Appeals have utilized the intermediate scrutiny test while noting that strict scrutiny should apply if fundamental rights were at stake. In *Pusey*, this Court noted that a New York case on which it relied had “used a strict scrutiny test,” but

opined “it is equally doubtful that the maternal preference can be sustained on an intermediate level of review.” [719 P.2d at 120](#).

The intermediate standard of review requires “an *important* governmental interest that is *substantially* advanced by the legislation.” [In re Adoption of J.S., 358 P.3d at 1027](#) (emphasis in original):

The notion of a ‘substantial’ relation between means and ends implies a threshold consideration of the nature and extent of the discrimination at issue. For ‘official action that closes a door or denies opportunity to women (or to men)’ it is difficult for the government to show that its discriminatory policy ‘substantially’ advances an important objective. *Id.*

It is difficult to imagine a law that more completely “closes a door” or “denies opportunity” to women than the Criminal Abortion Ban.

The statute’s preamble states that the government has “a compelling interest in the protection of the lives of unborn children.” [Utah Code Ann. §76-7-301.1\(2\)](#). The State argues that preventing women from terminating unwanted pregnancies is “substantially related” to that interest.

A more accurate statement of the government’s interest is to force a woman who has conceived through consensual sex to give birth to a baby unless to do so will kill her or gravely and permanently damage her physical health. As Professor Reva Seigel has written about Utah’s abortion statute:

The state does not consistently act to protect unborn life. Rather, as the statute’s preamble explains, the state has determined that “a woman’s liberty interest, in limited circumstances, may outweigh the unborn child’s right to

protection.” Thus, the state is indeed making judgments about women as well as the unborn.

....

Traditional sex-role assumptions also shape the exception that allows abortions to save the pregnant woman’s life or to prevent grave damage to her health. . . . Indeed, more than any sex-based legislation the Court has reviewed in the modern era, the therapeutic exception graphically defines women as childbearers. Utah has weighed ‘woman’s liberty interest’ against that of the unborn, and decided that women can be forced to be mothers except when they are physically incapable of the act. By allowing women abortions, but only when pregnancy threatens to kill them or to inflict ‘grave damage’ on their ‘medical health,’ Utah has defined the pregnant woman’s ‘liberty interest’ as an interest in brute physical survival—reasoning about women as if they had no social, intellectual, or emotional identity that transcended their physiological capacity to bear children.²⁵

The statutory exception for rape or incest that has been reported to the police further belies the claim that the government has a “compelling interest” in “unborn life.” The fetus conceived through rape or incest is no less an “unborn child” than is the fetus conceived through consensual sex. Professor Seigel explains:

The statutory exception allowing women to have abortions if they conceive an act of rape or incest indicates that the state’s decision to compel women to bear children depends upon certain normative judgments about women’s sexual conduct. The apparent widespread belief that it is reasonable to force women who have consented to sex to bear children likely rests on unarticulated social assumptions about women’s maternal obligations. But, more importantly, rape exceptions of this sort offend core values of equal

²⁵ Reva Seigel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 364-65 (1992) (citations omitted). Seigel references Utah Code Ann. §76-7-301-302 (1991) which was in essence re-enacted in 2020. Senate sponsor Daniel McCay’s testimony confirms Seigel’s analysis: “The right to privacy is granted by our creator . . . Right of privacy exists but ends when she is making a decision for another. From the moment of implantation, the baby’s right begins.” Health and Human Service Committee Hearing March 9, 2020. <https://le.utah.gov/~2020/bills/static/SB0174.html>

protection because they reason on a sexual “double-standard.” Utah has decided to punish pregnant women who have “voluntarily” engaged in sex by making them bear children, yet it has enacted a statute that imposes no similar duties, burdens or sanctions on the men who were co-participants in the act of conception.²⁶

Not only does this law impose no burden on a man who has impregnated a woman, but no other law imposes any burden on a man to devote his body or his bodily fluids to keeping another being alive. Fathers are not required to donate blood if their child needs a transfusion, or bone marrow if their child needs that treatment for cancer, or a kidney if to do so would save the child’s life. It is only women, only pregnant women, who are ever required to devote their physical body to giving life to another being.

The fact that the legislature failed to take any other action to protect mothers and their children further belies the argument that this statute is intended to protect life. The state’s interest in the unborn has not extended to providing paid maternity

²⁶ *Id.* The fact that the father must support the child does not eliminate the discrimination, since both mother and father are required to support their children.

leave,²⁷ providing robust financial assistance for needy families,²⁸ or providing Medicaid without work requirements.²⁹ As Professor Seigel concludes:

Here the state’s choice of sex-based, coercive means suggests that it is interested in controlling and/or punishing women who resist motherhood: It will promote the welfare of the unborn only when it can use women’s bodies and lives to realize the potential of unborn life—and not when the community as a whole would have to bear the costs of its moral preferences.³⁰

Because the Criminal Abortion Ban treats women differently than men and indirectly limits women’s rights to participate equally in civil society, and the government’s stated interest is questionable (but neither substantial nor compelling) and is not “substantially advanced” by this Act, this Court should find that it offends the Equal Rights provision of the Utah Constitution.

²⁷ Eleven states and the District of Columbia require employers to provide paid family leave, but Utah does not. Declaration of Colleen M. Heflin, Ph.D. ¶ 45. R338-89.

²⁸ Federal law limits Temporary Assistance to Needy Families to 60 months in a lifetime, though states may use state funds to provide assistance for a longer period. Utah provides a shorter limit (36 months), and funds assistance at only 20-29% of the federal poverty level. See Center on Budget and Policy Priorities, *Policy Basics: Temporary Assistance for Needy Families* (March 1, 2022) <https://www.cbpp.org/research/family-income-support/temporary-assistance-for-needy-families> and Utah Code Ann. §35A-3-306 (2022).

²⁹ KFF, Status of State Action on the Medicaid Expansion Decision, fn. 1, 2, and 18. <https://www.kff.org/health-reform/state-indicator/state-activity-around-expanding-medicaid-under-the-affordable-care-act/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D#note-4>

³⁰ Seigel, *supra* note 25 at 366.

III. THE CRIMINAL ABORTION BAN WILL HARM WOMEN AND
THEIR CHILDREN AND WILL HARM THE STATE
ECONOMICALLY

Enforcement of Utah’s Criminal Abortion Ban will harm women’s abilities to participate “equally in all civil rights and privileges.”

A. Most Women Who Seek Abortions Do So For Economic Reasons

The majority of Utah women obtaining abortions do so because they cannot afford to care for a child.³¹ Nationally the majority of women seeking abortions are poor and another 25% are low-income.³² The majority of women in the USA and nearly the majority of women in Utah who terminate their pregnancies already have children that they are struggling to rear.³³

Socioeconomics was the dominant reason the three women affiants (two of whom had other children) sought to terminate their pregnancies. Alex Roe, the primary caretaker for two children, had earnings of \$1800 per month as a

³¹ Andy Larsen, *Here’s what data shows on who, where and why women get abortions in Utah*, SALT LAKE TRIBUNE July 2, 2022 available at:

<https://www.sltrib.com/news/2022/07/02/heres-what-data-shows-who/>

³² Declaration of Colleen M. Heflin, R. 348-349.

³³ *Id.* “Fifty-nine percent of abortions in 2014 were obtained by patients who had had at least one birth.” Guttmacher Institute, available at: https://www.guttmacher.org/fact-sheet/induced-abortion-united-states?gclid=CjwKCAjw5P2aBhAIEiwAAdY7dODDARmrOTM0_Wgvy56F9WFCoYBjg7fvEqAHycPWbFkNvRcTCuENtxoCz-4QAvD_BwE. Larsen, *supra* note 37.

housecleaner which put her family below 100% of the federal poverty level.³⁴ She explained: “It is already hard for me to support and care for my two existing children on my income. I already worry about paying rent each month.” Affidavit Alex Roe at 1-2. R 719-720.

Affiant Jane Doe was a community college student and server, earning \$1000 per month, also below 100% of the federal poverty level.³⁵ She explained: “I am not ready to have kids. I can barely take care of myself. I can’t take care of another human being. I don’t make enough money, and I would not have financial support from my family if I had a child.” Affidavit of Jane Doe R 715.

Ann Moe was the sole working breadwinner in a family of seven, including a disabled partner, her mother, and two children with special needs. The household income was below 150% of the federal poverty level.³⁶ She explained that economics together with the personal needs of her dependents prevented her from adding a new baby to the family:

Even aside from these financial concerns, I am stretched so thin already taking care of my family. And once my mother adopts my niece I know that I will be responsible for a large portion of that child’s care, too. I do not want anyone in our home to feel that someone is getting more care over another. But when a baby comes, and you have someone else in the home with special needs, it can be challenging to make sure that everyone is getting the care they need. Affidavit of Ann Moe R 724.

³⁴ See: <https://jobs.utah.gov/housing/scso/seal/documents/federalpovertylevel.pdf>

³⁵ *Id.*

³⁶ *Id.* The income of \$4800 is below 150% of the poverty level for a family of seven.

B. Women Denied Abortions Almost Always Keep Their Babies.

Those denying abortion care to women too often cite adoption as a simple solution for an unwanted pregnancy.³⁷ This ignores the fact that the vast majority of women who experience unplanned pregnancies choose either abortion or parenting the child—not adoption. Dr. Turok stated: “I have had multiple patients tell me that adoption is simply not an option for them because they understand the emotional impact of carrying a pregnancy to term and then placing a child for adoption, yet they know that carrying a pregnancy to term and parenting the new child would compromise the health of the children they already have.”³⁸ Indeed, studies of adoption have consistently shown that relinquishing a child for adoption results in serious negative impacts to the mother’s health, mental health and relationships.³⁹ No doubt the effect on her other children—seeing their mother give away their new baby brother or sister—would be equally devastating.

³⁷ Justice Alito wrote “[A] woman who puts her newborn up for adoption today has little reason to fear that the baby will not find a suitable home.” *Dobbs*, 142 S. Ct. 2228, 2258-59. During oral argument Justice Amy Coney Barrett asked whether “safe haven laws” allowing anonymous relinquishment of infants don’t “take care of that problem” of forced parenthood preventing women’s access to equal opportunities. *Transcript Dobbs v. Jackson Women’s Health* at p. 56, line 23-24. During floor debates on the Criminal Abortion Ban House sponsor Representative Lisonbee noted “we don’t talk enough about adoption” after another representative and a private witness had urged passage because adoption was available. House Floor 3/12/2020 and House Health and Human Service Committee Hearing March 9, 2020. <https://le.utah.gov/~2020/bills/static/SB0174.html>

³⁸ Declaration of David Turok, MD, MPH, FACOG, R 294.

³⁹ Madden, E. E., et al., *The Relationship Between Time and Birth Mother Satisfaction With Relinquishment*, FAMILIES IN SOCIETY, 99(2), 170–183, (2018), <https://doi.org/10.1177/1044389418768489> ; Askren and Bloom, *Postadoption Reactions*

Social science confirms that women experiencing an unplanned pregnancy rarely choose adoption. The “Turnaway Study”⁴⁰ compared women who were either afforded a second-trimester abortion or “turned away” from obtaining an abortion because it was too late in the pregnancy. The study followed both sets of women (almost 1000 women total) for ten years, collecting extensive data about these women, their children, and their financial and social circumstance. It has resulted in over fifty peer-reviewed publications. Of the women denied abortions, 91% of the woman who gave birth kept their babies.⁴¹

Enforcing the Criminal Abortion Ban will result in more children living in deeper poverty, adding to the challenges of families like those of Alex Roe and Ann Moe.

of the Relinquishing Mother: A Review, JOURNAL OF OBSTETRIC, GYNECOLOGICAL & NEONATAL NURSING, 28(4), 395-400 (1999).

⁴⁰ See DIANE GREEN FOSTER, PHD, THE TURNAWAY STUDY (2020) and University of California San Francisco, Advanced New Standards in Reproductive Health (ANSIRH) <https://www.ansirh.org/research/ongoing/turnaway-study>

⁴¹ G. Sisson, L. J. Ralph, H. Gould, D.G. Foster, *Adoption Decision Making among Women Seeking Abortion*, 27(2) WOMEN’S HEALTH ISSUES 136-144 (March, 2017). <https://www.ansirh.org/research/publication/adoption-decision-making-among-women-seeking-abortion>

C. Denying Women Abortions Will Harm Them and Their Children.

A large body of research shows that being denied an abortion limits women’s education, their time in the workforce, and their wages; and that these negative economic consequences extend well into the lives of their children.⁴² One hundred and fifty-four distinguished economists with expertise in the field of “causal inference” filed a brief in the *Dobbs* case, explaining they had isolated and measured the effects of abortion access on birth rates, marriage, educational attainment, occupations, earnings, and financial stability.⁴³ They assert that abortion access reduced teen motherhood by 34% and teen marriage by 20%.⁴⁴ It had large effects on women’s education, labor force participation, occupations, and earnings.⁴⁵ Access to abortion also shaped family circumstances—reducing

⁴² Jennifer Ludden, *Women who are denied abortions risk falling deeper into poverty. So do their kids* (May 26, 2022) npr.org at: <https://www.npr.org/2022/05/26/1100587366/banning-abortion-roe-economic-consequences>

⁴³ Brief of Amici Curiae Economists in Support of Respondents, No. 19-1393, 1 and 3, available at: https://www.supremecourt.gov/DocketPDF/19/19-1392/193084/20210920175559884_19-1392bsacEconomists.pdf

⁴⁴ *Id.* at 10, citing Caitlin Knowles Myers, *The Power of Abortion Policy: Reexamining the Effects of Young Women’s Access to Reproductive Control*, 125 J. OF POL. ECON. 2178, 2178-2224 (2017).

⁴⁵ *Id.* at 13 citing Kelly Jones, *At a Crossroads: The Impact of Abortion Access on Future Economic Outcomes* at 14-16 (American Univ. Working Paper, 2021), <https://dra.american.edu/islandora/object/auislandora%3A95123>

poverty and child neglect while increasing the children’s educational attainments and reducing their welfare dependency.⁴⁶

The economists noted that even though contraception is legal, it is not available cost-free⁴⁷ and it is not foolproof—“even with widespread contraceptive use of all forms, about 6% of all women aged 15-34 in the United States are likely to experience an unintended pregnancy *each year*.”⁴⁸ Abortion continues to be a necessary component of family planning.

The longitudinal Turnaway Study is another source of robust evidence that being denied an abortion harms women and their children. Both Professor Heflin and Dr. Turok rely upon this comprehensive study in their Declarations:

Women who seek but are denied an abortion are, when compared to those who are able to access abortion, more likely to lower their future goals, and less likely to be able to exit abusive relationships. Their existing children are also more likely to suffer measurable reductions in achievement of child

⁴⁶ *Id.* at 14 citing Jonathan Gruber et al., *Abortion Legalization and Child Living Circumstances: Who is the ‘Marginal Child’?* 114 Q. J. OF ECON. 263, 280-81 (1999), Marianne Bitler & Madeline Zavodny, *Child Abuse and Abortion Availability*, 93 AMER. ECON. REV. 363, 365 (2002); Marianne P. Bitler & Madeline Zavodny, *Child Maltreatment, Abortion Availability, and Economic Conditions*, 2 REV. OF ECON. OF THE HOUSEHOLD 119, 135 (2004)

⁴⁷ In 2020 Utah Department of Health estimates 11.8% of Utahns lacked health insurance coverage. Public Health Indicator Based Information System. https://ibis.health.utah.gov/ibisph-view/indicator/complete_profile/HlthIns.html and Utah law does not prohibit cost sharing for contraceptives. *Insurance Coverage of Contraceptives* Guttmacher.org at <https://www.guttmacher.org/state-policy/explore/insurance-coverage-contraceptives>

⁴⁸ Brief of Amici Curiae Economists, *supra* note 43 at 16-18 citing Lawrence B. Finer et al., *A Prospective Measure of Unintended Pregnancy in the United States*, 98 CONTRACEPTION 522, 525 (2018). <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6263030/>

developmental milestones and an increased chance of living in poverty. They are also less likely to be employed full-time, more likely to be raising children alone, more likely to receive public assistance, and more likely to not have enough money to meet basic living needs than women who received an abortion. Turok Declaration R 295 (citations omitted)

The Turnaway Study, a nationwide study conducted by researchers at the University of California San Francisco, documents that women who were unable to obtain an abortion were three times more likely to be unemployed six months later, nearly four times more likely to have fallen below 100% FPL, more likely to be receiving public assistance benefits, and more likely to be raising children alone, as compared to women who were able to obtain an abortion. Moreover, the negative consequences to economic well-being were shown to persist for four years later compared to women who were able to obtain an abortion. Heflin Declaration R 362 (citations omitted)

Their children also suffered, including children already in the home as well as the child born after the denial when compared with children born later to women who had been able to terminate their unwanted pregnancies.⁴⁹

D. Utah Women and Mothers are Already Economically Disadvantaged

Currently Utah women earn less than 70% of what men earn—Utah suffers from the second-worst gender pay gap in the United States.⁵⁰ Over a third of

⁴⁹ THE TURNAWAY STUDY, *supra* note 40 *citing* Foster et al., *Effects of carrying an unwanted pregnancy to term on women’s existing children*, 205 THE JOURNAL OF PEDIATRICS 183-89 (October 2018), and Foster et al., *Comparison of health, development, maternal bonding, and poverty among children born after denial of abortion vs. after pregnancies subsequent to an abortion*, 172 (11) JAMA PEDIATRICS 1053-60 (September 2018).

⁵⁰ Trevor Wheelwright, *The Gender Pay Gap Across the US in 2022* (March 1, 2022), Business.org. <https://www.business.org/hr/benefits/gender-pay-gap/>. Utah’s pay gap is worse than any state other than Wyoming.

women-headed households with children under age five live in poverty.⁵¹ “Poverty rates are notably worse for women within certain demographic groups, particularly Black[]” women.⁵² The presence of children in a household impedes Utah women’s ability to pursue post-secondary education at twice the rate that it impedes men, “which indicates that a motherhood penalty may be exacerbating the disparity in poverty rates for Utah women.”⁵³ The high cost of childcare (higher than college tuition) further affects Utah women’s ability to support themselves and their children.⁵⁴ Utah has the second least affordable child care centers for infants and toddlers in the nation.⁵⁵ Moreover, seventy-seven percent of people in Utah live in a child care desert, the worst of any state in the union.⁵⁶

E. The Criminal Abortion Ban Will Harm Utah Economically.

According to a study that interviewed over 50 experts from over 39 businesses (including 24 Fortune 500 companies):

Women’s ability to fully participate in the workforce is a critical issue for every business in the United States. Contraception and abortion are critical components of a broader reproductive health package that ensures women

⁵¹ Utah Women & Leadership Project, *Utah Women Stats: Research Snapshot* No. 33, 1 (January 19, 2022) <https://www.usu.edu/uwlp/files/snapshot/33.pdf>

⁵² *Id.*

⁵³ *Id.* at 2.

⁵⁴ *Id.*

⁵⁵ Declaration of Colleen M. Heflin, R 363.

⁵⁶ Center for American Progress, <https://childcaredeserts.org/2018/?state=UT> Child care deserts are defined as a tract with more than 50 children under 5 that contains either no child care provider or so few options that there are more than three times as many children as licensed slots.

and their partners can effectively plan for when and how to have children and fully participate in the workforce. These services are used by nearly all women: 99% of women have used contraception, 24% of women have had an abortion by age 45.⁵⁷

A company's benefits package plays an important role in attracting talent.

Recent surveying reveals that 83% of women of reproductive age want the employer's insurance to cover the full range of reproductive health care including abortion, and 63% of college-educated workers would not apply to a job in a state that had banned abortion.⁵⁸ The Criminal Abortion Ban is likely to deter employees from accepting jobs in Utah and to deter employers from doing business in Utah.⁵⁹

The Criminal Abortion Ban has already caused "Boston-based Public Responsibility in Medicine and Research (PRIM&R) and the American Society of Human Genetics headquartered in Maryland" to cancel the conferences each had planned to hold in Salt Lake City.⁶⁰ "Utah's abortion law will put the University

⁵⁷ Rhia Ventures, *Hidden Value: The Business Case for Reproductive Health Care* 4, 11 (2022). <https://rhiaventures.org/wp-content/uploads/2022/08/Hidden-Value-The-Business-Case-for-Reproductive-Health-2022.pdf>

⁵⁸ *Id.* at 18. See Perry Udem Research & Communication, *How Top Talent Views Politics and Social Issues in Their Workplace: Findings from a National Survey*, (Oct. 4, 2022).

⁵⁹ Alexander Burns, *States With Abortion Bans Risk Losing Their Economic Edge*, NEW YORK TIMES (July 11, 2022). <https://www.nytimes.com/2022/07/11/us/politics/abortion-ban-states-businesses.html>

⁶⁰ PRIM&R also cited the ban of transgender girls from school sports as a reason it cancelled its conference in Utah. *Conferences pull out of Utah in protest of abortion and transgender sports bans*. KSL, July 28, 2022. <https://ksltv.com/500924/conference-pulls-out-of-utah-over-discriminatory-abortion-and-transgender-sports-bans/>

[of Utah’s] OB-GYN residency program ‘in jeopardy’” which will likely reduce the number of OB-GYN doctors settling in the state.⁶¹

A recent meta-analysis of hundreds of studies shows that employee wellbeing is associated with higher productivity, better firm performance, greater customer satisfaction and lower turnover.⁶² Employees who are worried about facing an unplanned pregnancy will experience increased mental stress, which will harm their job performance. When employees suffer from stress, their wellbeing is compromised and businesses suffer reduced productivity and “presenteeism,” absenteeism, and employee turnover, costing U.S. businesses up to \$300 billion annually.⁶³

Not only employees, but women business owners as well will be negatively affected. “[F]emale entrepreneurs who experience challenges between business and

⁶¹ Carlene Coombs, *Utah’s abortion ban could decrease the number of OB-GYNs who study, work in the state*, DESERET NEWS, Jul 9, 2022.

<https://www.deseret.com/utah/2022/7/9/23184963/utahs-abortion-ban-impact-obgyn-shortage-university-of-utah-roe-v-wade-trigger-law>

⁶² World Economic Forum, *It’s official: happy employees mean healthy firms*, (Jul 18, 2019) <https://www.weforum.org/agenda/2019/07/happy-employees-and-their-impact-on-firm-performance>

⁶³ Amy Richman, et al., *Corporate Voices for Working Families, Business Impacts of Flexibility: An Imperative for Expansion* 13 (Feb. 2011).
(https://www.wfd.com/PDFS/BusinessImpactsofFlexibility_March2011.pdf)

family may be significantly more likely to exit their business than their male counterparts.”⁶⁴

If the Criminal Abortion Ban goes into effect not only the lives of women and their children, but the entire state economy will likely be negatively impacted.

CONCLUSION

For all of the above reasons, amici request that this Court affirm the decision of the district court.

Respectfully submitted this 26th day of January 2023

LEAGUE OF WOMEN VOTERS OF UTAH
AND 39 BUSINESS LEADERS

/s/ Linda Faye Smith

Linda Faye Smith

Attorney for League of Women Voters of Utah
And 39 Business Leaders

⁶⁴ Dr. Laura J. Ahlstrom and Malabi Dass, *Status of Women in Oklahoma* 20 (April, 2022) <https://oklahoma.gov/content/dam/ok/en/ocsw/documents/Status+of+Women+in+Oklahoma+Report.pdf>

CERTIFICATE OF COMPLIANCE

I certify that in compliance with [Rule 24, Utah R. App. P.](#), this brief contains 6964 words, excluding certificates of counsel.

I also certify that in compliance with [Rule 21, Utah R. App. P.](#), this brief does not contain private, controlled, protected, safeguarded, sealed, juvenile court legal, juvenile court social, or any other information to which the right of public access is restricted by statute, rule, order, or case law (non-public information).

/s/ Linda Faye Smith _____

LINDA FAYE SMITH

Counsel for League of Women Voters Utah
And 39 Business Leaders

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 26th day of January 2023, I served the foregoing **BRIEF OF LEAGUE FO WOMEN VOTERS OF UTAH AND 39 BUSINESS LEADERS AS AMICI CURIAE IN SUPPORT OF PLANNED PARENTHOOD AND AFFIRMANCE** via email on the following:

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In accordance with Utah Supreme court Standing Order No. 11, paper copies of the brief will be delivered to the Court no more than 7 days after filing by email.

/s/ Linda Faye Smith

