No. 02-1235

IN THE

Supreme Court of the United States

GREENVILLE WOMEN'S CLINIC, ET AL.,
Petitioners,

v.

COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Fourth District

MOTION OF THE NATIONAL ABORTION FEDERATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS AND BRIEF *AMICUS CURIAE*

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MOTION OF THE NATIONAL ABORTION FEDERATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the rules of this Court, the National Abortion Federation ("NAF") respectfully moves the Court for leave to file the attached brief *amicus curiae* in support of the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in *Greenville Women's Clinic v. Commissioner*, 317 F.3d 357, 367 (4th Cir. 2002). Petitioners have consented to the filing of the attached brief. Respondent has declined to consent. Copies of Petitioners' letter giving consent are on file with the Clerk of the Court.

In this case, the Fourth Circuit upheld a regulation promulgated by the South Carolina Department of Health and Environmental Control ("DHEC") that permits the Department to review, copy, and retain abortion patients' medical

records and that will result in the public disclosure of information personally identifying abortion patients. This public disclosure is of fundamental interest to NAF, a non-profit professional organization of abortion providers. Both the DHEC and the Fourth Circuit improperly relied on standards published by NAF to demonstrate the DHEC's need for copying and retaining abortion patients' medical records. In fact, NAF's standards do not support disclosure of medical records without protection of patients' personally identifying information. Breaches of patient confidentiality will also seriously compromise women's access to safe, legal abortions in South Carolina, and will put both abortion providers and patients at increased risk of harassment and violence in that State.

NAF is in a unique position to aid the Court in its consideration of the issues presented. NAF's members provide over half the abortions in the United States. NAF publishes comprehensive standards for abortion providers, and NAF compiles statistics on the harassment and violence directed toward abortion patients and providers. Accordingly, NAF respectfully requests that the Court grant this motion for leave to file a brief *amicus curiae*.

Respectfully submitted,

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BRIEF OF THE NATIONAL ABORTION FEDERATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The National Abortion Federation ("NAF") submits this brief *amicus curiae* in support of Petitioners, Greenville Women's Clinic and William Lynn, M.D., on behalf of themselves and their patients seeking abortions, urging writ of certiorari to review the judgment of the Fourth Circuit Court of Appeals, which upheld a South Carolina regulation

[1] Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amicus*, or its members or counsel, made any monetary contribution to the preparation or submission of this brief.

governing the licensing and operation of abortion clinics, S.C. Code Ann. Regs. 61-12.

NAF is a non-profit professional organization dedicated to preserving the right of all women to choose a safe, accessible, and legal abortion. Founded in 1977, NAF's members include almost 400 non-profit and private clinics, women's health centers, Planned Parenthood facilities and private physicians' offices in 47 states and 8 provinces in Canada. NAF's members provide over half of the abortions performed in the United States each year. NAF publishes comprehensive standards for abortion providers and is the only organization that provides accredited, abortion-specific, continuing medical education in all aspects of abortion care.[2] NAF is also one of the primary organizations that collects and disseminates information on the harassment of and violence against abortion providers and patients.

The issues at stake in this case are of immediate concern to NAF and its members. As an organization devoted to ensuring quality abortion care in the United States, NAF is deeply committed to protecting the confidentiality of women who seek to obtain abortions. The doctor-patient relationship is of paramount importance to the provision of safe abortion care, and it is imperative that patients be able to trust that their private information is secure. Breaches of patient confidentiality can be particularly dangerous in the context of abortion, given the current level of harassment and violence against both abortion providers and patients. Moreover, the Fourth Circuit relied on a misreading of NAF's standards in concluding that the Regulation is constitutional. NAF thus seeks to clarify the meaning of its standards.

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[2] NAF has been termed a "mini-AMA" for abortion providers by the New York Times. Jack Hitt, *Who Will Do Abortions Here?*, N.Y. Times Magazine, Jan. 18, 1998, at 20.

STATEMENT

In this case, the United States Court of Appeals for the Fourth Circuit upheld a provision of South Carolina Regulation 61-12 (hereinafter the "Regulation") that permits the State to review, copy, and retain abortion patients' medical records without protecting any personally identifying information in those records from public disclosure. The provision requires that abortion clinics give inspectors from the South Carolina Department of Health and Environmental Control ("DHEC") "access to all properties and areas, objects, records and reports," and the provision further states that the inspectors "shall have the authority to make photocopies of those documents required in the course of inspections or investigations." S.C. Code Ann. Regs. 61-12, § 102(F)(2).

The Regulation was promulgated by the DHEC in 1995, and it imposes comprehensive licensing and operational requirements on "facility[ies] in which any second trimester or five or more first trimester abortions per month are performed." S.C. Code Ann. Regs. 61-12, § 101(B). In 1996, the Greenville Women's Clinic, the Charleston Women's Clinic, and William Lynn, M.D., on behalf of themselves and their patients, challenged the constitutionality of the Regulation.[3] Plaintiffs-Petitioners argued that the Regulation violates their constitutional rights and their patients' constitutional rights under the Due Process Clause, the Equal Protection Clause, and the Establishment Clause.

The district court granted Plaintiffs-Petitioners declaratory and injunctive relief, holding that the Regulation unduly burdens women's right to choose an abortion in violation of the Due Process Clause and that the Regulation distinguishes unreasonably between clinics in violation of the Equal Pro-

[3] As Petitioners' explain in their brief, the Charleston Women's clinic is not a petitioner at this stage in the proceedings. *See* Pet. Br. 11 n.1.

tection Clause. *Greenville Women's Clinic v. Bryant*, 66 F. Supp. 2d 691 (D.S.C. 1999). The Fourth Circuit reversed, and the Supreme Court denied Plaintiffs-Petitioners' petition for certiorari. *Greenville Women's Clinic v. Bryant*, 222 F.3d 157 (4th Cir. 2000), *cert. denied*, 531 U.S. 1191 (2001).

On remand, the district court addressed Plaintiffs-Petitioners remaining claims, dismissing all but Plaintiffs-Petitioners' claim that the Regulation violated their informational privacy rights. *Greenville Women's Clinic v. Bryant*, No. 6:96-1898, slip op. (D.S.C. Aug. 31, 2001).[4] Over a dissent by Judge King, the Fourth Circuit again reversed the judgment of the District Court. *Greenville Women's Clinic*, 317 F.3d at 371. Plaintiffs-Petitioners petitioned for rehearing *en banc*, and the Fourth Circuit initially granted the petition; however, the Circuit vacated the grant one week later.

ARGUMENT

I. THE FOURTH CIRCUIT'S DECISION PERMITS THE PUBLIC DISCLOSURE OF ABORTION PATIENTS' PERSONALLY IDENTIFYING INFORMATION.

Under the Regulation, the DHEC is not required to remove patients' personally identifying information from any records and reports it reviews, copies, and retains. S.C. Code Ann. Regs. 61-12. This Court has held that patients have a protected interest "in avoiding disclosure of personal matters." *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). The right to informational privacy, as this interest has been

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[4] The district court found that, because South Carolina identified "no compelling interest in the disclosure of identifying information'—i.e., information that reveals to the State the names of patients procuring abortions—§ 102(F)(2) violates the patient's constitutional right to privacy 'insofar as it requires access to identifying information.'" *Greenville Women's Clinic v. Commisioner*, 317 F.3d 357, 367 (4th Cir. 2002) (quoting *Greenville Women's Clinic v. Bryant*, No. 6:96-1898, slip op. (D.S.C. Aug. 31, 2001)).

termed, has been upheld and expanded by the majority of federal Courts of Appeal. *See* Pet. Br. 12 (listing cases).[5]

Instead of weighing abortion patients' privacy interests against the State's interest in disclosure, however, the Fourth Circuit wrongly concluded that, because other state statutes purport to prevent the *public* disclosure of patients' private medical information, the Regulation does not violate women's constitutional privacy rights. *See Greenville Women's Clinic*, 317 F.3d at 370-71. *First*, the Fourth Circuit's methodology in analyzing Plaintiffs-Petitioners' constitutional privacy claim puts it at odds with the majority of the circuits. As Petitioners discuss at greater length in their brief, the Fourth Circuit's failure to balance individual patients' interests against the State's interest has moved the circuit from the majority of circuits to the minority of circuits. *See* Pet. Br. 11-20.[6]

Second, it is clear that other state statutes will not prevent the public disclosure of abortion patient's personally identifying information. As Petitioners also discuss at greater length in their brief, it is uncontested that the DHEC is authorized to disclose personally identifying information

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[5] For instance, the Ninth Circuit has explicitly extended *Whalen* to the disclosure of personally identifying information in the abortion context. *See, e.g.*, *Planned Parenthood of S. Arizona v. Lawall*, 307 F.3d 783, 789-90 (9th Cir. 2002). In these other circuits, an individual's right to informational privacy is weighed against a state's interest in disclosure of the individual's personal information. *See, e.g.*, *id.* at 790 ("in evaluating an informational privacy claim, the Court engages in the delicate task of weighing competing interests") (internal quotation marks and citation omitted).

[6] In an earlier case, the Fourth Circuit had applied a balancing test to an informational privacy claim. *See Walls v. City of Petersberg*, 895 F.2d 188 (4th Cir. 1990); *see also* Pet. Br. 15 ("The decision below significantly adds to [the circuit split] by moving the Fourth Circuit from the position held by the majority of circuits to the minority position requiring nothing more that a rational basis to require significant privacy intrusions.").

about abortion patients in proceedings "involving the licensure or certification of need of the [abortion] facility or licensing proceedings against an employee of the facility." S.C. Code Ann. § 44-7-310.

II. THE FOURTH CIRCUIT MISINTERPRETED NAF'S STANDARDS TO SUPPORT THE DISCLOSURE OF ABORTION PATIENTS' PERSONALLY IDENTIFYING INFORMATION.

In its argument before the Fourth Circuit, South Carolina cited the 1988 NAF publication *Standards for Abortion Care* ("*NAF Standards*") as support for its assertion that South Carolina needs to access personally identifying information about abortion patients to "monitor abortions and assure compliance with the health-care standards in Regulation 61-12 aimed at preserving maternal health." *Greenville Women's Clinic*, 317 F.3d at 367. The Fourth Circuit quoted the State's citation of the NAF *Standards* at length: "[South Carolina] notes that even the National Abortion Federation . . . states that the 'maintenance of complete and accurate records is essential for quality patient care and meaningful review of services.'" *Id.* at 367-68. The Court then stated that "[t]he Federation's 'Standards of Abortion Care' explains that the 'reporting of abortion procedures and complications to appropriate private and legally sanctioned public agencies generally improve[s] family planning services and public health information.'" *Id.* at 368 (alteration in original).

The Fourth Circuit misrepresented NAF's Standards by citing them in the context of the State's claim that it needed to access abortion patients' *personally identifying* information. NAF's Standard's do not support this position. Though NAF encourages clinics to report *aggregated, statistical* information, NAF has always stressed the importance of maintaining the confidentiality of patient's *personally identifying* information. Thus, the very statement on record keeping and reporting from the NAF Standards cited by the Fourth Circuit

is immediately followed by the qualification that: "Nevertheless, within such reports, *confidentiality of individual patient identity is essential and should be safeguarded*." *NAF Standards* 18 (emphasis added).

Since 1978, NAF has published and updated exhaustive standards, formulated by special committees of practitioners and experts, on the medical, nursing, counseling, administrative, and ethical aspects of abortion services.[7] These standards were designed to promote the health, safety, and psychological well being of abortion clinic patients. Accordingly, the standards urge maintenance of complete and accurate patient records. NAF has also advocated the compilation of statistics regarding the safety of abortion by both private and governmental entities; in particular, statistics compiled by the Centers for Disease Control ("CDC") and the Alan Guttmacher Institute are invaluable in maintaining the high standards of abortion care that exist in this country.

NAF has never suggested, however, that record keeping or the reporting of statistical information should occur at the expense of women's confidentiality. In a section entitled "Confidentiality," the same NAF Standards cited by the Fourth Circuit state: "Every woman has the right to expect her privacy will be respected and confidentiality of her records protected. . . . In addition, *if a member of the facility receives a subpoena for a woman's record, action must be taken to prohibit the release of the records without the woman's consent*." *NAF Standards* 15-16. The NAF Standards further advise: "*The patient's record must not be re-*

[7] In the early 1990's, NAF undertook a major revision of its standards and, relying on an evidence-based approach to clinical decision-making, replaced the standards with guidelines for quality abortion care, set forth in the publication, *Clinical Policy Guidelines*. National Abortion Federation, *Clinical Policy Guidelines* (1996), *available at* www.guidelines.gov ("*Clinical Policy Guidelines*"). These guidelines, which are reviewed and updated annually, set the standard for quality abortion care in North America.

leased without the consent (preferably in writing) of the patient." *Id*. at 15; *see also Clinical Policy Guidelines* ("all reasonable precautions must be taken to ensure the patient's confidentiality").

No entity—private or governmental—*needs* to collect personally identifying information in order to compile statistical information about abortion for public health purposes. The CDC, for instance, publishes instructions on the collection of abortion statistics. *See* CDC, *Handbook on the Reporting of Induced Termination of Pregnancy* (1997), *available at* http://www.cdc.gov/nhcs/data/misc/hb_itop.pdf. The instructions explain that: "The Report . . . is designed to collect information for statistical and research purposes only. These reports are not maintained permanently in the official files of the State health department. The data that are gathered from these reports are presented in aggregate statistics, not individually, so that specific individuals may not be identified." *Id.* at 3.

Similarly, NAF does not believe that the DHEC inspectors *need* to copy and retain abortion patients' personally identifiable information in their review of abortion providers' record keeping. As the district court noted, the "constitutional problem [in the Regulation] can be cured by . . . redacting the documents to remove such information." *Greenville Women's Clinic*, 317 F.3d at 367 (quoting *Greenville Women's Clinic v. Bryant*, No. 6:96-1898, slip op. (D.S.C. Aug. 31, 2001)).

III. THE PUBLIC DISCLOSURE OF ABORTION PATIENTS' PERSONALLY IDENTIFYING INFORMATION WILL SERIOUSLY COMPROMISE WOMEN'S ACCESS TO REPRODUCTIVE HEALTH CARE AND THE QUALITY OF THAT CARE.

Because information collected by DHEC inspectors under the Regulation could—and, indeed, has been—publicly disclosed, the Regulation will force women in South Carolina to weigh a decision to have a safe and legal abortion against

the threat of public exposure of their private health information. It is inconceivable that this threat of public disclosure would not interfere with a woman's decision to terminate a pregnancy. As this Court has made clear, "[a] woman and her physician will necessarily be more reluctant to choose an abortion if there exists a possibility that her decision and her identity will become known publicly." *Thornburgh v. American Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 766 (1986), *overruled in part on other grounds*, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). "The decision to terminate a pregnancy," this Court explained, "is an intensely private one that must be protected in a way that assures anonymity." *Id.*

In addition to the burden imposed on women's right to choose an abortion by the Fourth Circuit's decision, the threat of public disclosure of a woman's personally identifying information could have a host of damaging consequences for her health. For instance, a woman might choose not to have a medically recommended abortion if she knew that her decision could become a matter of public record, thus potentially risking not only her health but also her life. *See, e.g.*, Maureen Paul, et al., *A Clinician's Guide to Medical and Surgical Abortion* 58 (1999) ("Some cardiac lesions such as cardiomyopathy, primary pulmonary hypertension, Eisenmenger syndrome, and Marfan syndrome, considerably increase the risk of maternal death during pregnancy; abortion is often recommended, even if the pregnancy is wanted.").

The threat of public disclosure could also inhibit the candor essential to a meaningful doctor-patient relationship. This Court has established that the "physician, in consultation with his patient, [must be] free to determine, without regulation by the State, that, in his medical judgment, the patient's [first-trimester] pregnancy should be terminated." *Roe v. Wade*, 410 U.S. 113, 163 (1973). "[T]he medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient." *Doe v. Bolton*, 410

U.S. 179, 192 (1973). If a woman fails to provide a complete and accurate medical record to the doctor because she fears public disclosure, the meaningful exercise of her doctor's medical judgment would inevitably be impaired.[8]

Indeed, in health care contexts other than abortion, it is well recognized that sensitive medical information should be protected. For example, Congress passed the Health Insurance Portability and Accountability Act ("HIPAA"), *see* Pub. L. No. 104-191, § 247, 110 Stat. 1936, 2018 (1996) (codified at 29 U.S.C. §§ 1181 *et seq.*), to protect the privacy of medical information maintained by health care plans and providers. One of the stated goals of HIPPAA was the protection of personally identifying medical information. *See* 142 Cong. Rec. S9501, S9505 (daily ed. Aug. 2, 1996).

IV. THE PUBLIC DISCLOSURE OF ABORTION PATIENTS' PERSONALLY IDENTIFYING INFORMATION PUTS BOTH ABORTION PROVIDERS AND PATIENTS AT INCREASED RISK OF HARASSMENT AND VIOLENCE.

The Regulation also puts South Carolina women who have chosen to terminate their pregnancies and the doctors and clinics who provide abortions at considerably greater risk of harassment and even physical violence. NAF collects and disseminates information about the harassment of and violence against abortion providers and women seeking abortions in an effort to assist them in preventing violent attacks and managing them when they do occur. Based on extensive evidence of anti-choice harassment of and violence against abortion providers and their patients, NAF is deeply con-

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[8] Instead of giving [the doctor] an accurate medical history, a woman might well hide previous abortions, past incidents of venereal disease, or other data about her sexual activity that might be embarrassing but extremely relevant to a doctor's treatment and advice. This is a clear constraint on the development of a candid doctor-patient relationship. *See Margaret S. v. Edwards*, 488 F. Supp. 181, 214 (E.D. La. 1980).

cerned that the Regulation could cause a serious increase in violence against clinics and their patients in South Carolina.

Both women who seek abortions and physicians who provide abortions have been targets of a rising tide of anti-choice violence and harassment. Since 1977, NAF has catalogued more than 4,000 acts of violence against abortion providers and recorded more than 76,000 incidents of harassment, bomb threats, and picketing. National Abortion Federation, *NAF Violence and Disruption Statistics: Incidents of Violence and Disruption Against Abortion Providers in the U.S. and Canada* (Dec. 31, 2002), *available at* www.prochoice.org/Violence/Statistics/stats.pdf. Recently, anti-choice extremists have shifted their focus toward the harassment and intimidation of individual women visiting reproductive health care clinics. National Abortion Federation, *Analysis of Trends of Violence and Disruption Against Reproductive Health Care Clinics For 2002*, *available at* www.prochoice.org/Violence/Trends/2002.htm (last updated Feb. 6, 2003). There were 10,241 reported incidents of picketing last year, an increase from 9,969 in 2001. *Id.*

The Regulation will permit abortion opponents to identify more easily those obtaining or providing abortion services. In fact, the Regulation has already been used by anti-abortion activists to single out a patient of a South Carolina abortion clinic: as Judge King explained in his dissent, "the evidence show[ed] that abortion protesters distributed a flyer containing a photocopy of a medical record obtained from DHEC concerning a fifteen-year-old girl's pregnancy termination." *Greenville Women's Clinic*, 317 F.3d at 376 (King, J., dissenting).

Unfortunately, there is an audience, and a market, for information that personally identifies abortion patients: anti-choice activists increasingly use this information to target individual abortion patients. The Christian Gallery News Service, an organization created by Neal Horsley, founder of the Nuremberg Files web site, encourages the publication of

personally identifying information, including photographs, to deter women from having abortions. *See* www.abortioncams .com. Horsley's website features pictures of numerous women patients; he has said that "homicidal mothers must be held up for the world to see"; and he has voiced his support for the use of violence to stop abortions. *Fox Hannity & Colmes*: *Does the First Amendment Protect a Website That Posts the Names of Abortion Doctors?* (Fox News Network television broadcast, Apr. 5, 2001). And in a case in Illinois, after a patient was transferred to a local hospital because a complication occurred during an abortion, antiabortion activists acquired her medical records from a source at the hospital and posted them on the Internet along with a grainy photograph. The patient testified to the humiliation and fear she experienced as a result. *See* Jo Mannies, *Activist Admits Role in Acquiring Medical Records of Abortion Patient*, St. Louis Post-Dispatch, Aug. 23, 2001, at A1.

Indeed, the recognized harassment of abortion providers and women who seek abortions in part led Congress to pass the Driver Privacy Protection Act ("DPPA"). The legislative history of the Act documented the serious nationwide problem of women being stalked, assaulted, and at times murdered by individuals who obtained the women's home addresses from state departments of motor vehicles. *See, e.g.*, *Protecting Driver's Privacy: Hearing Before the House Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm.* (1994) (statement of David Beatty, Director of Public Affairs, National Victims Center), *available at* 1994 WL 14168013; *see also* 139 Cong. Rec. S15745, S15761-65 (daily ed. Nov. 16, 1993). Senator Robb described the case of a Virginia woman who "was shocked to discover black balloons and antiabortion literature on her doorstep days after she had visited a health clinic that performs abortions. Apparently, someone used her license plate number to track down personal information which was used to stalk her." 139 Cong. Rec. at S15765. The DPPA now prohibits state departments of motor vehicles, and their employees, from

disclosing personal information about individuals without their consent. Pub. L. No. 103-322, 108 Stat. 1796, 2099-2102 (1994) (codified at 18 U.S.C. §§ 2721-2725).[9]

The disclosure of personal information, such as addresses, could also put women at increased risk of domestic violence. In 1994, Congress found that domestic violence is the leading cause of injuries to women between the ages of 15 and 44. Violent Crime Control and Law Enforcement Act of 1994, H.R. Conf. Rep. No. 103-711, at 391 (1994). Nearly 30 percent of all murders of women are committed by husbands or boyfriends. Congressional Research Service Report for Congress, *Violence Against Women: An Overview* 5 (1994). As this Court stated in *Planned Parenthood v. Casey*, 505 U.S. 833, 893 (1992), "there are millions of women in this country who are the victims of regular physical abuse at the hands of their husbands. Should these women become pregnant, they may have very good reasons for not wishing to inform their husbands of their decision to obtain an abortion." *See also* Janlori Goldman et al., *Health Privacy Principles for Protecting Victims of Domestic Violence* (2000), *available at* http://www.ihealthbeat.org.

Finally, the violence directed at abortion providers directly threatens the ability of women to obtain safe abortions. As one expert has noted: "harassment and intimidation may dissuade skilled clinicians from entering this field, or convince them to quit." *See* David A. Grimes, *Clinicians Who Provide Abortions*, 80 Obstetrics and Gynecology 719, 721 (1992). Doctors, nurses, and administrators have been

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[9] *See also Operation Rescue v. Women's Health Center*, 626 So. 2d 664, 668 (Fla. 1993), *rev'd in part*, *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994) (discussing the recording of license plate numbers at an abortion clinic by anti-choice activists); *Morning Edition: Florida Lawsuit Charging Compuserve and Anti-Abortion Protester Violated Rights of Abortion-Seekers and Workers by Tracking Them Down with Their License Plate Numbers* (National Public Radio broadcast Feb. 16, 1999) (same).

stalked, assaulted, and sometimes murdered; faced with such harassment and violence, many choose to resign. *See* Kimberly A. Lonsway et al., *2002 National Clinic Violence Survey Report* (rel. Mar. 2003), *available at* http://www. feminist.org/research/cvsurveys/clinic_survey2002.pdf.

CONCLUSION

For the reasons set forth above, this Court should grant the petition for writ of certiorari and reverse the decision of the Fourth Circuit.

Respectfully submitted,

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