No. 16-1140

IN THE

Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, D/B/A NIFLA, *et al.*,

Petitioners,

v.

XAVIER BECERRA, ATTORNEY GENERAL, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* ALPHA CENTER, A PREGNANCY HELP CENTER REGISTERED UNDER THE LAWS OF SOUTH DAKOTA IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the disclosures required by the California Reproductive FACT Act violate the protections set forth in the Free Speech Clause of the First Amendment, applicable to the States through the Fourteenth Amendment.

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INTEREST OF AMICUS CURIAE[1]

Alpha Center, a Pregnancy Help Center Registered Under the Laws of South Dakota: Alpha Center is a 501(c)(3) charitable corporation, maintaining an eight thousand square foot facility in Sioux Falls, South Dakota. Sioux Falls has the largest population of any city in South Dakota. South Dakota's only abortion clinic, run by Planned Parenthood, is located in Sioux Falls. Alpha Center has provided pregnancy help counseling and services for more than thirty-three years in Sioux Falls and is the largest pregnancy help center in the state. Typically, over the years, Alpha Center provided pregnancy services to between 2,000 and 3,000 women in a year. Over one thousand of these women seek pregnancy testing. Of the 500 to 750 women who test positive for pregnancy, about half indicate that they are considering, or someone is urging them, to have an abortion. Alpha Center provides counseling about what assistance is available to women who prefer to keep their children. Alpha Center provides parenting classes and provides clothing, cribs and information about financial assistance. Of the women who initially indicate that they are considering or being pressured into an abortion, about 85% of them carry the child to term and about 90% to 95% of these women exercise their right to keep and raise their children.

Alpha Center has created a warm and welcoming environment for the pregnant mothers. There are licensed

1. All parties received notice of amicus' intent to file this brief and have consented. No counsel for any party authored this brief in whole or in part and no person or entity other than amicus funded its preparation or submission.

nurses and social workers on staff and there is a sonogram machine on the premises, used under the supervision of a Medical Director, a practicing physician in Sioux Falls. There are twenty-two physicians who participate in Alpha center's doctor's certificate program. These doctors are located in many different communities in the state, and provide initial consultations for pregnant mothers without charge.

All of Alpha Center's services are provided to the women free of charge.

Alpha Center's main mission is to help a pregnant mother keep and maintain her relationship with her child. The services at Alpha Center are intended to provide a safe haven free from pressure for the mother to give up her parental rights. As a result, Alpha Center does not refer pregnant mothers to any facility or entity which is involved in terminating the mother's relationship with her child. Thus, Alpha Center does not refer women to abortion doctors or clinics.

In 2011, Alpha Center became one of the first two pregnancy help centers to be placed on the State Registry of Pregnancy Help Centers pursuant to South Dakota's Anti-Coercion law. That statute was designed to protect pregnant mothers from being coerced or pressured into an abortion they preferred not to have. To be placed on the registry maintained by the South Dakota Department of Health, a pregnancy help center: (1) cannot perform abortions and cannot have an affiliation with an organization that performs abortions (SDCL §34-23A-58(3)); (2) cannot refer women for abortions (SDCL §34-23A-58(4)); and (3) cannot place children for adoption

(SDCL §34-23A-58(8)). The purpose of the registered pregnancy help center is to provide a facility that focuses on the needs and desires of the pregnant mothers, and to help them exercise their right to raise their children.

Alpha Center also provides post-abortion counseling. Some of the counselors, and the founder of Alpha Center, are post-abortive women who understand the pressure placed upon pregnant women to have abortions, and understand the potential for abortion to have a devastating psychological harm for the mothers.

When Planned Parenthood sued the Governor and the Attorney General in 2005 asserting that South Dakota's newly enacted Informed Consent Abortion law violated the physician's First Amendment rights, Alpha Center intervened and participated fully in the entire litigation. Alpha center's concerns about the need for proper pre-abortion counseling and post-abortion trauma, and its work in those areas over the years were important to their participation in the litigation. They brought their experiences and the scientific literature to the attention of the court through their experts.

In 2005, South Dakota reaffirmed its reasonable patient disclosure standard (*See*, *Wheeldon v. Madison*, 374 N.W. 2d 367, 375 (S.D. 1985)), and its application to abortion procedures. SDCL §34-23A-1.7. Because of the extraordinary and unique nature of that particular medical procedure, the state imposed additional requirements to protect the pregnant mother's Fourteenth Amendment liberty interest in her relationship with her child. *See*, South Dakota's 2005 Abortion Informed Consent Statute, SDCL §34-23A-1.2 to 1.7; SDCL §34-23A-10.1(1), (2) & (3).

That South Dakota Informed Consent Statute was the subject of a constitutional challenge instituted by the only abortion clinic in the state in which the abortion providers claimed that the required disclosures violated the physicians' First Amendment rights. The state and Alpha Center, one of the two pregnancy help centers who intervened, successfully defended the statute, prevailing on all contested issues, but the litigation required the state and Intervenors to win three different U.S. Court of Appeals decisions, including decisions by two separate *en banc* panels. *See*, *Planned Parenthood of Minn, North Dakota, South Dakota, and Dr. Carol Ball, MD v. Gov. Mike Rounds, Alpha Center, et al.*, 530 F.3d 724 (8th Cir. 2008) (*en banc*) ("*Rounds I*"); *Planned Parenthood, et al. v. Rounds, Alpha Center, et al.*, 650 F. Supp. 2d 972 (Dist. SD, 2009); *Planned Parenthood, et al. v. Rounds, Alpha Center, et al.*, 653 F.3d 662 (8th Cir. 2011) ("*Rounds II*"); *Planned Parenthood, et al. v. Rounds, Alpha Center et al.*, 686 F.3d 889 (8th Cir. 2012) (*en banc*) ("*Rounds III*").

One provision of the South Dakota 2005 statute was that the physician had to disclose to the pregnant mother "that an abortion terminates the life of a whole, separate, unique, living human being." SDCL §34-23A-10.1(1)(a).

The court upheld that disclosure, holding that the burden was on the abortion provider to demonstrate that the disclosures were false, misleading or not relevant to the mother's decision. *Rounds I*, at 733-738. *Rounds I* found that the disclosure was a truthful statement of scientific fact, and was relevant to the decision of the pregnant mother. *Rounds I* is consistent with the standard of scrutiny in commercial speech cases enunciated in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626,

637, 650-651 (1985) and the decision of the U.S. Court of Appeals for the Third Circuit in *Planned Parenthood of S.E. Pa. v. Casey*, 947 F.2d 682, 705-706 (3rd Cir. 1991), *aff'd* in relevant part, 505 U.S. 833 (1992); *see, also, Texas Medical Providers Performing Abortion Services v. Lakey*, 667 F.3d 570 (5th Cir. 2012).

South Dakota and its registered pregnancy help centers have an interest in preserving a healthy and vibrant network of pregnancy centers which assist pregnant mothers to keep their rights and their relationship with their children when that is their true preference. The importance of the work of the pregnancy centers is reflected in the state legislature's 2011 Concurrent Resolution which proclaimed the need for, and importance of, these pregnancy centers. The resolution was adopted by both the Senate and the House of Representatives by a joint vote of 100 to 1. *See,* Senate Concurrent Resolution No. 1–A Concurrent Resolution Honoring Pregnancy Care Centers: http://www.sdlegislature.gov/Legislative_Session/Bills/Bill.aspx?File=SCR1ENR.htm&Session=2011&Version=Enrolled&Bill=SCR1

In 2012, an *en banc* panel of the United States Court of Appeals for the Eighth Circuit ruled that the requirement of South Dakota's statute that the abortion doctor must disclose that an abortion places a woman at increased risk for suicide ideation and suicide was constitutional because it was truthful and relevant to the decision of the pregnant mother. *Rounds III* (*en banc*).

In 2011, Alpha Center, in its capacity as a registered pregnancy help center, intervened in Planned Parenthood's attack on South Dakota's Anti-Coercion Abortion Statute.

See, SDCL §34-23A-53 to 62 (2011). That case is pending. The entire purpose of that statute, and the entire purpose of Alpha Center's services and counseling, like that of most pregnancy centers, is to help pregnant mothers keep their children if that is what they prefer, free from coercion, pressure, or undue influence from others, and to help provide what the mother needs to exercise her right to keep her relationship with her child.

Alpha Center finds a referral to an abortion facility, which acts to terminate the pregnant mother's relationship with her child, completely antithetical to the very purpose of the center and its fundamental mission.

SUMMARY OF ARGUMENT

Pregnant mothers come to pregnancy centers seeking counseling and assistance to help them keep their relationship with the children they carry. Often they come to find refuge from people pressuring them into having an abortion. California requires licensed pregnancy centers to advise these mothers that the state of California will provide them with free or low cost abortions, and to tell them where they can call to find out if they can obtain a free abortion. California Health and Safety Code §123472(a)(1).

The statute compels content based speech and requires the pregnancy center to give advice that is antithetical to the pregnancy center's mission and one that conflicts with the very reason that the mother seeks the help of the centers.

Under no circumstance would these pregnancy help centers provide and promote this information on their own

because the compelled disclosures operate to undermine their effort to help the pregnant mothers keep their relationship with their children and they are completely irrelevant to the particular services they provide.

The mission of pregnancy help centers in South Dakota and across the country is to provide counseling, education and assistance to pregnant mothers to help them maintain and keep their constitutionally protected relationship with their unborn children. SDCL §34-23A-54(4)&(5).

The abortion procedure terminates the life of a whole, separate, unique, living human being. SDCL §34-23A-10.1(1)(b).

An *en banc* panel of the United States Court of Appeals held that the state compelling that disclosure was constitutional and did not violate the First Amendment rights of the physician, because the statement was a statement of fact which was truthful, non-misleading and relevant. *Rounds I* (*en banc*). Upon remand, the U.S. District Court held that doctors performing abortions in South Dakota must use the precise language of the statutory disclosure, and should explain it. *Planned Parenthood, et al. v. Rounds, Alpha Center et al.*, 650 F.Supp.2d 972 (Dist. SD, 2009). A subsequent panel of the U.S. Court of Appeals affirmed that part of the District Court's decision. *Rounds II*.

Thus, an abortion is one method to terminate a pregnant mother's constitutionally protected relationship with her child.

Consequently, the pregnancy centers serve an essential role in protecting the mothers' parental rights. However, the California statute, in large measure, defeats the mission of the centers and undermines the help the mothers seek.

The pregnant mother who comes to the pregnancy centers as a safe haven to speak with understanding counselors who can help her keep her child and to resist the pressure to have an abortion, is immediately met with a message of who to call to terminate her relationship and obtain an abortion she does not want. It is a message hostile to the mother's needs and desires and it forces the pregnancy centers to deliver a message hostile to their very purpose.

California is compelling the pregnancy centers to deliver a message hostile to their mission, hostile to the pregnant mother's purpose in seeking their services, and irrelevant to the precise services the centers provide. In the process, the state effectively eliminates and suppresses the alternative voice of the centers which promote the mother's interest in her child's life, by enlisting them – against their will – to deliver that message which is hostile to the mother's desires and the center's purpose. That is the essence of viewpoint discrimination compelled speech, or, at the very least, the kind of content based compelled speech which is subjected to strict scrutiny and which requires a compelling state interest to justify it. *See*, *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 795 (1988); *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 642 (1994). Whether the message content is obvious – which we think it is – or whether it is subtle, is irrelevant. In either event, the compelled speech

is subject to strict scrutiny. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015).

California disapproves of the pregnancy centers' mission to encourage mothers to maintain their relationship with their children (JA85), preferring instead to support "forward thinking" programs which provide abortion services. JA84. Such targeting of particular views, rather than just the subject matter, is an even more blatant First Amendment violation. *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995) (*citing*, *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992)). The government must not regulate speech when, as here, "the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.*

The state has no legitimate interest in promoting abortion as a method for a pregnant mother to terminate her constitutionally protected relationship with her child. State promotion of a mother giving up her constitutionally protected liberty interest conflicts with the state's duty to protect that interest. The state certainly has no interest in promoting the termination of the life of a mother's child when she seeks help to keep that child. State promotion of the taking of the life of a human being conflicts with the state's duty to protect the life of all human beings. Even if the state had a legitimate interest in giving information to a woman who wants an abortion, the state has no legitimate interest in providing that information to a woman who does not want an abortion. The state has no interest of any kind to give a message about free abortions to a woman who seeks the sanctuary of a pregnancy center to avoid pressure to have an abortion.

LEGAL ARGUMENT

I. State Mandated Compelled Speech Which Is Antithetical to the Central Mission of Pregnancy Centers, Which is to Help Pregnant Mothers Keep and Maintain their Constitutionally Protected Relationship with Their Children, Violates the Free Speech Clause of the First Amendment, Applicable to the States through the Fourteenth Amendment

The mission of pregnancy help centers in South Dakota is to provide counseling, education and other assistance to pregnant mothers to help them maintain and keep their constitutionally protected relationship with their unborn children. SDCL §34-23A-54(4) & (5).[2] South Dakota expressly recognizes that a pregnant mother has an existing relationship with the child she carries. SDCL §34-23A-1.3. South Dakota has passed a number of laws which have as their purpose, the protection of the pregnant mother's fundamental liberty interest in her relationship with the child she carries. *See*, *generally*, SDCL §34-23A-1.3, 1.4, 1.5.[3]

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2. While South Dakota has expressly set forth this mission in its statutory law, this is essentially the primary mission of all pregnancy help centers across the nation. Heartbeat International has identified 4,137 such centers in the United States. Heartbeat International, *Worldwide Directory of Pregnancy Help*, search by organization, name, country, state/province: U.S. only,https://www.heartbeatservices.org/worldwide-directory (last visited January 12, 2018).

3. "The Legislature finds that pregnant women contemplating the termination of their right to their relationship with their unborn children, including women contemplating such termination by an abortion procedure, are faced with making a profound decision most

South Dakota recognizes that an abortion procedure, whether surgical or chemically induced, terminates the life of a whole, separate, unique, living human being. SDCL §34-23A-1.2. Consequently, the state requires a physician, and those assisting in an abortion, to disclose to the pregnant mother the fact "that the abortion will terminate the life of a whole, separate, unique, living human being." SDCL §34-23A-10.1(1)(b).

An *en banc* panel of the United States Court of Appeals held that the state compelling that disclosure was constitutional and did not violate the First Amendment rights of the physician, because the statement was a statement of fact which was truthful, non-misleading and relevant. *Rounds I* (*en banc*). Upon remand by the Eighth Circuit, the U.S. District Court held that doctors performing abortions in South Dakota must use the precise language of the statutory disclosure, and should explain it. *Rounds,* 650 F. Supp. 972. A subsequent panel of the U.S. Court of Appeals affirmed that part of the District Court's decision. *Rounds II*.

Thus, the pregnancy help centers have as their mission the protection of the pregnant mother's constitutional right to her relationship with her child. The function and role of the abortion providers is the complete antithesis of that mission: the termination of the mother's constitutionally protected relationship.

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often under stress and pressures from circumstances and from other persons, and that there exists a need for special protection of the rights of such pregnant women, and that the State of South Dakota has a compelling interest in providing such protection."

As a result, the standard of review for the pregnancy help centers, in the context of compelled speech, is far different from the standard applicable to the commercial speech of physicians in the context of medical providers seeking consent for an abortion.

A. The Nature of the Decision Faced by the Pregnant Mother

1. The Pregnant Mother's Fundamental Right to Continue and Maintain her Relationship with her Child

> "A Mother's unique relationship with her child during pregnancy is one of the most intimate and important relationship, and worthy of protection. The unique bond between mother and child creates a human relationship that may be the most rewarding in all of the human experience ... Our laws are based upon the premise that the mother's intrinsic natural right [to that relationship] is fundamental, and its termination is a great loss to the mother." Report of the South Dakota Task Force to Study Abortion (2005) (hereafter "SD Report"), p. 55.

The relationship between parents and their children has always been protected as fundamental. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); *Santosky v. Kramer*, 455 U.S. 745, 753, 759 (1982). The source of this liberty interest is the intrinsic natural rights which derive by virtue of the existence of the individual; not rights conferred by government. *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977); *Moore v. City of East Cleveland, supra*. This is an interest in the

"companionship" with one's children. *Santosky*, 455 U.S. at 759; *Lassiter v. Department of Soc. Serv.*, 452 U.S. 18, 27 (1981); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). The entitlement to protection of this right is self-evident. *Lehr v. Robertson*, 463 U.S. 248 (1983); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

Since the interest protected is the interest in the relationship itself, the mother's interest in her relationship with her child is always protected as fundamental, even during pregnancy. The majority in *Lehr v. Robertson*, 463 U.S. 248 (1983), adopting the reasoning of Justice Stewart's dissent in *Caban*, 441 U.S. 380, 398-99 (1979), and that of Justice Stephens, 441 U.S. at 403-405, emphasized the difference in the father's relationship and that of the mother: "The mother carries and bears the child, and in this sense her parental relationship is clear." *Lehr* at 259-60; 260, n.16. *Lehr* thus recognized the mother's protected interest because during pregnancy the mother has an actual relationship with her child. To establish that she has a protected Due Process Right, the pregnant mother must simply have an existing relationship with the child, and it is the "biological" relationship which controls, not the "legal" status accorded by a state. *Glona v. Amer. Guar. & Liab. Ins. Co.*, 391 U.S. 73, 75-76 (1968).

In contrast to the birth mother, the genetic father does not always enjoy constitutional protection. The mere fact that a man is genetically related does not give rise to a liberty interest under the Fourteenth Amendment. *See and compare, Stanley*, 405 U.S. 645; *Caban*, 441 U.S. 380; *Quilloin v. Alcott*, 434 U.S. 246 (1978); *Lehr*, 463 U.S. 248. The difference in the reproductive roles of the mother who carries the child and a person who "fathers" the child not only distinguish how their reproductive rights can be

established, but justifies different treatment under the Fourteenth Amendment. *See*, e.g. *Tuan Anh Nguyen v. Immigration and Naturalization Services*, 523 U.S. 53, 62-73 (2001) (citing *Lehr*, *supra*).

Constitutional protection of the mother's right to her relationship with her child has taken different forms. For instance, a state court cannot enter an order terminating those rights unless the basis for such termination is proven by clear and convincing evidence. *Santosky*, 485 U.S. 745 (1982). That higher standard must be met even when the state is not a party to the action because it is the state order which terminates the mother's rights. *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

2. The Social Question and the Nature of the Services of the Pregnancy Centers

The first and most important question the pregnant mother faces is the primary and central question of whether she should keep her relationship with her child. *See*, SDCL §34-23A-1.5. Having adequate counseling as the mother contemplates that question is essential to the mother's needs, interests, and rights. S.D. Report, pp. 19-22. Only after she makes a decision of whether she can and should keep her relationship with her child, and *only* if the pregnant mother decides that she must give up and terminate her relationship with her child, does the secondary question of what method of termination she should employ arise. Only then does the mother face the question of whether termination should be by a court order in an adoption proceeding, with all of its safeguards against uninformed and involuntary termination; or by terminating that relationship by an abortion. The 2011 South Dakota Anti-Coercion Abortion Statute states, in part:

> "It is a necessary and proper exercise of the state's authority to give precedence to the mother's fundamental interest in her relationship with her child over the irrevocable method of termination of that relationship by induced abortion." SDCL §34-23A-54(5).

The central mission of pregnancy help centers is to assist the mother to keep her relationship with her child by providing protection against pressure and coercion, and information about all financial and other assistance which is available to her if she prefers to keep her child, including assistance from the pregnancy help centers.

Thus, the role of the pregnancy help centers which assist women in exercising their fundamental right to maintain their relationship with their child is the polar opposite of the abortion providers' purpose of terminating that relationship.

B. The Nature of the Abortion Procedure: Termination of the Mother's Constitutionally Protected Relationship with Her Child by Terminating the Life of the Child

By its nature, an abortion terminates the life of a whole, separate, unique, living human being. *Rounds I* (*en banc*).

South Dakota's Informed Consent Abortion Law requires a physician to disclose the nature of the abortion procedure by disclosing to the pregnant mother "that an abortion will terminate the life of a whole, separate, unique, living human being." SDCL §34-23A-10.1(1)(b). The Planned Parenthood affiliate which performs

abortions in Sioux Falls, South Dakota, sued the state in an action brought pursuant to 42 U.S.C. §1983 alleging that the compelled disclosure violated the physician's Fourteenth Amendment right of free speech. An *en banc* court of the U.S. Court of Appeals for the Eighth Circuit held that the disclosure was a statement of scientific fact – not a statement of ideology as maintained by Planned Parenthood – and that it was a truthful statement of fact relevant to the decision of a pregnant mother contemplating whether or not to sign a consent for an abortion.

It is well established that modern medicine recognizes that a physician who has a pregnant woman as a patient, has two separate patients, the mother and her unborn child and the physician has a duty to both. American College of Obstetricians & Gynecologists, ETHICS IN OBSTETRICS AND GYNECOLOGY 34 (2nd ed. 2004) ("The maternal-fetal relationship is unique in medicine ... because both the fetus and the woman are regarded as patients of the obstetrician"); Harrison, M.R., Golbus, M.S., Filly, R.A. (Eds); THE UNBORN PATIENT, 2nd Ed.; W.B. Saunders, Phil. 1991. Numerous courts have recognized this concurrent duty to both mother and child in utero, and recognize that the doctor has a duty to the unborn child, as with all patients, to disclose the risks and consequences of the procedure to the child by informing the mother of those risks, and the mother makes the decision for herself and her child.[4]

4. The lead case is *Hughson v. St. Francis Hospital*, 92 A.D.2d 131, 132-33, 459 N.Y.S.2d 814, 816 (1983) ("both the mother and child *in utero* may each be directly injured and are each owed a duty, independent of the other"). Courts have specifically recognized this concept in the informed consent context, stating that the doctor has a duty to provide the mother – as surrogate for the child – of the

Thus, when a physician proposes to perform an abortion, the physician is proposing to terminate the life of a separate human being, who is one of the physician's patients. An abortion is not a medical procedure in the sense that it is not a procedure to cure or treat an illness or adverse medical condition. It is terminating the life of the child as a method to terminate the mother's relationship with her child.

If a pregnant mother feels that she cannot or should not raise her unborn child, there is one legal method other than abortion for the mother to terminate her relationship with her child: termination by a court order in the context of an adoption after a court hearing and findings of fact in a court of law.

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information regarding the consequences and risks the proposed treatment would have for the child. *Id.* ("encompassed within the independent duty flowing between the doctor and infant *in utero* is the obligation of the physician to obtain informed consent from the parent"); *see also Harrison v. United States*, 284 F.3d 293, 301 (1st Cir. 2002) (Massachusetts law); *Roberts v. Patel*, 620 F.Supp. 323, 326 (N.D. Ill. 1985); *Walker v. Mart*, 164 Ariz. 37, 41, 790 P.2d 735, 739 (1990); *In re A.C.*, 573 A.2d 1235, 1246 n. 13 (D.C. 1990); *Nold v. Pinyon*, 272 Kan. 87, 105, 31 P.3d 274, 289 (2001); *Draper v. Jasionowski*, 372 N.J.Super. 368, 376, 858 A.2d 1141, 1146 (N.J. App. Div. 2004); *Ledford v. Martin*, 87 N.C.App. 88, 91, 359 S.E.2d 505, 507 (1987). Other cases have recognized this two-patient concept in other malpractice contexts. *See*, e.g., *Burgess v. the Superior Court of Los Angeles*, 2 Cal.4th 1064, 1076, 831 P.2d 1197, 1203, 9 Cal.Rptr.2d 615, 621 (1992); *Ob-Gyn Associates of Albany v. Littleton*, 259 Ga. 663, 663, 386 S.E.2d 146, 147 (1989). *See*, also, *In re Certification of Question of Law from U.S. District Court (Farley)*, 387 N.W.2d 42 (S.D. 1986) (holding that a wrongful death malpractice action can be brought for the death of a stillborn child).

In the context of adoption, every effort is made to protect the mother's constitutional liberty interest in maintaining her relationship with her child – termination of the mother's rights is treated as the last option, and every effort is made to insure that the mother has every opportunity to avoid waiving her constitutional right to keep her child. For instance, under South Dakota's adoption laws, the petition which represents the waiver by a mother of her rights cannot be filed, at the earliest, until five days after the birth of her child. S.D.C.L. 25-5A-4. Even if the pregnant mother had decided to give up her rights early in pregnancy, no written document evidencing that decision is enforceable in law. The mother is given the entire gestational period to change her mind. The petition must set forth the reasons why the mother wants to give up her rights, and an express written consent to the termination of her rights. S.D.C.L. 25-5A-6 (5) & (7). To help insure that her decision is informed, the law requires that the mother receive counseling from an adoption agency, South Dakota DSS or a private counselor before she consents to giving up the rights. S.D.C.L. 25-5A-22. The counselor must determine that the waiver of rights is voluntary without undue influence of others; that all other alternatives were examined; must explain likely emotional losses involved; must disclose the legal right to counsel; must discuss the permanent consequences of the decision; and must make an assessment of the ability of the parent to understand the consequences. S.D.C.L. 25-5A-23. This counseling must take place at least fifteen days before the mother petitions the court. A report must be submitted to the court certifying that all of these matters were discussed with the mother and the mother must sign a statement verifying that she understood the counseling. S.D.C.L. 25-5A-24.

The court must then hold a hearing before it can terminate the mother's rights. S.D.C.L. 25-5A-9. That court must determine that the consent is knowing, informed and voluntary. *See*, *e.g.*, *Matter of D.D.D.*, 294 N.W.2d 423, 426 (1980). *In the Matter of J.M.J.* 368 N.W. 2d 602, 606-607 (S.D. 1985) the S.D. Supreme Court ruled that a judgment terminating a mother's rights should be vacated, even if the trial court found that her decision was informed and voluntary, if the record does not support the court's finding. The law even allows the mother under certain circumstances to withdraw her consent. In *Matter of Everett*, 286 N.W.2d 810 (S.D. 1979).

Thus, in the adoption context a mother must be fully counseled about how she can keep her child, cannot give up her rights until after the birth of her child, and her rights cannot be terminated except by a court order entered by a judge following a hearing in which the court concludes, upon an adequate record, that the mother's waiver of her rights was informed, knowing and voluntary. California has similar protections for women in the adoption context. In California, a pregnant mother voluntarily surrendering her rights in an adoption is not bound by an agreement she signs before the birth of the child. Only an agreement signed after she leaves the hospital following the child's birth can be used as a basis to terminate her relationship with the child. Cal. Fam. Code §8801.3(b)(2). Even if the mother signs such a post-birth consent, the mother has thirty days to revoke the consent. (Fam. Code, §8814.5(a). The mother can request immediate return of the child. (Fam. Code, §8815(b).

By contrast, the pregnant mother who goes to an abortion clinic often does not know her child already exists

and that she has a constitutional right she is giving up. Typically, the decision is made by the pregnant mother in a single day. Unlike promising to give up her rights in an adoption, the abortion is totally irrevocable. This decision – which may be the most important decision she makes in her entire life – is made without her receiving any meaningful counseling.

In short, the essential difference between the pregnancy center and the abortion provider is that the pregnancy help center is providing help to the mother that increases her ability to exercise her constitutional right to preserve and maintain her relationship with her child; while the abortion provider irrevocably terminates her constitutionally protected relationship, usually in a single day, in a short span of only hours, and without adequate counseling.

The two missions are polar opposites, and the purpose of an abortion is the very antithesis of the central mission of the pregnancy centers.

C. The Traditional Standards Applicable to Required Disclosures Made by a Physician Before Obtaining Consent for a Medical Procedure

All states require a physician to obtain a written consent before the physician can perform a medical procedure on a patient, and failure to obtain such consent exposes the physician to liability for a battery. *See*, e.g. *Cobbs v. Grant*, 502 P.2d 1, 7 (Cal.1972) ("Where a doctor obtains consent of the patient to perform one type of treatment and subsequently performs a substantially

different treatment for which consent was not obtained, there is a clear case of battery"); *Howard v. UMDNJ*, 800 A.2d 73, 80 (N.J. 2002); *see, also, Duncan v. Scottsdale Medical Imaging*, 70 P.3d 435, 439 (Ariz. 2003) (*en banc*); *Humboldt General Hospital v. The Sixth Judicial District Court*, 326 P.3d 167, 171 (Nev. 2016).

Thirty-five states and the federal government now have fetal homicide statutes making it a criminal homicide to kill an unborn child. In twenty-six of these jurisdictions, including South Dakota, killing an unborn child at any age after conception is a homicide. Consequently, in these states (and in the other ten jurisdictions depending upon the age of the "fetus"), failure to obtain a written consent exposes a physician to conviction of not just battery, but for homicide.[5]

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5. *See,* Alabama, Ala. Code 1975 §13A-6-1 (2001) (conception); Alaska, AS. §11.41.150 (2006) (conception); Arizona, Ariz. Rev. Stat §13-1103 (A)(5); Arkansas, ARST §5-1-102(13)(B)(i)(ii)(iii) (2013) (conception); California, Cal. Penal Code §187(a) (1970) (fetal stage); Federal, 18 U.S.C. §1841(C) (2004) (conception); Florida, F.S.A. §782.09 (2005) (quickening); Georgia, Ga. Code Ann. §16-5-80 (2006) (conception); Idaho §§11-4001; 18-4006 (2006) (conception); Illinois, 720 ILCS 5/9-1.2 (2010) (conception); Indiana, IC 35-42-1-3 *et seq.* (1997) (viability); Iowa, I.C.A. §707.8 (1996) (conception); Kentucky, KRS §§507A.010, 507A.020 (2004) (conception); Louisiana, LSA-RS Ann §14:32.5 *et seq.* (2006) (conception); Massachusetts, *Comm. v. Crawford*, 722 NE.2d 960 (Mass. 2000) (viability); Michigan, M.C.L.A. §750.322 (1970) (quickening); Minnesota, M.S.A. §609.266 *et seq.* (2007) (conception); Mississippi, Miss. Code. Ann. §97-3-37 (2011) (conception); Missouri, V.A.M.S. 1.205 (Mo. 1988) (conception) and *State v. Rollen*, 133 SW.3d 57 (2003); Nebraska, Neb. Rev. St. §28-388 *et seq.* (2002) (conception); Nevada, N.R.S. 200.210 (1995) (quickening); New York, McKinney's Penal Law §125.00 (24 weeks pregnant); North Carolina, N.C.G.S.A. §14-23.1

There are two general standards for physician disclosure under the laws of the various states, with some modest variations. The older standard is the "professional standard" in which a doctor must disclose the risks of a proposed procedure which practitioners determine should be disclosed. *See*, *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972).

Canterbury introduced the newer standard of disclosure, the "reasonable patient standard," under which the physician must disclose the nature of the procedure, all of the risks of the procedure, and the alternatives that a reasonable patient would consider relevant to the patient's decision. *See*, e.g. *Cobbs v. Grant*, 502 P.2d 1, 10-11 (Cal. 1972); *Largey v. Rothman*, 540 A.2d 504, 506 (N.J. 1988); *Wheeldon*, 374 N.W. 2d at 375; *Sard v. Hardy*, 379 A.2d 1014, 1022 (Md. Ct. of App. 1977); *Scott v. Bradford*, 606 P.2d 554, 558 (Okla. 1979); *Downs v. Trias*, 49 A.3d 180, 186 (Con. 2012); *Dennis v. Jones*, 928 A.2d 672, 676 (D.C. Ct. of App. 2007).

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et seq. (2011) (conception); North Dakota NDCC 12.1-17.1-02 *et seq.* (1987) (conception); Ohio, R.C. §2903.01 *et seq.* (1996) (conception); Oklahoma, 21 Okl. St. Ann §691 (2006) (conception); Pennsylvania, 18 Pa. C.S.A. §106 (1997) (conception); Rhode Island, Gen. Laws 1956 §11-23-5 (1975) (quickening); South Carolina, Code 1977 §16-3-1083 (2006) (conception); South Dakota, SDCL §22-16-1.1 (1995) (conception); Texas, V.T.C.A. Penal Code §1.07, 19.01-19.06 (2011) (conception); Utah, U.C.A. 1953 §76-5-201 *et seq.* (2010) (conception); Virginia, VA Code Ann. §18-2-32.2 (2004) (fetal stage); Washington, Wash Rev. Code Ann. §9A.32.060 (2004) (quickening); West Virginia, W. Va. Code §61-2-30, 61-2-1, 61-2-4, 61-2-7 (2005) (conception); Wisconsin, W.S.A. 940.04 *et seq.* (2012) (quickening); and Wyoming, W.S. 1977 §6-2-109 (2010) (conception).

Uninformed consent is a negligence concept, being a breach of a duty. In "reasonable patient" jurisdictions, there is no need to prove the standard of care by expert testimony – unlike in most professional malpractice cases – because what a reasonable patient would want to know is a fact question for the jury. *See,* e.g. *Cobbs*, *supra; Largey, supra; Canterbury, supra*.

Some states still adhere to the "professional standard" of negligence in obtaining a consent for a medical procedure. *See*, e.g. *Whittington v. Mason*, 905 So.2d 1261, 1266 (Miss. 2005); *Laui v. NYU Hospital Center*, 133 AD. 3d 830, 832 (N.Y. App. Div. 2015); *Fain v. Smith*, 479 So.2d 1150, 1151 (Ala. 1985); *Gorab v. Zook*, 943 P.2d 423, 427(Ga. 1997); GA Code ANN. §31-9-6.1 (Georgia Statutory Law); *Anderson v. Hollingsworth*, 42 P.3d 228, 231 (Idaho 2002).

In "professional standard" jurisdictions, in order to establish the standard of care with respect to the physician's duty to disclose before taking a consent, the plaintiff patient must have an expert testify to what the accepted standard was in the profession. *See,* e.g. *Whittington, supra; Laui v. NYU, supra.*

Thus, the states have always regulated the medical profession and have imposed standards of conduct upon physicians before they can take a written consent from a patient before performing a medical procedure.

However, the abortion procedure is unique and there are far more interests of the mother and the state at stake when the physician proposes to perform an abortion: (1) the procedure terminates the mother's constitutionally

protected interest in her relationship with her child; (2) the procedure, by its nature, deliberately terminates the life of a human being, which would constitute a homicide if a written consent were not obtained; (3) in the overwhelming majority of cases, no adverse medical condition is being "treated;" and (4) the mother, because of the death of the child and termination of her right to her relationship, is placed at increased risk for suicide ideation and suicide. *Rounds III (en banc).*

Therefore, the state's interest in compelling accurate and complete information before a physician takes a consent for an abortion, and its interest in insuring that the consent is truly voluntary, is greater than in any other medical procedure.

D. State Mandated Disclosures Imposed upon Physicians in Connection with Proposed Medical Treatment, Including Abortion Procedures, Are Subject to Simple Rational Basis Scrutiny, So That it Is Sufficient That the Disclosure Is True, Non-Misleading and Relevant to the Patient's Decision

The U.S. Court of Appeals for the Third Circuit held that a physician could be required by a state to make certain disclosures to a pregnant mother before the physician could take a written consent for an abortion from the mother.

To successfully challenge the state's mandate, an abortion doctor would have to show that the specific disclosure was untruthful, misleading, or not relevant to the mother's decision pertaining to the specific medical procedure involved. *Casey*, 947 F.2d at 705-706.

In affirming the Third Circuit, the United States Supreme Court did not impose a greater standard of scrutiny.

When imposing the rational basis standard of scrutiny, the Third Circuit followed the exact same standard earlier announced by the U.S. Supreme Court in professional commercial compelled speech cases. *Zauderer*, 471 U.S. at 637, 650-651 (1985).

Subsequent to the *Casey* decision, two other circuit courts followed the standard imposed by the Third Circuit in *Casey*. In *Rounds I*, an *en banc* panel of the Eighth Circuit held that as long as the disclosure imposed upon an abortion doctor was relevant to the procedure, the disclosure will be upheld if it embodies a true statement of fact. That standard was followed by the Fifth Circuit in *Lakey*, 667 F.3d 570 and again by the Eighth Circuit by a second *en banc* court in *Rounds III*; *but see*, *Stuart v. Camnitz,* 774 F.3d 238 (4th Cir. 2014).

The critical fact that resulted in imposition of the rational basis standard is that the disclosure in question related directly to a particular procedure the physician intended to perform. The doctor has no obligation to disclose risks or other information which relate to other kinds of procedures and matters not before the physician.

E. California's Statute Which Compels the Pregnancy Centers to Advise Pregnant Mothers of Information about How to Obtain an Abortion Is Antithetical to the Central Mission and Purpose of the Pregnancy Centers and the Reasons Why the Pregnant Mothers Seek Their Help. The Statute Violates the Free Speech Rights of the Pregnancy Center, Their Personnel and Those of the Mothers Guaranteed by the Fourteenth Amendment

Pregnant mothers come to California pregnancy centers seeking counseling and assistance to help them keep their relationship with the children they carry. Often they come to find refuge from people pressuring them into having an abortion. California requires licensed pregnancy centers to advise these mothers that the state of California will provide them with free or low cost abortions, and to tell them where they can call to find out if they can obtain a free abortion. California Health and Safety Code §123472(a)(1).

The statute compels content based speech which promotes a view point and requires the pregnancy center to give advice that is antithetical to the pregnancy center's mission and one that conflicts with the very reason that the mother seeks the help of the centers.

Under no circumstance would these pregnancy help centers promote this information on their own because the compelled disclosures operate to undermine their effort to help the pregnant mothers keep their relationship with their children and they are completely irrelevant to the services they provide. The abortion procedure terminates

the pregnant mothers' relationship with their children, the very result the mothers seek to avoid when they seek the help of the pregnancy centers. The abortion procedure terminates the life of a living human being, an act that violates the moral conscience of the pregnancy center personnel, and the disclosure compels them to promote an act repugnant to their conscience. The pregnant mother who comes to the pregnancy center as a safe haven to speak with understanding counselors who can help her keep her child and to resist the pressure to have an abortion, is immediately met with a message of who to call to terminate her relationship and obtain an abortion she does not want. It is a message hostile to the mother's needs and desires and it forces the pregnancy centers to deliver a message hostile to their very purpose.

It is axiomatic that in scrutinizing the constitutionality of a state statute which controls speech the court must first determine the appropriate level of scrutiny and identify the state's interest to determine if it satisfies that level of scrutiny.

Once we identify the nature of the abortion procedure – the termination of the mother's relationship with her child by terminating the child's life – the lack of any state interest becomes clear. The state has no legitimate interest in promoting the termination of a mother's constitutionally protected relationship with her child. Neither does it have an interest in promoting the killing of her child.

Whatever interest the state may have in letting a woman who wants an abortion know that she may qualify for a free or low cost abortion, the state has no interest in providing that information to women who do not seek

an abortion, women who didn't want an abortion, and women who have sought the help of a pregnancy center precisely because she wants help and advice to keep her relationship with her child, and be free from pressure to have an abortion.

The Act operates to compel pregnancy centers to communicate facts in furtherance of a message they find morally objectionable, that is antithetical to their *raison d'être*, and for which the state has no legitimate interest: that a woman should immediately and irrevocably terminate her relationship with her child by terminating that child's life. As such, it survives no level of judicial scrutiny, much less the strict scrutiny applicable to such content based and viewpoint discriminatory compelled speech.

1. The Act Is Content-Based on its Face, and Therefore Subject to Strict Scrutiny

California is compelling the pregnancy help centers to deliver a message hostile to their mission, hostile to the pregnant mother's purpose in seeking their services, and irrelevant to the precise services the centers provide. In the process, the state effectively eliminates and suppresses the alternative voice of the center which promotes the mother's interest in her child's life, by enlisting them – against their will – to deliver that message which is hostile to the mother's desires and the center's purpose. That is the essence of viewpoint discrimination compelled speech, or, at the very least, the kind of content based compelled speech which is subjected to strict scrutiny and which requires a compelling state interest to justify it. *See*, *Riley*, 487 U.S. at 795; *Turner Broadcasting System, Inc.*,

512 U.S. at 642. Whether the message content is obvious – which we think it is – or whether it is subtle, is irrelevant. In either event, the compelled speech is subject to strict scrutiny. *Reed*, 135 S. Ct. at 2227.

For the state to force the pregnancy centers to deliver a message that is relevant only to women who want an abortion is offensive to the rights of the centers and the women in equal measure. It forces the pregnancy centers to have a discussion that is disruptive to the one it normally conducts, and one that is contrary to the purpose of the mother's visit to the center. That mandate disturbs the free communication of the pregnancy centers "on matters of public concern." *Evergreen v. City of New York*, 740 F.3d 233, 250 (2nd Cir. 2014). The state is capable on its own of informing women of the information they wish to impart. Instead, the state conscripts the pregnancy centers to convey the state's message which can be made without their assistance (*Evergreen*, at 250), and the state compels the disclosures to be delivered in a totally inappropriate time and place.

"Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 135 S. Ct. at 2227 (2015) (citing, e.g. *Sorrell v. IMS Health, Inc.*,131 S.Ct. 2653, 2663-2664 (2011); *Carey v. Brown*, 447 U.S. 455, 562 (1980)). Telling a pregnant mother where to go to get information about an abortion clearly consists of speech which conveys a message. *See*, *Reed*, 135 S. Ct. at 2227.

Laws mandating speech which "a speaker would not otherwise make" are content-based regulations subject

to strict scrutiny. *Riley*, 487 U.S. at 795 (1988); *Turner Broadcasting System, Inc.*, 512 U.S. at 642 (1994); *see also*, *Reed*, 135 S. Ct. at 2227.

2. The Act Targets a Specific Class Based upon the Message That Class Conveys – One Intended to Help Mothers Keep Their Children – Making It a Content-Based Regulation Subject to Strict Scrutiny.

The Act effectively applies only to pro-life pregnancy centers. Only clinics providing pregnancy-related services which do not participate in government programs that provide abortion-related services fall within the Act's ambit. Petitioner's brief adequately explains that fact at some length. *See,* Petitioner's Brief, pp. 8-14; 31-34.

"[A] speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Reed*, 135 S. Ct. at 2227 (2015) (*citing*, *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 537 (1980)).

The Act is content-specific, because it cannot be "justified without reference to the content of the regulated speech." *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293, (1984). Most offensive is that it forces a message contrary to the mission of the centers in order to suppress their message and force conformity to the message the state wishes to promote. Therefore, it is subject to strict scrutiny.

3. The Act Is Subject to Strict Scrutiny as a Viewpoint Discriminatory Law Because the Legislative Record Reveals the Animus Which Motivated the Bill's Enactment

The legislative record – although unsupported by any fact witnesses, expert testimony, or admissible evidence concerning the pregnancy centers' practices whatsoever – reveals the legislature's hostility to pregnancy centers, whose existence was deemed to be "unfortunate." JA84. Clearly, the Act was occasioned by the government's disagreement with the pregnancy centers' message. It is, therefore, content-based and subject to strict scrutiny. *Reed*, 135 S. Ct. at 2227 (*citing*, *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

The state disapproves of the pregnancy centers' mission to encourage mothers to maintain their relationship with their children (JA85), preferring instead to support "forward thinking" programs which provide abortion services. JA84. Such targeting of particular views, rather than just the subject matter, is an even more blatant First Amendment violation. *Rosenberger*, 515 U.S. at 829 (*citing*, *R.A.V.*, 505 U.S. at 391). The government must not regulate speech when, as here, "the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* (*citing*, *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983)).

Strict scrutiny is properly applied "to facially content-based regulations of speech… when there is any 'realistic possibility that official suppression of ideas is afoot.'" *Reed*, 135 S. Ct. at 2237 (Kagan, concurring) (*citing*, *Davenport*

v. Washington Ed. Assn., 551 U.S. 177, 189 (2007) (*quoting*, *R.A.V.*, 505 U.S. at 390).

Such is the case here.

By applying only to pregnancy centers who may be forced to shut down rather than comply with the Act's compelled speech requirements, the law serves to affect, alter and perhaps even eliminate discussion of an entire topic – how women can be assisted in maintaining their relationship with their children. Such content discrimination "raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace." *R.A.V.*, 505 U.S. at 387 (*quoting*, *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991);

4. The Act Does Not Advance Any Legitimate State Interest, and So Fails to Meet Any Standard of Constitutional Scrutiny

To survive strict scrutiny, the Government must prove that the compelled speech is narrowly tailored to further a compelling state interest. *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721, 734 (2011).

The state has no legitimate interest in promoting abortion as a method for a pregnant mother to terminate her constitutionally protected relationship with her child. State promotion of a mother giving up her constitutionally protected liberty interest conflicts with the state's duty to protect that interest. The state certainly has no interest in promoting the termination of the life of a mother's child when she seeks help to keep that child. State promotion

of the taking of the life of a human being conflicts with the state's duty to protect the life of all human beings. Even if the state had a legitimate interest in giving information to a woman who wants an abortion, the state has no legitimate interest in providing that information to a woman who does not want an abortion. The state has no interest of any kind to give a message about free abortions to a woman who seeks the sanctuary of a pregnancy center to avoid pressure to have an abortion.

In addition, the state has no legitimate interest in interfering with the lawful and competent counseling provided by the pregnancy centers.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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