Right to Remain Silent: A First Amendment Analysis of Abortion Informed Consent Laws, The

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The Right to Remain Silent: A First Amendment Analysis of Abortion Informed Consent Laws

I. INTRODUCTION

Since the United States Supreme Court legalized abortion in the 1973 decision Roe v. Wade,1 the law governing the regulation of abortions has been in a constant state of flux. After the legalization of abortion, states began enacting informed consent laws in order to regulate what information a woman must be given before terminating her pregnancy; today, a total of 32 states have an informed consent law of some kind.2 Many informed consent laws, such as that of Missouri, require that a woman receive information at least 24 hours before undergoing an abortion and that the abortion providers disclose the physical and mental risks involved with the termination of pregnancy.3 However, states are increasingly considering informed consent laws that go well beyond merely informing women of health risks associated with abortion.4 Fueled by pressure from anti-choice groups and bolstered by a predominantly conservative Supreme Court,5 state legislatures introduced 92 bills regarding the expansion of informed consent requirements in 2006 alone.6

Proponents of expanded informed consent laws argue that such measures are necessary not only to protect the potential lives of fetuses, but also

3. See MO. REV. STAT. § 188.039 (2006); Simon, supra note 2.
4. See Simon, supra note 2. For example, Minnesota currently requires abortion providers to inform women that having an abortion increases the chance of developing breast cancer, despite the fact that leading cancer researchers have failed to find such a connection. Id.
5. See Gonzales v. Carhart, 127 S. Ct. 1610 (2007) (Ginsberg, J., dissenting). In a dissenting opinion joined by Justices Stevens, Souter, and Breyer, Justice Ginsberg notes that the Supreme Court is differently composed now than it was the last time it considered a restrictive abortion regulation. Id. at 1652. She went on to state that the Gonzales v. Carhart majority, which included the two newest members of the Court – Roberts and Alito – is “hardly faithful” to precedent set by former Supreme Court decisions or to the principle of stare decisis. Id. Although Gonzales v. Carhart involved a ban on partial birth abortion, the Court’s stance will likely increase states’ efforts to regulate abortion, including the enactment of stricter informed consent laws. See, e.g., Jordan Lite, Feds May ‘Break Down Doors,’ Pro-Choicers Worry, N.Y. DAILY NEWS, April 23, 2007 (“Anti-abortion activists said the court’s ruling bolstered their strategy to dismantle the 1973 Roe v. Wade decision . . . by limiting the practice incrementally at the federal and state levels.”).
because some women are ignorant to what it means to be pregnant and may falsely believe that an abortion is merely a surgical operation that involves removing tissue. In response, pro-choice groups argue that such informed consent laws are meant only to scare and mislead women who have otherwise made an informed choice to terminate their pregnancies. In the past, courts have focused mostly on the rights of women and their unborn fetuses, but informed consent laws also directly implicate the rights of another group – abortion providers. While states are undoubtedly free to regulate abortions and to promote childbirth, problems arise when states compel physicians to deliver to their patients information with which the physicians themselves do not agree. In Planned Parenthood Minnesota v. Rounds, a 3-judge panel for the Eighth Circuit upheld a preliminary injunction against a South Dakota law compelling physicians to inform patients that an abortion terminates "the life of a whole separate, unique, living human being," stating that the challenged disclosures could be found to violate the First Amendment rights of physicians. This Note argues that Planned Parenthood Minnesota v. Rounds was correctly decided; it further argues that informed consent laws which force physicians to disseminate the State's moral ideology fall outside the purview of protections given to informed consent laws that involve the disclosure of scientific facts.

7. Appellants' Reply Brief at 10, Planned Parenthood Minn. v. Rounds, 467 F.3d 716 (8th Cir. 2006) (No. 05-3093), 2005 WL 4902902. The state presented testimony of women who had undergone abortions and who "were not told that the entity to be aborted was a human being, but rather that it was merely "tissue."" Id.

8. See Simon, supra note 2.

9. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992) (holding that "[t]o promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion").

10. See, e.g., Planned Parenthood Minn. v. Rounds, 467 F.3d 716, 724-25 (8th Cir. 2006), vacated, rehearing en banc granted.

11. Id. at 720. Part of the test for whether a preliminary injunction should be upheld is whether the moving party has a "fair chance of prevailing" after discovery and a full trial. Id. at 721. Therefore, the 3-judge panel for the Eighth Circuit held that the disclosures could violate the First Amendment rights of physicians, but did not have to decide whether the disclosures actually violate First Amendment rights. Id. at 727.

12. The first decision by the Eighth Circuit was vacated, and the case was reheard en banc on April 11, 2007. See Planned Parenthood Minn. v. Alpha Ctr., 213 Fed. App'x 508, 509 (8th Cir. 2007).
II. LEGAL BACKGROUND

A. Early Compelled Speech Cases: Barnette and Its Progeny

In the landmark case of West Virginia State Board of Education v. Barnette, the United States Supreme Court recognized that the First Amendment includes not only one’s right to express a viewpoint, but also the right to refrain from expression. In order to promote national unity during the height of World War II, the West Virginia Board of Education adopted a resolution ordering all students to salute the American flag and to recite the Pledge of Allegiance – an act that was contrary to the religious beliefs of Jehovah’s Witnesses. Examining the differing ideologies, the Court noted that “what is one man’s comfort and inspiration is another’s jest and scorn.” Ultimately, the Court concluded that the act of compelling a flag salute and pledge “transcends constitutional limitations on [the local authorities’] power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”

In the 1976 case Wooley v. Maynard, the Supreme Court examined whether a state could constitutionally force individuals to display an ideological message on their private property in a manner that would disseminate that message to the public. At issue in Wooley was a New Hampshire state law making it a crime to obscure “the figures or letters” on any license plate. The plaintiff, Maynard, was a Jehovah’s Witness who was convicted of violating that law after he covered the portion of his license plate displaying the New Hampshire state motto, “Live Free or Die,” because he believed that a message advocating death was directly contradictory to his religion.

14. See W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943) (“It is now a commonplace that censorship or suppression of expression . . . is tolerated by our Constitution only when the expression presents a clear and present danger . . . . It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence.”).
15. See id. at 628-29.
16. Id. at 632-33.
17. Id. at 642. It is noteworthy that the Court expressly abstained from examining whether national unity qualifies as a compelling government interest by stating that “[n]ational unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.” Id. at 640.
19. Id. at 707.
20. See id. at 707-08. In an affidavit, Maynard explained, “I refuse to be coerced by the State into advertising a slogan which I find morally, ethically, religiously and politically abhorrent.” Id. at 713.
nard then brought an action seeking an injunction against the enforcement of the law, insofar as it made it a criminal offense to obscure the motto.\textsuperscript{21} The United States District Court for the District of New Hampshire found that the act of covering the motto "Live Free or Die," qualified as an act of symbolic speech and that the State’s interest "in the enforcement of its defacement statute is not sufficient to justify the restriction on [Maynard’s] constitutionally protected expression."\textsuperscript{22}

On appeal, the Supreme Court looked to \textit{Barnette} and explained that in addition to protecting the freedom to speak, the First Amendment also protects "the right to refrain from speaking at all."\textsuperscript{23} In comparing \textit{Wooley} to \textit{Barnette}, the Court noted that the fact patterns of the two cases were not analogous: while the statute at issue in \textit{Barnette} compelled an affirmative act by requiring students to recite a pledge, the New Hampshire law merely required the passive act of carrying a motto on a license plate.\textsuperscript{24} However, the Court found that the difference between the affirmative act in \textit{Barnette} and the passive act in \textit{Wooley} was only a matter of degree and that the New Hampshire law still had the effect of forcing a private citizen to foster an ideological point of view contrary to his own belief.\textsuperscript{25} Finding that the state’s interests\textsuperscript{26} were not sufficient to justify the law, the Court held that New Hampshire could not compel individuals to display the state’s motto on license plates.\textsuperscript{27} The Court specifically explained that "where the State’s interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual’s First Amendment right to avoid becoming the courier for such message."\textsuperscript{28}

The Supreme Court again examined the issue of compelled speech in 1986.\textsuperscript{29} In \textit{Pacific Gas & Electric Co. v. Public Utilities Commission}, the Supreme Court examined whether the California Public Utilities Commission could require a privately owned utility company to include the speech of a third party in its billing envelopes, when the utility company disagreed with

\textsuperscript{21} Id. at 709.
\textsuperscript{22} Id. at 713.
\textsuperscript{23} Id. at 714.
\textsuperscript{24} See id. at 715.
\textsuperscript{25} See id.
\textsuperscript{26} See id. at 716. The Court noted that "[t]he two interests advanced by the State are that display of the motto (1) facilitates the identification of passenger vehicles, and (2) promotes appreciation of history, individualism, and state pride." \textit{Id.} The Court rejected the first interest on the grounds that vehicles are identified not by the motto, but by a "specific configuration of letters and numbers." \textit{Id.} Next, the Court disposed of the second purported interest for the reason that it was not ideologically neutral. \textit{Id.} at 717.
\textsuperscript{27} See id.
\textsuperscript{28} Id.
the content of that speech. Pacific Gas & Electric Company was a privately owned utility company that distributed monthly newsletters in its billing statements in order to fill the "extra space" in its envelopes. However, the California Public Utilities Commission determined that "extra space" in utility statement envelopes was the property of the ratepayers and began requiring all utility companies to include a newsletter produced by a different organization four times during the year.

Pacific Gas argued that following Wooley, it had the constitutional right not to disseminate a message with which it disagreed and that its right was violated by the Commission's order. Because the speech contained in the newsletter at issue was content based, the Court noted that the Commission's decision could be upheld only if it "were a narrowly tailored means of serving a compelling state interest." Although the Court found that the State may have had a compelling interest in ensuring fair and effective utility regulation, it was unable to find a relevant correlation between that regulation and the State forcing utility companies to distribute a newsletter. Therefore, the Court held that the Commission infringed upon the First Amendment rights of Pacific Gas by requiring utility companies to associate themselves with the viewpoints of others and by selecting the viewpoints to be expressed in a content-based manner.

B. The Constitutionality of Informed Consent Laws

While Barnette and Wooley laid the foundation for analyzing compelled speech cases, special complications arise when the speech involved is part of an informed consent provision of an abortion law. Although courts have struggled to balance a state's legitimate right to regulate the medical profession against the possibility of physicians being forced to express views contrary to their own professional judgment, courts have often stopped short of examining the issue in the context of the First Amendment.

30. See id. at 4.
31. See id. at 5. "Extra space" is defined as "the space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other materials up to such total envelope weight as would not result in any additional postage cost." Id. at 5-6.
32. Id. at 5-7.
33. See id. at 7.
34. Id. at 19.
35. Id. The Court also rejected the Commission's contention that the dissemination of the newsletter constituted a permissable time, place, or manner regulation, because the State's interest in exposing people to varying viewpoints did not even purport to be content neutral. Id. at 20.
36. See id. at 20-21.
37. See infra notes 38-69 and accompanying text; see also Christina E. Wells, Abortion Counseling as Vice Activity: The Free Speech Implications of Rust v. Sulli-
After the Supreme Court held in Roe v. Wade that a woman has the right to decide whether to terminate her pregnancy,\textsuperscript{38} certain states enacted legislation designed to test the limits of the Court’s holding.\textsuperscript{39} The Court confronted such legislation in the 1978 case City of Akron v. Akron Center for Reproduction Health, which came about after the City of Akron enacted an ordinance setting forth seventeen different provisions intended to regulate the performance of abortions.\textsuperscript{40} The ordinance contained an informed consent provision, which required physicians to inform patients:

That the unborn child is a human life from the moment of conception and that there has been described in detail the anatomical and physiological characteristics of the particular unborn child . . . including, but not limited to, appearance, mobility, tactile sensitivity, including pain, perception or response, brain and heart function, the presence of internal organs and the presence of external members . . . That abortion is a major surgical procedure which can result in serious complications, including hemorrhage, perforated uterus, infection, menstrual disturbances, sterility and miscarriage and prematurity in subsequent pregnancies . . . \textsuperscript{41}

Not long after the ordinance was enacted, the United States District Court for the Northern District of Ohio invalidated the provision that required disclosure of facts concerning pregnancy, fetal developments, and potential complications; the Court of Appeals for the Sixth Circuit affirmed.\textsuperscript{42}

\textsuperscript{38} 410 U.S. 113 (1973). Specifically, the Court found that the right of privacy, which stems from the Fourteenth Amendments’ concept of personal liberty, “is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.” Id. at 153. Although the United States Constitution does not explicitly articulate the right to privacy, the Supreme Court has consistently found a right of personal choice in matters concerning family life. See, e.g., Eisenstadt v. Baird, 405 U.S. 438 (1972) (finding that single persons have a right to receive contraceptives that previously, under state law, were only available to married persons); Loving v. Virginia, 388 U.S. 1 (1967) (finding a personal freedom in choosing who to marry, thus invalidating a state statute prohibiting interracial marriages); Griswold v. Connecticut, 381 U.S. 479 (1965) (finding a personal freedom in choosing to use contraceptives as part of the right to privacy in marriage).


\textsuperscript{40} Id. at 421-22.

\textsuperscript{41} Id. at 423.

\textsuperscript{42} Id. at 425.
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In examining the constitutionality of the Akron ordinance, the Supreme Court explained that it had previously defined "informed consent" as "the giving of information to the patient as to just what would be done and as to its consequences. To ascribe more meaning than this might well confine the attending physician in an undesired and uncomfortable straightjacket in the practice of his profession."43 The Court explained that the validity of informed consent provisions stems from the State's interests in protecting the health of pregnant women. However, the Court added that, despite having the authority to protect women's health, states do not have "unreviewable authority" in determining the content of the information to be conveyed through informed consent laws.44 Because it was the attending physician's responsibility to ensure that adequate information was conveyed, the state's interest did not justify abortion regulations designed to influence the woman's choice between abortion and childbirth.45

Building off these principles, the Court found that the informed consent provisions in Akron did not pass constitutional muster.46 The Court concluded that the provision requiring physicians to estimate the probable anatomical characteristics of fetuses would involve "at best speculation by the physician."47 Looking next to the provision requiring physicians to state that "an abortion is a major surgical procedure," the Court found that such a statement amounted to "a parade of horribles" that was intended to convey that an abortion is a particularly dangerous procedure.48 Taken together, the Court held that the two provisions went beyond describing the subject matter necessary to obtain informed consent and actually intruded upon the discretion of physicians, in that the provisions required physicians to make statements about risks, even when those risks are nonexistent to a given patient.49 Despite finding that the informed consent laws at issue would require physicians to deliver information with which they may not agree, the Court did not mention any possible infringement on First Amendment rights. Instead, the Court affirmed the Sixth Circuit's finding that the provisions were unconstitutional because they unreasonably placed "obstacles in the path of the doctor upon whom [the woman is] entitled to rely for advice in connection with her decision."50

In a dissenting opinion joined by Justice White and Chief Justice Rehnquist, Justice O'Connor briefly raised the issue of compelled speech under the

43. Id. at 443 (citing Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 67 n.8 (1976)).
44. See id.
45. Id. at 443-44.
46. See id. at 444-45.
47. Id. at 444.
48. Id. at 445.
49. See id.
50. Id. (alteration in original) (quoting Whalen v. Roe, 429 U.S. 589, 604 n. 33 (1977)).
First Amendment.\textsuperscript{51} After stating her belief that certain sections of \textit{Akron's} regulations do not violate any privacy right under the Fourteenth Amendment, O'Connor went on to explain that "[i]t is not to say that the informed-consent provisions may not violate the First Amendment rights of the physician if the State requires him or her to communicate its ideology."\textsuperscript{52} However, O'Connor noted that Akron Center for Reproductive Health failed to raise a First Amendment argument in the lower courts, thus explaining why the majority did not examine the informed consent laws as a form of compelled speech.\textsuperscript{53}

Three years after its decision in \textit{Akron}, the Supreme Court again encountered a challenge to the constitutionality of informed consent laws, this time as part of Pennsylvania's 1982 Abortion Control Act.\textsuperscript{54} Like the informed consent law in \textit{Akron}, the Pennsylvania law at issue in \textit{Thornburgh} required physicians to inform patients of the probable developmental characteristics of a fetus at varying stages and of the medical risks associated with an abortion.\textsuperscript{55} The Pennsylvania law further required that women seeking an abortion be informed that medical assistance benefits may be available for childbirth and that the father of the child is liable to assist in the child's support; while physicians were required to deliver most of the statements, others could deliver the provisions regarding benefits and child support.\textsuperscript{56} Finally, the statute also required abortion providers to inform women of printed materials that describe the fetus and list the names of agencies that promote abortion alternatives. The literature must also include the following statement: "The Commonwealth of Pennsylvania strongly urges you to contact them before making a final decision about abortion. The law requires that your physician or his agent give you the opportunity to call agencies like these before you undergo an abortion."\textsuperscript{57}

Although the State of Pennsylvania attempted to distinguish its informed consent laws from those at issue in \textit{Akron}, the Supreme Court nonetheless found them to be unconstitutional.\textsuperscript{58} The Court found that the printed materials were "nothing less than an outright attempt to wedge the Commonwealth's message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician."\textsuperscript{59} In addition, the Court noted that when a physician is required to present materials with certain agencies listed, the patient could have the impression that the physician is

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\textsuperscript{51} See id. at 472 n.16 (O'Connor, J., dissenting).
\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{55} See id. at 760.
\textsuperscript{56} See id. at 760-61.
\textsuperscript{57} Id. at 761.
\textsuperscript{58} Id. at 762-63.
\textsuperscript{59} Id.
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endorse such agencies, thus effectively forcing the physician or counselor to act as an agent of the State. 60

Turning to the requirement that fetal developmental stages be disclosed, the Court stated that it was “overinclusive,” in that such information is not always relevant to a woman's decision and that it has the potential to heighten anxiety and to confuse. 61 Furthermore, using potentially irrelevant information to heighten a patient's anxiety would be an act “contrary to accepted medical practice.” 62 The Court also found problematic the provision requiring physicians, or other personnel at the abortion clinic, to inform the patient that medical assistance benefits may be available and that the father of the unborn child would be liable for assistance. 63 In addition to the fact that the information would be irrelevant to many patients, the Court noted that counseling on issues such as medical benefits and liability would be beyond a physician's area of expertise. Finally, for some patients, such statements could be considered cruel and therefore destructive to the physician-patient relationship. 64

The Court also examined the provision requiring physicians to inform women of “detrimental physical and psychological effects” and of all “particular medical risks.” 65 As it did in Akron, the Court noted that such a compelled disclosure in all cases would have the effect of intruding upon the professional judgment of physicians. 66 However, the Court went a step farther in its criticism of the Pennsylvania law, saying that “[t]his type of compelled information is the antithesis of informed consent.” 67 The Court aptly noted that the State of Pennsylvania did not compel similar disclosures in correlation with other surgeries or medical procedures and that the disclosure went beyond the general subject matter of informed consent and revealed the anti-abortion purpose of the statute. 68 Therefore, the Court held that the statute's informational requirements were facially unconstitutional. 69

60. See id. at 762-63.
61. Id. at 762.
62. Id. After the Supreme Court's decision in City of Akron, federal courts consistently struck provisions requiring fetal descriptions on the basis that they are inflammatory. See id. at n.10.
63. See id. at 763.
64. Id. For example, the Court explains that “a victim of rape should not have to hear gratuitous advice that an unidentified perpetrator is liable for support if she continues the pregnancy to term.” Id. The Court specifically found that the disclosures would be considered cruel to a patient terminating a life-threatening pregnancy. Id. at 764.
65. Id.
66. Id.
67. Id.
69. Id.
Less than a decade after Thornburgh, the Supreme Court again heard a challenge to Pennsylvania’s Abortion Control Act in Planned Parenthood v. Casey, which has become the most significant abortion-related decision since Roe. Where Roe established a framework for government regulation of abortions that was based on the trimesters of a woman’s pregnancy and that allowed almost no regulation during the first trimester, the Casey court rejected the trimester approach in favor of the “undue burden” standard. The Court examined section 3205 of the Act, which required physicians to inform patients of health risks associated with abortion and the probable gestational age of the fetus, and found that its previous decisions in Akron and Thornburgh were inapposite under the new undue burden standard. The Court explained:

To the extent that Akron I and Thornburgh find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the “probable gestational age” of the fetus, those cases go too far, are inconsistent with Roe’s acknowledgement of an important interest in potential life, and are overruled.

Although the petitioners in the case asserted that physicians have a First Amendment right not to provide state mandated medical information, the Court quickly dismissed their argument. Citing Wooley, the Court acknowledged that the First Amendment rights of physicians were implicated, but stated that the physicians’ speech at issue was “part of the practice of medicine, subject to reasonable licensing and regulation by the State.”

70. In Casey, the challenged provisions were part of the 1988 amendments to the Abortion Control Act. See Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992). While Casey involved challenges to five provisions of the Act, this Note only discusses Section 3205, which is the provision requiring informed consent and specifying the types of information to be given to women seeking abortions. See id.

71. See id. Although the Supreme Court was asked to overrule Roe only nineteen years after its decision, a majority opinion delivered by Justices O’Connor, Kennedy and Souter affirmed Roe’s central holding. See id. at 844, 846.

72. See id. at 872, 876-77. The Court explained, A finding of an undue burden is shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman’s free choice, not hinder it. Id. at 877.

73. See id. at 881-82.

74. Id. at 882.

75. See id.

76. Id. at 884.
III. RECENT DEVELOPMENTS

The most recent development with regard to compelled speech in abortion informed consent law is currently taking place in the Eighth Circuit Court of Appeals, which must examine possible constitutional implications of a recent South Dakota law. Under South Dakota law, no abortion may be performed without the voluntary and informed consent of the patient.\(^77\) Since its inception in 1993, the State’s informed consent laws have required physicians to inform patients of the medical risks involved with abortion, the probable gestational age of the unborn child, the fact that medical assistance benefits may be available, and the fact that the father of the unborn child is liable to assist in supporting the child.\(^78\) In 2005, the South Dakota Legislature passed House Bill 1166 in order to expand the existing disclosure requirements.\(^79\) Under the new law, a physician is required to present patients seeking an abortion with the following statement in writing:

(b) That the abortion will terminate the life of a whole, separate, unique, living human being;

(c) That the pregnant woman has an existing relationship with that unborn human being and that the relationship enjoys protection under the United States Constitution and under the laws of South Dakota;

(d) That by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship will be terminated;

(e) A description of all known medical risks of the procedure and statistically significant risk factors to which the pregnant woman would be subjected, including:

(i) Depression and related psychological distress;

(ii) Increased risk of suicide ideation and suicide.\(^80\)

Prior to consenting to the abortion, the patient is also required to sign a written statement indicating that the abortion provider complied with all require-
ments. In addition, the attending physician must certify in writing that the required information has been provided to the woman, that the woman has read the materials, and that the physician believes that the woman understands the information contained therein. House Bill 1166 also provides that if a physician knowingly or recklessly disregards the requirements set forth in South Dakota Codified Law section 34-23A-10.1, he or she is guilty of a class two misdemeanor, which is punishable by up to thirty days imprisonment and/or a 500 dollar fine.

Before House Bill 1166 went into effect, Planned Parenthood of Minnesota, North Dakota and South Dakota, along with its medical director Dr. Carol E. Ball, brought a constitutional challenge in the United States District Court for the District of South Dakota against South Dakota Governor Mike Rounds asking the court to enjoin enforcement of the 2005 amendments to section 34-23A-10.1. Among other claims, Planned Parenthood argued that the law would force abortion providers to "articulate the state's abortion ideology and philosophical beliefs about abortion, in violation of their First and Fourteenth Amendment rights."

The District Court began its analysis by noting that in order to determine whether a preliminary injunction is appropriate, the following Dataphase factors must be considered: the likelihood of success on the merits, the threat of irreparable harm to the party moving for the injunction, balancing the threat of irreparable harm against the harm that would come to the other party should the injunction be granted, and the effect on public interest. Applying these factors, the District Court found that the 2005 amendments express the State's philosophy on an "unsettled medical, philosophical, theological, and scientific issue" and that requiring physicians to give such messages likely

81. Id.
82. Id.
84. Id. § 22-6-2.
85. See Planned Parenthood Minn. v. Rounds, 467 F.3d 716, 718 (8th Cir. 2005), vacated, rehearing en banc granted.
86. See Planned Parenthood Minn. v. Rounds, 375 F. Supp 2d. at 885. Planned Parenthood also alleged various constitutional violations suffered by patients. See id. Specifically, they argued that the requirements violate the First and Fourteenth Amendment rights of pregnant women, in that the law forces them "to listen to and understand the state's anti-abortion views." Id. Planned Parenthood further argued that forcing women to receive and understand misleading information violates privacy and liberty rights protected by the Fourteenth Amendment and that the requirements constitute an undue burden on the right to choose an abortion. Id. Finally, Planned Parenthood alleged that several provisions are impermissibly vague, thus violating the Due Process Clause of the Fourteenth Amendment. Id.

87. See id. (citing Dataphase Sys., Inc. v. C. L. Sys. Inc., 640 F.2d 109, 114 (8th Cir. 1981) (en banc)). In Dataphase, the Eighth Circuit set forth the factors to be weighed when deciding whether a preliminary injunction should issue. See Dataphase at 114.
violates their First Amendment right regarding compelled speech. Therefore, the court held that Planned Parenthood was likely to succeed on the merits. Next, the District Court determined that both public interest and the threat of irreparable harm also weighed in favor of Planned Parenthood; consequently, it granted a preliminary injunction against the enforcement of the 2005 amendments to section 34-23A-10.1.

On appeal, South Dakota's primary argument as to why the preliminary injunction should be overturned was that the challenged statements consisted of medical and scientific facts, making them constitutional under the Supreme Court's decision in Casey. Like the District Court, the Eighth Circuit, in an opinion delivered by Judge Murphy and joined by Judge Melloy, began its analysis by applying the Dataphase factors and first looked to Planned Parenthood's likelihood of success on the merits. The court first examined the principles of compelled speech set forth by Wooley and Pacific Gas, noting that '[g]overnmentally compelled expression is particularly problematic when a speaker is required by the state to impart a political or ideological message contrary to the individual's own views.'

Following the Supreme Court's decision in Casey, the court explained that when the speech at issue involves the disclosure of "truthful, nonmisleading factual information" through an informed consent law, the constitutional balance of interests is to be weighed slightly differently than the interests in cases such as Wooley. Although the Casey Court resolved the constitutional balance regarding the disclosure of factual information, the Eighth Circuit noted that it did not go so far as to exempt all informed consent laws from First Amendment protection. Furthermore, the court distinguished the South Dakota law from the Pennsylvania law at issue in Casey by explaining that while the law in Casey required physicians to inform patients that printed materials were available, the South Dakota law actually requires physicians to present the State's ideological messages themselves. The Eighth Circuit then explained that while the disclosure of factual information is considered part of the ordinary regulation of the medical profession, no court has ever "extended the bounds of permissible regulation to laws which force unwilling speakers themselves to express a particular ideological viewpoint."

88. Planned Parenthood Minn. v. Rounds, 467 F.3d at 721.
89. Id.
90. Id.
91. Id.
92. See id. at 721-22.
93. Id. at 722 (citing Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 410-11 (2000)).
94. Id.
95. See id.
96. Id.
97. Id. at 722-23.
The Eighth Circuit next addressed South Dakota’s argument that even if the disclosures constitute compelled speech, they should be upheld under the second part of the Wooley test because the State has a compelling interest in protecting fetal life and maternal psychological health. Finding that South Dakota failed to show that the required disclosures would be the least burdensome means of protecting these interests, the Eighth Circuit held that the District Court was therefore not obligated to find the disclosures justified.

The final argument raised by South Dakota regarding the compelled speech challenge was that even if the required disclosures were a facial violation of the First Amendment, physicians could still disassociate themselves from the ideological messages that they are forced to convey. The Eighth Circuit rejected this contention, observing that the 2005 amendments do not mention any such right of disassociation. Furthermore, the court found that because the amendments subject physicians to criminal liability for failure to comply with the disclosures, it would be even more difficult to infer that the same amendment would allow for disassociation. The court then explained that even if a right of disassociation could be inferred, it would be “chilled” by the requirement that physicians certify in writing that the compelled statements were made by the physician and understood by the patient. In addition, the court found that the right of disassociation, even if it did exist, would not lessen Planned Parenthood’s chance of success on the merits. Under Pacific Gas, the injury that results from compelling speech could not be cured by simply allowing an abortion provider to insert his or her own opinion in addition to the State’s message.

Aside from the potential that the South Dakota law could compel physicians to deliver the viewpoint of the State, the Eighth Circuit also examined whether the law would affect the ability of abortion providers to act according to their own professional judgment. The court looked to Casey for guidance but found that significant differences existed in the level of discretion the Pennsylvania and South Dakota laws afforded their respective physicians. While the law challenged in Casey allowed physicians not to obtain informed consent if they “reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient,” the South Dakota law only allows physicians to bypass

98. Id. at 724-25.
99. Id.
100. Id. at 725.
101. Id.
102. Id.
103. Id.
104. Id.
105. Id.
106. See id.
107. See id. at 725-26.
obtaining informed consent if it would be impossible to do so. The court found that South Dakota's law would therefore prohibit physicians from exercising their professional judgment under circumstances when they believe that the required disclosures could be detrimental to the health of patients.

Finally, the Eighth Circuit examined whether the public interest would be served by upholding the preliminary injunction. While South Dakota argued that the public interest would be served by allowing the Act to go into effect in order to protect women and unborn children, Planned Parenthood contended that the public interest would be served by keeping the legislature’s actions within its constitutional limits. The court explained that in the past, it has recognized that the freedom of expression is at the core of the public interest and that it has previously upheld injunctions against laws burdening First Amendment rights. Therefore, the court concluded that “[t]he need for First Amendment protection is no less apparent with respect to abortion providers,” and that the District Court did not err in finding that the public interest weighed in Planned Parenthood’s favor.

Ultimately, a divided panel for the Eighth Circuit, finding no abuse of discretion, upheld the preliminary injunction granted by the District Court. In his dissenting opinion, Judge Gruender acknowledged that the “law governing compelled speech by physicians is relatively undeveloped.” The portion of Judge Gruender’s dissent that discusses the free speech rights of physicians focuses mainly on the fact that physicians have a diminished right against compelled speech due to the fact that their profession is subject to regulation. He also emphasized the portion of Casey’s holding that allows for the State to express its preference for childbirth. However, soon after the panel’s decision, the Eighth Circuit granted South Dakota’s petition for a rehearing, en banc, and subsequently vacated the decision. The case was reheard in front of the full eleven judge court on April 11, 2007.

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108. Id.
109. Id. at 726. The court went so far as to say, “[t]his is counter to the law upheld in Casey.” Id.
110. See id. at 728.
111. Id.
112. See id.
113. Id.
114. See id. at 729.
115. See id. at 734 (Gruender, J., dissenting).
116. Id.
117. See id.
118. See Planned Parenthood Minn. v. Alpha Ctr., 213 Fed. App’x 508, 509 (8th Cir. 2007).
119. Id.
IV. Comment

Cases such as *Barnette* and *Wooley* demonstrate that freedom of speech is greatly valued in American society, which is why regulations violating the freedom to refrain from speaking are generally subject to strict scrutiny.120 Regarding the issue of compelled speech, *Casey v. Planned Parenthood* changed the analysis given to informed consent laws by holding that it is constitutional to compel physicians to convey certain information, if doing so is part of the state’s “reasonable licensing and regulation” of the practice of medicine. Because the *Casey* court did not reach the question as to what point informed consent laws could exceed constitutional limits regarding the information they force abortion providers to compel, states such as South Dakota have sought to extend the limits of permissible speech. This Note argues that when an informed consent law compels physicians to deliver the State’s moral or ideological messages, rather than scientific facts, that informed consent law exceeds constitutional limits. To hold otherwise would be to misconstrue the holding of *Casey*.

In his dissent, Judge Gruender argued that South Dakota’s disclosures are constitutional under *Casey*, because “physicians enjoy a diminished right not to be compelled to speak in the context of practicing medicine, as that practice is subject to state licensing and regulation.”121 According to Judge Gruender’s interpretation, a State can, at most, direct a physician to “provide any disclosure that is otherwise permissible under the undue burden standard.”122 Furthermore, Judge Gruender interprets the enumerated types of permissible information set forth in *Casey* as being the *minimum* amount of information that a state can permissibly direct a physician to disclose.123 Judge Gruender’s interpretation of the boundaries set by *Casey* would allow the state to compel physicians to articulate statements that are purely moral ideology, so long as having the physician do so does not constitute an undue burden. While Judge Gruender is correct in that physicians “enjoy a diminished right not to be compelled to speak in the context of practicing medicine,” that diminished right should be interpreted as pertaining only to speech that involves the communication of scientific facts. There is no support, in *Casey* or elsewhere, that physicians have a diminished right against compelled speech with regard to speech that is purely ideological in nature.

Judge Gruender’s interpretation is directly at odds with Justice O’Connor’s opinion in *Casey*. Justice O’Connor stated that while a physician’s First Amendment rights are implicated with regard to informed consent

120. See Planned Parenthood Minn. v. Rounds, 467 F.3d at 722. To survive strict scrutiny, the requirement in question must be “narrowly tailored to further a compelling government interest.” *Id.*
121. *Id.* at 734 (Gruender, J., dissenting).
122. *Id.* (emphasis added).
123. *Id.*
laws, those rights are "part of the practice of medicine, subject to reasonable licensing and regulation by the State." As Judge Murphy correctly pointed out, the permissible disclosures set forth in Casey include "truthful, nonmisleading factual information." To hold, as Judge Gruender would, that the Casey court had no intention of limiting the information contained in informed consent laws to factual information, but rather would extend those laws to include ideology, would be to take informed consent laws completely out of the ordinary practice of medicine. It would be, at best, a stretch to interpret the phrase "reasonable licensing and regulation by the State" to include the State's moral feelings regarding a medical procedure.

Judge Gruender's interpretation of Casey also directly contradicts prior statements made by Justice O'Connor regarding the First Amendment rights of physicians. In her dissenting opinion in Akron, O'Connor stated that informed consent provisions could violate the rights of a physician "if the State requires him or her to communicate its ideology." Judging by this statement, it appears as though O'Connor certainly intended to draw a distinction between informed consent laws requiring the disclosure of scientific facts and those which would require the disclosure of the State's ideology. Therefore, it is unlikely that she would have taken such a dramatic departure of her former view in Casey without any further explanation. Indeed, in Casey, Justice O'Connor spoke only of "truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus." All of the particular disclosures that Justices O'Connor, Kennedy, and Souter mentioned in Casey involve facts that can be scientifically proven. Therefore, it would be a misapplication of Casey to read into the holding that the government can compel physicians to deliver messages that are purely ideological and not in any way related to scientific facts.

If the Eighth Circuit rejects Judge Gruender's argument and determines that it is unconstitutional for states to compel physicians to deliver statements of ideology, one of the greatest challenges that courts will face is determining whether a disclosure involves scientific fact or ideology. During the en banc rehearing of Planned Parenthood v. Rounds, Chief Judge Loken asked Harold Cassidy, the attorney for pregnancy crisis centers supporting the law, whether the South Dakota law would require a physician to "take time out of the doctor-patient relationship to preach ideology." When Cassidy responded that the information in the law was not ideology, Chief Judge Loken responded

125. Planned Parenthood Minn. v. Rounds, 467 F.3d at 722.
127. Id.
In contrast, when an attorney for Planned Parenthood argued that the information was “calculated to mislead” and that it interferes with the Supreme Court’s ruling that woman are free to form their own opinions regarding whether a fetus is a person, Judge Gruender responded by asking, “What part of [the disclosure] is untruthful?” The disagreement amongst the Eighth Circuit judges regarding whether the disclosure should be considered truthful information or mere ideology reflects the general disagreement among members of society regarding such questions. Therefore, courts would be wise to follow the example set by the Supreme Court in Roe v. Wade and to hold that there is no medical scientific or moral consensus about when life begins.

V. CONCLUSION

The three judge panel’s decision in Planned Parenthood v. Rounds correctly applied Casey by acknowledging that although the State has the right to promote childbirth and to require physicians to make factual disclosures, there are limits to what the State can compel physicians to disclose. To hold otherwise would not only be a misapplication of Supreme Court precedent, but it would also create a slippery slope by which the State could infringe on the First Amendment rights of individuals. Through Barnette and later compelled speech cases, the Supreme Court has consistently recognized that there are very few circumstances in which the State can constitutionally compel an individual to convey the State’s ideology. Therefore, the decision in Planned Parenthood v. Rounds is also consistent with the Supreme Court’s jurisprudence regarding First Amendment Rights.

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130. Id.
131. Id.