

United States Court of Appeals for the Eighth Circuit.

PLANNED PARENTHOOD

v.

ROUNDS

Submitted: April 11, 2007.

Filed: June 27, 2008.

Before, LOKEN, Chief Judge, WOLLMAN, MURPHY, BYE, RILEY, MELLOY, SMITH, COLLOTON, GRUENDER, BENTON and SHEPHERD, Circuit Judges, en banc.

GRUENDER, Circuit Judge.

The Governor and Attorney General of South Dakota (“the State”), along with the intervenor crisis pregnancy centers, appeal the district court's preliminary injunction preventing the 2005 version of South Dakota's statute regulating informed consent to abortion from becoming effective. For the reasons discussed below, we vacate the preliminary injunction and remand to the district court for further proceedings.

I.

In 2005, South Dakota enacted House Bill 1166 (“the Act”), amending the requirements for obtaining informed consent to an abortion as codified in S.D.C.L. § 34-23A-10.1. Section 7 of the Act requires the performing physician to provide certain information to the patient as part of obtaining informed consent prior to an abortion procedure and to certify that he or she believes the patient understands the information. The provisions of § 7 relevant to the preliminary injunction are as follows (emphases added):

No abortion may be performed unless the physician first obtains a voluntary and informed written consent of the pregnant woman upon whom the physician intends to perform the abortion, unless the physician determines that obtaining an informed consent is impossible due to a medical emergency and further determines that delaying in performing the procedure until an informed consent can be obtained from the pregnant woman or her next of kin in accordance with chapter 34-12C is impossible due to the medical emergency, which determinations shall then be documented in the medical records of the patient. A consent to an abortion is not voluntary and informed, unless, in addition to any other information that must be disclosed under the common law doctrine, the physician provides that pregnant woman with the following information:

(1) A statement in writing providing the following information:

(a) The name of the physician who will perform the abortion;

(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;

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(2) A statement by telephone or in person, by the physician who is to perform the abortion, or by the referring physician, or by an agent of both, at least twenty-four hours before the abortion, providing the following information:

(a) That medical assistance benefits may be available for prenatal care, childbirth, and neonatal care;

(b) That the father of the unborn child is legally responsible to provide financial support for her child following birth, and that this legal obligation of the father exists in all instances, even in instances in which the father has offered to pay for the abortion;

(c) *The name, address, and telephone number of a pregnancy help center in reasonable proximity of the abortion facility where the abortion will be performed . . .*

\* \* \*

Prior to the pregnant woman signing a consent to the abortion, she shall sign a written statement that indicates that the requirements of this section have been complied with. *Prior to the performance of the abortion, the physician who is to perform the abortion shall receive a copy of the written disclosure documents required by this section, and shall certify in writing that all of the information described in those subdivisions has been provided to the pregnant woman, that the physician is, to the best of his or her ability, satisfied that the pregnant woman has read the materials which are required to be disclosed, and that the physician believes she understands the information imparted.*

In addition, § 8(4) of the Act amended S.D.C.L. § 34-23A-1 to define “Human being” for the purposes of the informed-consent-to-abortion statute as “an individual living member of the species of Homo sapiens, including the unborn human being during the entire embryonic and fetal ages from fertilization to full gestation.” A physician who violates the Act knowingly or in reckless disregard is guilty of a Class 2 misdemeanor.

\* \* \*

The State responded that every patient would receive the definition that “human beings are defined as members of the species *Homo sapiens*” because “that’s right in the statute.” With regard to disassociation, the State contended that “all [the physician] has to do is explain that basic scientific fact and then he can go on and have any kind of discussion about philosophy, theology or morality, or whatever it is that he wants to talk about.... [The physician’s] only obligation is regarding this narrow scientific fact.”

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## II.

We have jurisdiction under 28 U.S.C. § 1292(a)(1) to review an interlocutory order granting a preliminary injunction. In granting the preliminary injunction, the district court, applying our circuit precedent based on *Dataphase*, analyzed likelihood of success on the merits in terms of whether Planned Parenthood had a “fair chance of prevailing” on the merits, with a “fair chance” meaning something less than fifty percent. . . . As explained below, however, under our *Dataphase*-based precedent, the “fair chance” standard should not be applied to motions to preliminarily enjoin the enforcement of a state statute. Instead, we now clarify that, where a preliminary injunction of a duly enacted state statute is sought, we require a more rigorous threshold showing that the movant is likely to prevail on the merits.

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In conclusion, we emphasize that district courts should still apply the familiar “fair chance of prevailing” test where a preliminary injunction is sought to enjoin something other than government action based on presumptively reasoned democratic processes. Only in a case such as this one, where a preliminary injunction is sought to enjoin the implementation of a duly enacted state statute, must district courts make a threshold finding that a party is likely to prevail on the merits. By re-emphasizing this more rigorous standard for demonstrating a likelihood of success on the merits in these cases, we hope to ensure that preliminary injunctions that thwart a state’s presumptively reasonable democratic processes are pronounced only after an appropriately deferential analysis.

## III.

The district court granted the preliminary injunction based solely on Planned Parenthood’s claim that § 7(1)(b) violates physicians’ First Amendment rights to be free from being compelled to speak. We review that decision for an abuse of discretion. . . . Taking into account the statutory definition, we find that Planned Parenthood’s evidence at the preliminary injunction stage does not demonstrate that it is likely to prevail on the merits.

We first examine the contours of the right not to speak. “[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.” . . .

In *Planned Parenthood of Southeast Pennsylvania v. Casey*, the Supreme Court held that

“a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion” implicates a physician's First Amendment right not to speak, “but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.” However, the Court found no violation of the physician's right not to speak, without need for further analysis of whether the requirements were narrowly tailored to serve a compelling state interest where physicians merely were required to give “truthful, nonmisleading information” relevant to the patient's decision to have an abortion. . . .

In the recent *Gonzales v. Carhart* decision, the Supreme Court reaffirmed in the context of abortion that “it is clear the State has a significant role to play in regulating the medical profession” and that “[t]he government may use its voice and its regulatory authority to show its profound respect for the life within the woman.” . . .

*Casey* and *Gonzales* establish that, while the State cannot compel an individual simply to speak the State's ideological message, it can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion, even if that information might also encourage the patient to choose childbirth over abortion. Therefore, Planned Parenthood cannot succeed on the merits of its claim that § 7(1)(b) violates a physician's right not to speak unless it can show that the disclosure is either untruthful, misleading or not relevant to the patient's decision to have an abortion.

\* \* \*

. . . The disclosure actually mandated by § 7(1)(b), in concert with the definition in § 8(4), is “[t]hat the abortion will terminate the life of a whole, separate, unique, living human being,” and that “human being” in this case means “an individual living member of the species of *Homo sapiens* ... during [its] embryonic [or] fetal age[ ].” The State's evidence suggests that the biological sense in which the embryo or fetus is whole, separate, unique and living should be clear in context to a physician, and Planned Parenthood submitted no evidence to oppose that conclusion. Indeed, Dr. Wolpe's affidavit, submitted by Planned Parenthood, states that “to describe an embryo or fetus scientifically and factually, one would say that a living embryo or fetus in utero is a developing organism of the species *Homo Sapiens* which may become a self-sustaining member of the species if no organic or environmental incident interrupts its gestation.” This statement appears to support the State's evidence on the biological underpinnings of § 7(1)(b) and the associated statutory definition. Planned Parenthood's only other evidence, Dr. Ball's affidavit, ignores the statutory definition of “human being.” Finally, this biological information about the fetus is at least as relevant to the patient's decision to have an abortion as the gestational age of the fetus, which was deemed to be relevant in *Casey*. As a result, Planned Parenthood cannot meet even the less rigorous requirement to show a fair chance of prevailing, much less the more rigorous requirement applicable here to show that it is *likely* to prevail, on the merits of its claim that the disclosure required by § 7(1)(b) is untruthful, misleading or not relevant to the decision to have an abortion.

Planned Parenthood also contends that ¶ 2 of the Act, requiring the physician to certify in writing that he or she “believes [the patient] understands the information imparted,” does not allow a physician to disassociate himself or herself from the required disclosure in § 7(1)(b). . . . Because Planned Parenthood has failed to demonstrate the requisite likelihood of success on its claim that the disclosure required by § 7(1)(b) is untruthful or misleading, it has not demonstrated that there is an ideological message from which physicians need to disassociate

themselves. Therefore, we need not reach the disassociation issue in the instant case.

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Given Planned Parenthood's failure to produce sufficient evidence to establish that it is likely to prevail on the merits of its compelled speech claim, we need not address the remaining *Dataphase* factors. In summary, the district court abused its discretion by failing to give effect to the statutory definition of “human being” in § 8(4) of the Act. . . .

\* \* \*

[Chief Judge Loken’s concurrence omitted]

MURPHY, Circuit Judge, with whom WOLLMAN, BYE and MELLOY, Circuit Judges, join, dissenting.

I respectfully dissent. In order to uphold an amendment to South Dakota's informed consent law which imposes unprecedented restrictions on women seeking abortions and unprecedented demands on their physicians, the court has bypassed important principles of constitutional law laid down by the Supreme Court. It has also found it necessary to revise the circuit standard for preliminary injunctions and to depart from established practice by not remanding for the district court to have the opportunity to apply the new standard to the constitutional issues raised by Planned Parenthood. Since appellants have not shown that the district court abused its discretion in issuing a preliminary injunction, its order should be affirmed.

## I.

The provisions of this Act go far beyond the informed consent laws which have been upheld by the Supreme Court and the courts of appeal against constitutional challenges. The unique features in the Act include the extent of its interference with the doctor patient relationship, the nature of the information it forces the attending physician to transmit to the woman patient, the requirement that doctors certify that their patient has understood the state's messages, and the provision that any question raised by a woman be attached to her personal and permanent medical record.

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The Act requires that physicians make unique statements to their patients unrelated to the intended medical procedure. Several of the provisions in the Act force physicians to advise their patients on metaphysical matters about which there is no medical consensus, likely violating the First Amendment prohibition against compelled speech and placing an undue burden on the exercise of a woman's constitutional right to abort a nonviable fetus.

Section 7 requires the attending physician to advise the patient in writing that an abortion “terminate[s] the life of a whole, separate, unique, living human being” with whom she enjoys an

existing constitutionally protected relationship, which ends with an abortion. The physician must also tell the patient that significant risks of an abortion include depression, suicide, and suicidal ideation. The patient must sign each page of the state's required messages, certifying that she understands them. Any questions she may ask or explanations she may seek, as well as the physician's responses, must be reduced to writing and placed in the patient's permanent medical record. After physicians have complied with these requirements, they must then certify their satisfaction that the patient has read the materials and that she "understands the information imparted." These are unique requirements, unlike those contained in other informed consent laws.

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## II.

. . . In the abortion context such reasonable regulation includes the state's prerogative to assert its "legitimate interests in the health of the woman and in protecting the potential life within her." For that reason a state may require physicians to provide objectively truthful and nonmisleading information before obtaining a patient's informed consent to an abortion. But if "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."

The challenged Act compels doctors to declare to their patients that "the abortion will terminate the life of a whole, separate, unique, living human being." The term "human being" lacks a particular scientific definition or medical meaning. . . .

In the context of abortion, the term "human being" has an overwhelmingly subjective, normative meaning, in some sense encompassing the whole philosophical debate about the procedure. . . .

\* \* \*

Notwithstanding a state's prerogative to require certain factual disclosures in the course of professional communications, the state may not "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." The Act crosses that constitutional line by requiring physicians to communicate metaphysical ideas unrelated to any legitimate state interest in regulating the practice of medicine. . . . Since the state can assert no legitimate interest in defending the compulsory communication of ideological statements which do not pertain to its regulation of the practice of medicine, these provisions can not withstand constitutional scrutiny.

\* \* \*

South Dakota's attempted regulation of the medical profession is different because it requires physicians to espouse theological or philosophical beliefs about which there is no medical consensus and which implicate no legitimate governmental regulatory interests. . . .

\* \* \*

The adjectives used in the Act to modify “human being” are not statutorily defined so they must be construed “according to [their] accepted usage and a strained, unpractical, or absurd result should be avoided.” A nonviable fetus is not “whole” in that it cannot maintain a separate life outside the woman's womb, and it neither “contain[s] all components or constituents” nor does it represent “a complete entity or system.” Likewise, “separate” in common usage means “detached,” “disconnected,” “existing independently,” or “not shared.” A fetus cannot be established to be a “separate” human being since it is physically attached to a woman by an umbilical cord and fully contained inside her body, a connection on which its very survival depends.

Although a legislature may choose to give words its own unique definition, it cannot establish by fiat that the term “human being” has only biological connotations, for the constitutional analysis of whether the mandated statements convey factual truths or contestable ideology is not controlled by the wording of the Act. . . .

To understand the constitutional issues before the court, it is important to look exactly at the words employed in § 7 . . . . While the majority contends that the attending physician would attach the Act's definition of “human being” to the required information to be transmitted, nothing in the statute instructs a physician to do that. Section 7(1) enumerates what the physician must tell the patient, and it contains no cross reference to the § 8 definition. There is no evidence in the record showing that a physician would go beyond the mandatory advisories in § 7 unless directed by the statute to do so, especially in light of the strict certification requirements and criminal penalties.

. . . Section 8(4) defines “human being” as “an individual living member of the species *Homo sapiens*, including the *unborn human being* during the entire embryonic and fetal ages *from fertilization to full gestation*.” Without acknowledging the elimination of the italicized portions of the definition, the majority asserts that the “truthfulness and relevance of the disclosure in § 7(1)(b) generates little dispute” once the statutory definition is taken into account. This pronouncement is quite amazing in light of the well established precept that the point at which human life begins is indeterminable as a legal matter.

The Act more than likely violates the First Amendment by compelling doctors to communicate the state's ideology since the statutory definition of “human being” incorporates the metaphysical viewpoint that a “human being” is “living ... from fertilization.” Statutes requiring doctors to tell their patients that a human being exists at conception conflict with the Supreme Court's admonition that a state may not adopt one theory of the beginning of life. The majority's attempt to save the statute by speculating that doctors will incorporate the definition in § 8(4) into the required script they must deliver cannot succeed since that definition is also constitutionally flawed.

The script physicians are compelled to give by § 7(1)(b)-“that the abortion will terminate the life of a whole, separate, unique, living human being”-incorporates a value judgment and therefore escapes scientific verification. Because the point at which a living human being comes into existence can no more be established in the law or in science than the proposition that a fetus has no soul or that abortion is not a sin, the majority places an unprecedented and impossible burden of proof on Planned Parenthood by requiring it to show that the state's forced message is “untruthful, misleading or not relevant to the patient's decision to have an abortion.” In contrast, *Casey* effectively placed the burden of proof on the state by declaring that “[i]f the information ... is truthful and not misleading, the requirement may be permissible.” The burden of proof

assigned by the majority presupposes that all speech is demonstrably either true or false, overlooking the vast expanse of ideas that lie beyond means of proof because they appeal to subjective notions of morality, religion, or aesthetics.

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Even if the physician were able to disclaim sponsorship of the state's message, the constitutional defects inherent in compelled ideological speech would not be cured. . . .

### III.

. . . Planned Parenthood also alleged that the Act violates the Fourteenth Amendment by creating an undue burden on a woman's constitutional right to terminate her pregnancy and by being unconstitutionally vague.

. . . Informed consent requirements prior to an abortion may be permissible only if they mandate the disclosure of "truthful and not misleading" information. The state may express in myriad ways its "respect for life, including life of the unborn," provided that its requirements "inform the woman's free choice, not hinder it." Procedures that "amount in practical terms to a substantial obstacle to a woman seeking an abortion" are an undue burden and therefore constitutionally prohibited.

The provisions mandated by §§ 7(1)(b)-(d) [are] . . . also more than likely impose an undue burden on a woman's decision to have an abortion before viability. That is because their apparent intent and probable effect is to place substantial obstacles in the way of a woman attempting to exercise her constitutional right to obtain an abortion. . . .

\* \* \*

Under the Act a woman is given a Hobson's choice: either to certify that she understands vague and ideological statements disguised as medical information or to carry her pregnancy to term. . . .

The requirement in § 7(1) ¶ 2 that any question a woman asks, as well as the doctor's response, must be recorded in writing and included in her own permanent medical record likely intrudes upon "the special relationship between patient and physician [ ... ] within the domain of private life protected by the Due Process Clause." The Act provides no protections to ensure that this interchange or the woman's medical records will be kept confidential and not be released to other individuals. . . . Conditioning a woman's right to obtain an abortion on her willingness to give up her private relationship with her doctor likely creates an undue burden on the woman's constitutional rights by deterring her from having an abortion.

Some of the advisories required by the Act are likely void for vagueness in violation of the due process clause, partly because they do not make clear exactly what is essential to obtain the patient's informed consent. . . . [T]he Act does not make clear what conduct may subject a physician to criminal prosecution. . . .

. . . The Act's reference to a constitutional relationship between the woman and her unborn child is unclear and undefined. . . .

Equally problematic from a vagueness standpoint is the requirement in § 7(1)(e) that the physician provide a written description of "all known medical risks of the procedure and the

statistically significant risk factors to which the pregnant woman would be subjected,” including “[d]epression and related psychological distress” and an “[i]ncreased risk of suicide ideation and suicide.” . . . Provisions such as these which fail to give a “person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute” have been found void for vagueness, especially “where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights.” A physician unsure of knowing how to comply with the Act might reasonably be expected to refuse to perform an abortion for fear of criminal liability.

. . . A learned commentator has pointed out that the § 7(1)(e) provisions “very likely . . . require physicians to disclose *information that is false*.” As a 2006 Congressional report on the subject pointed out, “there is considerable scientific consensus that having an abortion rarely causes significant psychological harm.”

The Act's broad mandate about psychological distress and suicide ideation is unlike the requirements in other informed consent laws found to be constitutional, which entrusted the communication of particular medical risks to the doctor's best professional judgment. By not allowing a doctor to omit the required disclosures in order to prevent serious adverse effects on a patient's health (in exceptional circumstances other than an emergency), the Act undercuts a physician's best medical judgment and discretion. . . .

#### IV.

In the process of reversing the district court, the majority apparently found it necessary to revise the circuit standard for preliminary injunctions established by our en banc court in *Dataphase* . . . .

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The majority's elevation of likelihood of success to a threshold requirement in cases challenging the constitutionality of a statute is not in keeping with Supreme Court precedent. . . .

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A singular focus on likelihood of success to the exclusion of the remaining *Dataphase* factors is also impractical, because an abbreviated inquiry emphasizing only one factor makes review of the denial of an injunction less efficient and reliable. . . .

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The pitfalls of the court's new and curtailed approach for legislative enactments are particularly apparent in this case because the Act more than likely violates constitutionally recognized fundamental rights of women seeking an abortion and of the attending physicians. Laws which infringe on fundamental rights come with a presumption of unconstitutionality, and the government bears the burden of showing otherwise. . . .

When the court sees fit to announce a new standard, it should adhere to its usual practice and remand the case so that the district court can apply the new test in the first instance. . . .

A remand is especially appropriate here, as this case has evolved since the intervenors

became parties after issuance of the preliminary injunction. . . .

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