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

United States Court of Appeals for the Eighth Circuit

PLANNED PARENTHOOD MINNESOTA, NORTH DAKOTA, SOUTH DAKOTA, AND CAROL E. BALL., M.D.,
Plaintiffs-Appellees/Cross Appellants,

v.

MIKE ROUNDS, GOVERNOR, AND MARTY JACKLEY, ATTORNEY GENERAL, IN THEIR OFFICIAL CAPACITIES,
Defendants-Appellants/Cross-Appellees,

and

ALPHA CENTER, BLACK HILLS CRISIS PREGNANCY CENTER, DOING BUSINESS AS CARE NET, DR. GLENN A. RIDDER, M.D., AND ELEANOR D. LARSEN, M.A., LSWA,,
Interveners-Appellants/Cross-Appellees,

ON APPEAL FROM U.S. DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, SOUTHERN DIVISION, CIVIL ACTION NO. 4:05-04077, HON. KAREN SCHREIER

BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLANTS' PETITIONS FOR RECONSIDERATION AND REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *amicus curiae* Eagle Forum Education & Legal Defense Fund makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

Dated: October 5, 2011

Respectfully submitted,

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum"), a nonprofit Illinois corporation, seeks the Court's leave to file this brief for the reasons set forth in the accompanying motion.[1] Founded in 1981, Eagle Forum has consistently defended federalism and supported states' autonomy from the federal government in areas – like public health – that are of traditionally local concern. In addition, Eagle Forum has a longstanding interest in protecting unborn life and in adherence to the Constitution as written. For these reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

INTRODUCTION

The panel majority relied on worst-case definitions from a survey of various medical dictionaries to find a South Dakota informed-consent requirement misleading. The statute requires warning of elective abortions' increased risk of suicide ideation and suicide:

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[1] By analogy to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

> (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[.]

SDCL 34-23A-10.1(1). The *correlation* between abortions and suicide is undisputed. Instead, like appellees (hereinafter, "Planned Parenthood"), the panel majority held that the lack of proof of *causation* renders the increased-risk warning misleading and thus an "undue burden" on abortion rights under *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833 (1992).

I. *EN BANC* REVIEW IS NECESSARY TO RESOLVE AN INTRA-CIRCUIT SPLIT ON WHEN COURTS IN THIS CIRCUIT MAY ADOPT INTERPRETATIONS OF ALLEGEDLY AMBIGUOUS STATE LEGISLATION THAT THE STATE COURTS HAVE NOT YET INTERPRETED

As explained below, panel decisions from this Circuit give conflicting solutions for how *federal* courts should resolve issues of statutory construction of new *state* laws. This issue is both particularly prevalent and particularly important, given the issues discussed in Sections II and III, *infra,* namely how to resolve facial, pre-enforcement attacks to new state regulation of the abortion industry that implement the Supreme Court's guidance in *Casey*. Because these attacks predate

any effort by the states to enforce – and thus to interpret – these new state laws, the federal courts in this Circuit must have a clear rule on how to resolve issues of statutory construction. Only the *en banc* Court can provide that clarity, particularly given this Court's uncertain guidance on how to resolve intra-circuit splits in authority.[2]

Under one strand of Circuit authority, "Federal courts do not sit as a super state legislature, [and] may not impose [their] own narrowing construction ... if the state courts have not already done so." *United Food & Commercial Workers Intern. Union, AFL-CIO, CLC v. IBP, Inc.,* 857 F.2d 422, 431 (8th Cir. 1988) (interior quotations omitted, alterations in original). This strand of authority reinforces a rule that

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[2] The federal courts of appeals must adopt "[a]ny procedure … which is sensibly calculated to achieve these dominant ends of avoiding or resolving intra-circuit conflicts." *Western Pacific R. Corp. v. Western Pacific R. Co.,* 345 U.S. 247, 271 (1941). Ironically, this Circuit has a intra-circuit split on intra-circuit splits. *Compare Toua Hong Chang v. Minnesota,* 521 F.3d 828, 832 n.3 (8th Cir. 2008) ("[w]hen there is an intra-circuit split, [courts] are free to choose which line of cases to follow") *with Murphy v. FedEx Nat. LTL, Inc.,* 618 F.3d 893, 902 (8th Cir. 2010) ("our general practice when dealing with intracircuit splits is to follow the earlier opinion, as it should have controlled the subsequent panels that created the conflict") (internal quotations omitted). Under *Murphy,* courts should follow *Toua Hong Chang,* not *Murphy,* although a court could adopt *Murphy* under *Toua Hong Chang*.

federal, pre-enforcement, facial challenges cannot truly redress injuries from new or novel state laws. Unlike federal courts, state courts have the authority to adopt narrowing constructions of state law and – by adopting such narrowing constructions – can reach results that differ from the result reached by a federal court not so empowered.

Under an alternate strand of Circuit authority, courts "must 'predict how the highest court of that state would resolve the issue'" "[w]hen state law is ambiguous." *C.B.C. Distribution & Marketing, Inc. v. Major League Baseball Advanced Media, L.P.,* 505 F.3d 818, 821-22 (8th Cir. 2007) (*quoting Clark v. Kellogg Co.,* 205 F.3d 1079, 1082 (8th Cir. 2000)). This strand of Circuit authority most resembles a court's traditional role of adopting sensible constructions that avoid absurd or unlawful consequences. *Echols v. Commissioner,* 61 F.2d 191, 193 (8th Cir. 1932); *Joubert v. Hopkins,* 75 F.3d 1232, 1241-42 (8th Cir. 1996); *Chaplinsky v. New Hampshire,* 315 U.S. 568, 574 n.8 (1942), which supports the dissent's view that the traditional and ubiquitous meaning of "risk" should govern the suicide warning.

The *en banc* Court must resolve not only the rules with respect to intra-circuit splits, *see* note 2, *supra,* but also the intra-circuit split with

respect to interpreting states laws that the state itself has not yet interpreted. *Compare IBP, Inc.,* 857 F.2d at 431 *with C.B.C.,* 505 F.3d at 821-22. As indicated in the next section, this issue is both prevalent and significant, given the numerous instances in which groups like Planned Parenthood race to federal court, before state laws even take effect, to enjoin sovereign states before the state mechanisms for implementing – and interpreting – state statutes can take effect. In the context of *habeas corpus* proceedings, the Supreme Court has held that comity and federalism require "giving state courts the first opportunity to review [a] claim, and to correct any constitutional violation in the first instance." *Jimenez v. Quarterman,* 129 S.Ct. 681, 686 (2009) (internal quotations omitted). Comity between federal and state sovereigns requires nothing less here.

II. *EN BANC* REVIEW IS NECESSARY TO ENSURE THAT COURTS IN THIS CIRCUIT DO NOT EXCEED THEIR JURISDICTION AND VIOLATE THE ELEVENTH AMENDMENT BY ENTERTAINING WORST-CASE INTERPRETATIONS OF STATE LAW IN FACIAL CHALLENGES AGAINST SOVEREIGN STATES

This case presents two critical issues that the *en banc* Court must resolve for facial challenges to state abortion legislation that seeks to protect the pregnant woman rather that to outlaw abortion: (1) the

plaintiff's burden under *Salerno,* and (2) abortion providers' ability to assert pregnant women's rights under *Roe* and *Casey*.

First, "[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *U.S. v. Salerno,* 481 U.S. 739, 745 (1987). Avoiding that issue, the majority held South Dakota to a worst-case interpretation to find the suicide warning facially invalid, based in part on perceived uncertainty about whether abortions *cause* suicide, as opposed to their merely having a strong *correlation*. To the contrary, "legislatures [have] wide discretion to pass legislation in areas where there is medical … uncertainty," and "medical uncertainty … provides a sufficient basis to conclude in [a] facial attack that the Act *does not* impose an undue burden." *Gonzales v. Carhart,* 550 U.S. 124, 164 (2007) (emphasis added). Significantly, the Constitution does "not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community." *Gonzales,* 550 U.S. at 163. In this respect, *Gonzales* overruled cases like *Planned Parenthood, Sioux Falls Clinic v. Miller,* 63 F.3d 1452, 1463

(8th Cir. 1995), that would exempt anti-abortion plaintiffs from the rigors applicable to facial challenges. *See* Interveners' Pet. at 10-13. *Amicus* Eagle Forum joins the Interveners in urging this Court to follow *Gonzales* in recognizing that the Constriction does not elevate abortion for more lenient and deferential treatment by reviewing courts.

Second, although Planned Parenthood likely has standing to challenge regulation of its commercial speech, Planned Parenthood lacks standing to raise the *Casey* "undue-burden" rights of pregnant women. In a case involving construction regulations for abortion clinics, this Court held that "Planned Parenthood should be allowed to assert the constitutional claims of its patients." *Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action,* 558 F.2d 861, 865 n.3 (8th Cir. 1977). Although that holding was expressly "[i]n the context of this case," it relied on three critical errors and cannot stand.

(1) It purports to cobble together a majority on standing from a plurality and a dissent in *Singleton v. Wulff,* 428 U.S. 106 (1976), which simply does not represent a holding. *Marks v. U.S.,* 430 U.S. 188, 193 (1977) ("fragmented [decisions in which] no single rationale explaining the result enjoys the *assent* of five Justices, the holding of the Court

may be viewed as that position taken by those Members who *concurred in the judgments* on the narrowest grounds") (emphasis added, interior quotations omitted); *U.S. v. Bailey,* 571 F.3d 791, 798 (8th Cir. 2009).

(2) *More importantly,* the cases cited by the plurality relied on the fact that the challenged statutes included criminal provisions that regulated the abortion providers' abortion practice, thereby putting the physicians in the same position as their pregnant patients. *Singleton,* 428 U.S. at 114-18; *see also Planned Parenthood of Southeastern Pennsylvania v. Casey,* 744 F.Supp. 1323, 1344 (E.D. Pa. 1990) (*Casey* statute subjected doctors to punitive civil and criminal sanctions). Significantly, the crucial fifth *concurring* vote did not agree that abortion providers could assert rights under *Roe:* "I am not sure whether the analysis in Part II-B would, or should, sustain the doctors' standing." *Singleton,* 428 U.S. at 122 (Stevens, J., concurring in part).

(3) *Most importantly,* the *Singleton* plurality does not represent Supreme Court precedent on *jus tertii* (third-party) standing, which requires that plaintiffs have their own constitutional standing and a "close" relationship with the absent third parties and that a sufficient "hindrance" keeps the absent third party from protecting its own

interests. *Kowalski v. Tesmer,* 543 U.S. 125, 128-30 (2004) (*citing Powers v. Ohio,* 499 U.S. 400, 411 (1991)). Tesmer is similar except that it involves attorney-client rather than physician-patient relationships, and it foreclosed basing third-party standing on the "*hypothetical* attorney-client relationship posited here." *Tesmer,* 543 U.S. at 131 (emphasis in original). While extant physician-patient relationship can be "close," abortion providers are not their patients' regular physician:

> In the overwhelming majority of cases, abortion surgery and medical abortions are scheduled for a pregnant mother without the mother first meeting and consulting with a physician or establishing a traditional physician-patient relationship[.]

SDCL 34-23A-54(1). Moreover, women as a class would be less inclined to forgo potentially relevant warnings (which they are free to ignore if they want an abortion) than the abortion industry for its own self-interested reasons is to provide those warnings.

Significantly, because it is not itself the rights holder under *Roe* and *Casey,* Planned Parenthood must enforce its rights under the commercial-speech doctrine, Interveners' Pet., at 3, 13, not under *Casey:*

> Clearly MHDC has met the constitutional requirements, and it therefore has standing to assert its own rights. Foremost among them is MHDC's right to be free of

> arbitrary or irrational zoning actions. But the heart of this litigation has never been the claim that the Village's decision fails the generous *Euclid* test, recently reaffirmed in *Belle Terre*. Instead it has been the claim that the Village's refusal to rezone discriminates against racial minorities in violation of the Fourteenth Amendment. As a corporation, MHDC has no racial identity and cannot be the direct target of the petitioners' alleged discrimination. In the ordinary case, a party is denied standing to assert the rights of third persons.

Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 263 (1977) (citations omitted). Because Planned Parenthood lacks standing to assert violations of *Casey,* this Court must apply the commercial-speech doctrine to Planned Parenthood.

This Court must align its precedents with the supervening Supreme Court decisions in *Gonzales* and *Tesmer*. After doing so, this Court must lift the injunction against the suicide warning, either because it is facially lawful or because it does not violate Planned Parenthood's commercial-speech rights.

III. THIS CASE PRESENTS ISSUES OF EXCEPTIONAL IMPORTANCE IN RECOGNIZING STATES' LATITUDE TO ENSURE INFORMED CONSENT AND TO PROTECT WOMEN CONSIDERNG ABORTIONS

This litigation presents issues of exceptional importance to the ongoing efforts of state legislatures and federal courts to define the roles of state and federal law in elective abortions. Significantly, *Roe v. Wade*,

410 U.S. 113 (1974), concerned states' ability to *prohibit* abortions in the interest of the *infant*. By contrast, this litigation concerns the states' ability to *regulate* abortions in the interest of *pregnant women* who contemplate abortions. Federal courts called upon to balance state regulation of abortions against the *Roe-Casey* right to abortions now rely on the new framework provided in *Casey:*

(1) Given "the State's profound interest in potential life," "the State may take measures to ensure that the woman's choice is informed … as long as their purpose is to persuade the woman to choose childbirth over abortion" and they are "not … an undue burden on the right."

(2) "The State may enact regulations to further the health or safety of a woman seeking an abortion" and only "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right."

Casey, 505 U.S. at 878. Adhering to the new *Casey* analysis justifies the *en banc* Court's revisiting this case.

First, when regulating abortion to protect pregnant women, only

"unnecessary" regulation triggers undue-burden analysis. *Casey,* 505 U.S. at 878. Given the undisputed strong correlation between abortion and suicide, Planned Parenthood cannot argue that South Dakota's effort to warn pregnant women is "unnecessary." Even assuming that *all* suicide risk results from confounding factors – *e.g.,* having an unwanted pregnancy in the first place – and not from elective abortions, that would not deny South Dakota the right to warn the women it can reach, who come to an abortion provider.

That South Dakota cannot or does not warn all women who become pregnant *without seeking an abortion* does not make warnings to those seeking abortions *unnecessary*. Legislatures have wide authority to solve only part of a perceived problem, leaving the balance to future legislation. *Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483, 487-89 (1955). Even assuming *arguendo* that all pregnant women were identically situated to Planned Parenthood's patients, Planned Parenthood would have neither a right nor a basis to deny warnings that might save its patients' lives simply because South Dakota does not require all pregnant women to receive that same warning.

The majority also relies on the fact that labeling approved for the

RU-486 abortion drug does not warn of suicide risks, notwithstanding that Food & Drug Administration ("FDA") rules require "warn[ing] of all 'clinically significant adverse reactions' and 'other potential ... hazards.'" Slip. Op. at 14 (*quoting* 21 C.F.R. §201.57(6)(i)). At the outset, FDA relies on data submitted by drug manufacturers, 21 U.S.C. §355(a)-(b), and RU-486's manufacturer has the same incentives to sugarcoat its product that Planned Parenthood has to sugarcoat its services. In any event, if the RU-486 label were actually at issue here, that label would not preempt a state-law suit for failure to warn of suicide risks. *Wyeth v. Levine,* 129 S.Ct. 1187, 1201-04 (2009). Because the label's lack of suicide warnings would not dispose of state-law failure-to-warn suits, that absence cannot prove anything relevant here about suicide risk. Indeed, while FDA requires "reasonable evidence of a causal association," 21 C.F.R. 201.57(c)(6) – although "a causal relationship need not have been definitely established," *id.* – other federal agencies have adopted the dissent's broader view:

> The requirement … that an increased risk of disease be "associated" with prisoner-of-war service may be satisfied by evidence that demonstrates either a statistical association or a causal association.

38 C.F.R. §1.18. But citing rival federal rules that are irrelevant to state abortion laws is irrelevant here. Because the federal rules do not apply, by their terms, and certainly do not purport to preempt state informed-consent laws, the rules could not set the evidentiary standard for state informed-consent laws, even if the federal agencies had so intended.

Although *Casey* rejects limiting due-process rights incorporated by the Fourteenth Amendment to "only those practices … protected against government interference … when the Fourteenth Amendment was ratified," *Casey,* 505 U.S. at 847, this case requires reflecting on what the states ratified in the Fourteenth Amendment. If *Roe-Casey* abortion rights had come instead via federal legislation, the resulting preemption would be subject to a presumption against preemption for fields – such as medical practice, public health, and informed consent – traditionally occupied by the states. *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947). When this "presumption against preemption" applies, courts do not assume preemption "unless that was the *clear and manifest purpose* of Congress." *Id.* (emphasis added). Moreover, even preemptive laws are subject to the presumption against preemption to determine the *scope* of their preemption. *Medtronic, Inc.*

v. Lohr, 518 U.S. 470, 485 (1996). "When the text of an express pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *Altria Group, Inc. v. Good,* 129 S.Ct. 538, 540 (2008) (*quoting Bates v. Dow Agrosciences LLC,* 544 U.S. 431, 449 (2005)). Although preemption does not apply *per se,* analogy to that analysis should proscribe searching out and applying a worst-case definition of the suicide warning's terms. A far better reading – more in line with what the states ratified – would allow any permissible reading to survive facial attack.

CONCLUSION

The petitions for reconsideration and rehearing *en banc* should be granted.

Dated: October 5, 2011

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CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Century Schoolbook 14-point font.

Dated: October 5, 2011

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