UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 09-3231, 09-3233, 09-3362

PLANNED PARENTHOOD MINNESOTA, NORTH DAKOTA, SOUTH DAKOTA, AND CAROL E. BALL., M.D.,
Appellees/Cross Appellants,
v.
MIKE ROUNDS, GOVERNOR, and MARTY JACKLEY, ATTORNEY GENERAL, in their official capacities,
Appellants/Cross-Appellees,

ALPHA CENTER, BLACK HILLS CRISIS PREGNANCY CENTER, etc.et al.,
Appellants/Cross-Appellees,

CHRISTIAN MEDICAL & DENTAL ASSOCIATIONS, et al.,
Amici on behalf of appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA, SOUTHERN DIVISION

THE HONORABLE KAREN SCHREIER
United States District Court Chief Judge

STATE APPELLANTS'/CROSS APPELLEES' PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

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F.R.A.P. 35 Statement

SDCL 34-23A-10.1(1) requires a physician to provide the following information to a patient considering an abortion:

> (e) A description of all known medical risks of the procedure . . . , including:
>
> (i) Depression and related psychological distress;
>
> (ii) Increased risk of suicide ideation and suicide[.]

Neither the term "risk" nor "increased risk" is defined by the statute. The Panel Majority found that the "increased risk of suicide ideation and suicide" language could be read to require the giving of the advisory only in the event that it were generally known that abortion "causes" suicide. The Majority concluded, moreover, that "causation" could not be shown, and affirmed the injunction against the advisory.

As the Dissent points out, however, the "increased risk" advisory, when read in terms of the relevant medical literature and expert testimony, provides only that women be advised that suicide is more frequent following abortions than following childbirth. The essentially undisputed evidence demonstrates that suicide is three to six times more frequent following abortion than childbirth.

The decision of the Panel Majority has the effect of negating the suicide advisory enacted by the South Dakota legislature and so is of exceptional importance, justifying en banc review under F.R.A.P. 35(b)(1)(B). Moreover,

the decision conflicts with this Court's en banc decision in *Planned Parenthood v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (en banc) and with decisions of the Supreme Court including *Gonzales v. Carhart*, 550 U.S. 124 (2007) and *Washington State Grange v. Washington State Republican Party,* 522 U.S. 442 (2008), and consideration by the full court is necessary to secure uniformity of its decisions with those of the Supreme Court. F.R.A.P. 35(b)(1)(A).

Issue Presented

Whether Planned Parenthood demonstrated that the suicide and suicide ideation advisory set out in SDCL 34-23A-10.1(1)(e)(ii), properly read, is untruthful, misleading or not relevant to the patient's decision to undergo an abortion.

Argument

A. *The disclosure actually required by the statute is that women who abort are at higher risk of suicide and suicide ideation than women who do not abort.*

The pivotal question posed by this Petition is the meaning of the advisory set out above in SDCL 34-23A-10.1(1)(e)(ii). Once that question is correctly resolved, the remainder of the analysis flows easily.

The State submits that Judge Gruender's dissent correctly concludes that SDCL 34-23A-10.1(1)(e)(ii) "requires a disclosure simply that the risk of suicide and suicide ideation is higher for women who abort compared to

women in other relevant groups, such as women who give birth or who do not become pregnant." Dissent at 23.

Judge Gruender found that the "increased risk" language used by the South Dakota Legislature should be interpreted by reference to its usage in the "relevant medical field." *Id.* at 19. Further, the "peer-reviewed medical literature in the record on the topic of suicide and abortion consistently uses the term 'increased risk' to refer to a relatively higher probability of an adverse outcome in one group compared to other groups—that is—to 'relative risk.'" *Id.* at 20. A brief review of that literature confirms the Dissent.

A 1996 study, Mika Gissler, et al., *Suicides After Pregnancy in Finland, 1987-94, register linkage study*, 313 BRIT. MED. J. 1431 (1996) (hereinafter Gissler, 1996) (ECF No. 172-3), compared the rate of suicide for women who had received induced abortions with two other groups, "women who gave birth and women who miscarried" and "characterized its finding of a vastly higher suicide rate for women who received induced abortions as 'an *increased risk* of suicide.'" Dissent at 20 (quoting Gissler, *supra*, at 1434) (emphasis by Dissent).

Another prominent study found that women "who had induced abortions" experienced a "'detectable *increase in risks* of concurrent and subsequent mental health problems.'" Dissent at 21 (quoting David M.

Fergusson, et al., *Abortion in Young Women and Subsequent Mental Health*, 47 J. CHILD PSYCHOLOGY & PSYCHIATRY 16, 19 (2006) (ECF No. 172-4) (emphasis by Dissent). Expert evidence before the Court explained that "'abortion would be considered an *increased risk* for suicide *if the relative risk is significantly higher* for women who abort compared to women who give birth or never have children.'" Dec. of Priscilla Coleman at ¶ 6 (July 6, 2006) (ECF No. 189), quoted at Dissent at 21 (emphasis added).

Rather than adopting the approach of the medical literature and the experts, the Majority failed to take into account the word "increased" as used in the statute, and instead found that the term "risk" could have more than one meaning, and that "its usage is not clarified in the statute." Slip. Op. at 12. As Judge Gruender points out, however the legislature's use of the "more precise phrase '[i]ncreased risk'" leads to the presumption that the terms has a "more precise meaning than the term 'risk' by itself." Dissent, 19. Moreover, the "peer-reviewed medical literature in the record on the topic of suicide and abortion consistently uses the term 'increased risk' to refer to a relatively higher possibility of an adverse outcome in one group compared to other groups—that is, to 'relative risk.'" Dissent, 20.

The Majority was further concerned that the advisory could be interpreted to mean that there was a known "causal connection between

abortion and suicide." Slip Op. at 13. There are two direct answers to the Majority's concern. First, any potential problem with varying constructions of the statute is addressed by the Majority's own language with regard to the relationship disclosures, language which is fully applicable to the suicide disclosure. As to the relationship disclosure, the Majority found that, given "varying constructions of the South Dakota statute," the "court's 'duty is to adopt'" an interpretation of a statute which would avoid, rather than embrace, "'grave and doubtful constitutional questions.'" Slip Op. at 10 (quoting *United States v. Adler*, 590 F.3d 581, 583 (8th Cir. 2009) (quoting *Harris v. United States*, 536 U.S. 545, 555 (2002))). The Majority added that "[t]his is especially so since '[i]n evaluating a facial challenge to a state law, a federal court must . . . consider any limiting construction that a state . . . enforcement agency has proffered.'" Slip Op. at 10 (quoting *Kolender v. Lawson,* 461 U.S. 352, 355 (1983)).

Each of these rules is likewise applicable to the suicide advisory. The advisory as articulated by the Dissent, which is consistent with the limiting construction offered by the State's Governor and Attorney General, has the effect of avoiding a doubtful constitutional question, and gives effect to all the words in the statute. The validity of this result is emphasized by the striking fact that the Majority does not squarely attack the plausibility of the Dissent's

interpretation of the suicide disclosure but instead argues that the statute has "varying meanings." Slip Op. at 12.

Further, this interpretation honors the basic rule that no construction of a statute should be adopted which "'would render it ineffective or meaningless.'" *Tracfone Wireless, Inc. v. South Dakota Department of Revenue and Regulation*, 778 N.W.2d 130, 136 n.7 (S.D. 2010). *See also NLRB v. Junes & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) ("The cardinal principle of statutory construction is to save and not to destroy.").

As noted above, a related concern of the Majority was that the advisory could be construed to mean that there was a "causal connection" between suicide and suicide ideation. Slip. Op. at 13. In fact, the term "increased risk" is not reasonably susceptible to such an interpretation because "risk" and "cause" are different concepts in medicine and in general usage.

The American Psychological Association Task Force on Mental Health and Abortion (ECF No. 283-3, 283-4) (a central piece of Plaintiffs' evidence), strongly criticizes as a "logical fallacy" the "'tendency to confuse a risk and a cause.'" Dissent at 22 (quoting APA Report at 31). Similarly, while Dr. Gissler finds that his studies did not prove a causal link between suicide and abortion, he nonetheless has "resolutely reiterated his finding of 'increased risk.'" Dissent at 22 (quoting Mika Gissler, et al., *Letter to the Editor, Pregnancy-*

Related Violent Deaths, 27 SCAND. J. PUB. HEALTH 1:54, 55 (1999) (ECF No. 206-10).

Likewise, the label approved by the Food and Drug Administration (FDA) for Mifeprex clearly distinguishes "risk" and "cause" when it requires that the doctor "'inform the patient about the risk'" of certain named adverse reactions; this was so even though "'[n]o causal relationship between the use of [the drug] and these events has been established.'" Dissent at 22 (quoting ECF No. 206-5). Even Planned Parenthood's own primary expert on suicide carefully distinguished between the "association" of suicide with abortion, which she frankly acknowledged, and the "causation" of suicide by abortion, which she denied. Deposition of Stotland at 283-84 (ECF No. 152-12).

B. *The advisory that the risk of suicide and suicide ideation is higher for women who abort compared to women in other relevant groups, such as women who give birth or who do not become pregnant, is truthful.*

There is abundant evidence that the risk of suicide and suicide ideation is higher for women who abort compared to women in other relevant groups; therefore, the advisory is truthful.

Dr. Gissler's comprehensive study, Mika Gissler, et al., *Injury deaths, suicides and homicides associated with pregnancy, Finland 1987-2000*, EUROPEAN JOURNAL OF PUBLIC HEALTH, Vol. 15, No. 3, 459, 60 (2005) (ECF No. 147-18) (hereinafter Gissler 2005) found a suicide rate of 5 per 100,000 after birth, 11.8

to 13.3 per 100,000 for non-pregnant women, 16.0 per 100,000 after spontaneous abortions or ectopic pregnancies, and 31.9 per 100,000 after an "induced abortion." *See also* Gissler, 1996, *supra* at 1431-34. Gissler's studies are especially important because they utilize Finnish "data linkages" to obtain comprehensive information, in contrast to many other studies which rely on death certificates, which may not provide complete information. *See* Mika Gissler, et al., *Methods for Identifying Pregnancy-Associated Deaths: Population Based Data from Finland, 1987-2000*, 18 PAEDIATRIC AND PERINATAL EPIDEMIOLOGY, 448-55 (2004) (ECF No. 172-11).

Drs. Shadigian and Bauer similarly found that two "case control" studies show that "suicide is 3 to 6 times greater in women obtaining an induced abortion than in women who deliver at term." Elizabeth M. Shadigian, M.D., and Samuel T. Bauer, M.D., *Pregnancy-Associated Deaths: A Qualitative Systematic Review of Homicide and Suicide,* OBSTETRICAL AND GYNECOLOGICAL SURVEY, CME Review Article, Vol. 60, No. 3, 183, 188 (2005) (ECF No. 172-5). And, as noted above, Dr. Stotland, Plaintiffs' witness, frankly acknowledged that Gissler's 2005 study indicated an "association" of suicide with abortion, though she denied it showed "causation." Dep. of Stotland at 283-84. *See* Dissent at 24.

Nor can it be denied that it is generally "known" that suicide and suicide ideation are higher after abortion than childbirth or other outcome; the advisory thus complies with SDCL 34-23A-10.1(1)(e) requiring disclosure of "[a]ll known medical risks of the procedure." Judge Gruender finds that the "record indicates that the disclosure actually required—that the relative risk of suicide and suicide ideation is higher for women who abort compared to women in other relevant groups—is generally 'known.'" Dissent at 25 n.12. As an example, the Dissent pointed to the APA Task Force which produced a "91-page APA report for the sole purpose of analyzing that known risk in more detail." *Id.* (The Majority, focusing on the causation question, does not appear to dispute the higher rate of suicide after abortion as compared to other outcomes. *See* Slip. Op. at 13.)

C. *Planned Parenthood has not demonstrated that the suicide advisory, properly construed, is misleading or irrelevant.*

The Majority erred in finding that Planned Parenthood had carried the burden of demonstrating that the suicide advisory, properly construed, is "misleading or not relevant." *Rounds,* 530 F.3d at 735.

The key to resolution of this issue is, again, proper construction of the advisory. As demonstrated by the Dissent and by Part A, *supra*, the advisory required is simply that the "risk of suicide and suicide ideation is higher for women who abort compared to women in other relevant groups, such as

women who give birth or who do not become pregnant." Dissent at 23. So read, the advisory is clearly "truthful" and it is also "known," in that there is virtually no evidence to the contrary. *See* Part B, *supra*.

The Majority nonetheless found that the advisory "as written could mislead women who have unwanted pregnancies into believing that choosing abortion would increase their risk of suicide." Slip. Op. at 14. The Majority essentially found that leaving this implication would be improper because the record did not "demonstrate a generally recognized *causal* connection between abortion and suicide," but rather revealed the existence of a "vigorous debate over whether an apparent statistical correlation results from common cofactors rather than a showing that one causes the other." *Id.* at 13 (emphasis added).

The Majority approach is flawed. First, the challenge here is a facial one, and the Supreme Court has directed in such cases that the courts "must be careful not to go beyond the statute's facial requirements and speculate about 'hypothetical' or 'imaginary' cases." *Grange,* 522 U.S. at 449. The argument that a statute may be struck down because there was a "risk" of misperception was, in fact, squarely rejected in *Grange* at *id.,* and should be rejected here.

Second, as the Dissent explains by reference to *Rounds*, 530 F.3d at 736, the Majority approach as to the potential for misapprehension is misplaced because the "physicians who provide abortions should be capable of reviewing

the research in the field, understanding the difference between relative risk and proof of causation and explaining it correctly to their patients." Dissent at 32. There are no grounds to abandon *Rounds* here, in the context of the same statute.

Third, there is no reasonable argument that the advisory, as correctly interpreted, is misleading or irrelevant simply because there may be medical uncertainly as to whether abortion *causes* suicide. It is appropriate to repeat at this point that the advisory, properly read, does not state that there is a causal relationship, but only would convey that suicide and suicide ideation are more frequent after an elective abortion rather than childbirth or other outcomes. Dissent 23. Thus the underlying question is whether it is proper to give a medical advisory in the absence of convincing proof of causation. The evidence shows that it is proper. For example, the regulations adopted by the FDA are consistent with the giving of an advisory without a showing of causation: 2 C.F.R. 201.80(e) (ECF No. 264-2) requires a drug manufacturer to revise its warning "as soon as there is reasonable evidence of a serious hazard with a drug; a causal relationship need not have been proved." Further, as Judge Gruender notes, the "usual medical practice reflected in the record is to *recognize* a strongly correlated adverse outcome as a 'risk' while further experiments are conducted to confirm or exclude other plausible

causes." Dissent at 25-26 (citing Coleman Dec. of July 6, 2006) (ECF No. 189). Dr. Gissler, while clarifying that his study did not prove causation, nonetheless states that the "elevated mortality risk after a terminated pregnancy [from suicide and other causes] has to be recognized in the provision of health care . . . ." Gissler 2005, *supra* at 467. *See also,* John M. Thorp, Jr., M.D. et al., *Long-Term Physical and Psychological Health Consequences of Induced Abortion: Review of the Evidence*, OBSTETRICAL AND GYNECOLOGICAL SURVEY, CME REVIEW ARTICLE, Vol. 58, No. 1, 67, 76 (2002) (ECF No. 28) ("Because of our review, we think that any woman contemplating an induced abortion should be cautioned about the mental health correlates of an increased risk of suicide or self-harm attempts. . . .").

Dr. Shadigian similarly points out that, by analogy, that while hormone replacement theory (HRT) may or may not be a cause of cancer, strong statistical evidence connects the two, and the National Cancer Institute lists HRT as a factor "associated with increased risk of breast cancer"; the American College of Obstetricians and Gynecologists takes the same approach. Dec. of Elizabeth Shadigian, M.D., ¶ 6, (ECF No. 172-5). Dr. Shadigan states that in this situation, it is her practice, and "should be the practice of other physicians" to "advise patients of the increased risk." *Id.* Planned Parenthood's contrary argument—that the "existence of other causes

proscribes the disclosure," Dissent at 26—is untenable. As the Dissent explains, the requirement of *Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992), that an advisory be "non-misleading" and "relevant" does not warrant a "new stricter definition of medical risk—a standard that requires certainty of causation – simply because the medical procedure at issue is abortion." Dissent at 26. *See Gonzales*, 550 U.S. at 153-54 (noting that *Casey* laid to rest the "antagonistic 'canon of construction under which in cases involving abortion, a permissible reading of a statute [was] to be avoided at all costs'").

Finally, the Majority ultimately relies on the authorities cited by Plaintiffs on the issue of whether suicide and suicide ideation are known risks of abortion, and ignores the authority cited by Defendants, some of which did use control groups of women carrying "unwanted" or "unplanned" pregnancies to term, because these studies were discounted by the APA. Dissent at 29 (citing Coleman Dec. at ¶ 19) (ECF No. 290-3). As the Dissent points out, the Majority failed to "explain by what authority the APA has become the sole arbiter of the discussion." Dissent at 30 n.13 (quoting *Gonzales*, 550 U.S. at 176 (Ginsburg, J., dissenting)) (noting that the legislation upheld in *Gonzales* was in contradiction to "'statements from nine professional associations, including ACOG.'")

Therefore, even if there were "medical uncertainty" about whether the suicide advisory should be given lacking proof of causality, the State nonetheless has the authority to require it under *Gonzales*, 550 U.S. at 163 ("state and federal legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty.")

Conclusion

The petition for rehearing en banc, or panel rehearing, should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided for in Rule 32(a)(7) using Calisto MT typeface in 14 point type. Appellant's Brief contains 14 pages.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010, and it is herewith submitted in PDF format.

Dated this 30th day of September, 2011.

/s/ John P. Guhin
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the State's Petition for Rehearing and Petition for Rehearing En Banc was served though the Court's electronic mail system on September 30, 2011, on the following persons:

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