FIRST AMENDMENT — COMPELLED SPEECH — EIGHTH CIRCUIT APPLIES *PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA V. CASEY* TO SOUTH DAKOTA "SUICIDE ADVISORY." — *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 686 F.3d 889 (8th Cir. 2012) (en banc).

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[1] the Supreme Court affirmed the government's power to compel certain speech acts from physicians in the course of ensuring informed patient consent to abortion. The Court recognized that this ability must be exercised in a manner that does not create an "undue burden" upon abortion rights; at a minimum, *Casey* requires compelled information to be truthful, nonmisleading, and relevant to the making of a "mature and informed" patient decision.[2] Recently, in *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*,[3] the Eighth Circuit, sitting en banc, upheld a problematic provision of South Dakota's informed consent statute by construing it in a counterintuitive, albeit technically permissible, way. The *Rounds* court applied *Casey*'s undue burden test to resolve both the due process and compelled speech components of the case, and declined to address whether salient First Amendment principles had independent bearing on its compelled speech analysis. Instead, the Eighth Circuit should have performed a more robust First Amendment inquiry, calibrated toward ensuring clinically and professionally appropriate speech within the doctor-patient relationship. Such an inquiry may have limited the range of acceptable statutory saving constructions available to the court.

In 2005, South Dakota enacted House Bill 1166 with the goal of "revis[ing] the physician disclosure requirements to be made to a woman contemplating submitting to an abortion."[4] The codified statute requires abortion providers to give patients a written statement describing "all known medical risks of the procedure and statistically significant risk factors to which the pregnant woman would be subjected,"[5] including "[i]ncreased risk of suicide ideation and suicide."[6]

Planned Parenthood promptly filed a preliminary injunction motion challenging the constitutionality of the "suicide advisory" and several other provisions.[7] A federal district court in South Dakota

---

[1] 505 U.S. 833 (1992).

[2] *Id.* at 883; *see id.* at 882–84.

[3] 686 F.3d 889 (8th Cir. 2012) (en banc).

[4] 2005 S.D. Sess. Laws 356.

[5] S.D. CODIFIED LAWS § 34-23A-10.1(1)(e) (2011).

[6] *Id.* § 34-23A-10.1(1)(e)(ii).

[7] *Rounds*, 686 F.3d at 892. These other provisions included the "biological disclosure" provision, requiring doctors to advise women that "the abortion will terminate the life of a whole, separate, unique, living human being," S.D. CODIFIED LAWS § 34-23A-10.1(1)(b), and the "relation-

granted the preliminary injunction,[8] finding that plaintiffs were likely to succeed on their First Amendment claim,[9] and a panel of the Eighth Circuit affirmed.[10] Sitting en banc, the Eighth Circuit reversed and remanded the panel's decision and vacated the preliminary injunction.[11] Drawing its test from *Casey*, the en banc majority found that Planned Parenthood had not proved that the compelled disclosures were untruthful, misleading, or irrelevant.[12] On remand, the district court granted summary judgment for Planned Parenthood on the unconstitutionality of the suicide advisory,[13] finding no evidence to establish that suicide was a "known medical risk" of abortion.[14] A second panel of the Eighth Circuit affirmed this determination.[15]

The en banc Eighth Circuit vacated the panel's decision to invalidate the suicide advisory[16] and granted partial rehearing en banc to address that issue.[17] Writing for the majority, Judge Gruender[18] reversed the district court's finding that the advisory both unduly burdened abortion rights and violated the First Amendment rights of physicians.[19] The court began by affirming its belief that *Casey*'s three-part standard governed both questions: "[T]o succeed on either its undue burden or compelled speech claims, Planned Parenthood must show that the disclosure at issue 'is either untruthful, misleading or not relevant to the patient's decision to have an abortion.'"[20]

---

ship disclosure" provision, requiring doctors to disclose "[t]hat 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" and "[t]hat by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship will be terminated," *id.* § 34-23A-10.1(1)(c)–(d).

8 Planned Parenthood Minn., N.D., S.D. v. Rounds, 375 F. Supp. 2d 881, 889 (D.S.D. 2005).

9 *Id.* at 887–88.

10 Planned Parenthood Minn., N.D., S.D. v. Rounds, 467 F.3d 716, 729 (8th Cir. 2006).

11 Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 738 (8th Cir. 2008) (en banc).

12 *Id.* at 737.

13 Planned Parenthood Minn., N.D., S.D. v. Rounds, 650 F. Supp. 2d 972, 987 (D.S.D. 2009). The district court also invalidated the "relationship disclosure" provision, *id.* at 977–79, but upheld the "biological disclosure" provision, *id.* at 976–77.

14 *See id.* at 982–83.

15 Planned Parenthood Minn., N.D., S.D. v. Rounds, 653 F.3d 662, 673 (8th Cir. 2011). However, the panel reversed the district court's finding that the relationship disclosure provision was unconstitutional. *Id.* at 668–70. The panel also affirmed the district court's decision regarding the constitutionality of the biological disclosure provision. *Id.* at 667–68.

16 Planned Parenthood Minn., N.D., S.D. v. Rounds, 662 F.3d 1072 (8th Cir. 2011) (en banc).

17 Planned Parenthood Minn., N.D., S.D. v. Rounds, 686 F.3d 889, 892 (8th Cir. 2012) (en banc).

18 Judge Gruender was joined by Chief Judge Riley and Judges Loken, Smith, Colloton, Benton, and Shepherd.

19 *Rounds*, 686 F.3d at 892.

20 *Id.* at 893 (quoting Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 735 (8th Cir. 2008) (en banc)).

The court then proceeded to parse the statutory language at issue — specifically, it found that the statute did not actually require doctors to disclose a causal relationship between abortion and suicide,[21] a central premise of the opinions below. Instead, zeroing in on the term "increased risk," the court argued that "[t]he peer-reviewed medical literature in the record . . . consistently uses the term 'increased risk' to refer to a relatively higher probability of an adverse outcome in one group compared to other groups — that is, to 'relative risk.'"[22] After dispensing with two counterarguments against its "relative risk" construction,[23] the court decided that its chosen definition of "risk" was the one intended by the legislature for the suicide advisory.[24]

The court then moved on to the three elements of the *Casey* standard. Proceeding from its determination that the suicide provision merely requires the disclosure of an observed statistical association between abortion and suicide, the majority found the disclosure to be truthful.[25] The majority pointed to a body of peer-reviewed studies showing that, as a group, women who underwent abortions tended to commit suicide at a higher rate than other cohorts.[26] According to the majority, this correlation was sufficient to make suicide a "known medical risk" under its chosen definition.[27]

The court also found the advisory to be nonmisleading and relevant, based on Planned Parenthood's failure to prove that "abortion has been ruled out, to a degree of scientifically accepted certainty, as a statistically significant causal factor in post-abortion suicides."[28] Because of this uncertainty regarding causation, the majority found that disclosure of the presently known statistical association was nonmisleading and relevant.[29] The court discounted a body of countervailing scientific evidence either downplaying the significance of the associa-

---

[21] *Id.* at 894.

[22] *Id.* (citing THOMAS LATHROP STEDMAN, STEDMAN'S MEDICAL DICTIONARY 1701 (28th ed. 2006)).

[23] The court rejected the argument that the clarifying phrase "to which the pregnant woman would be subjected" necessitated a disclosure of causation, arguing that, under rules of statutory interpretation, that phrase should be read to modify only the term "statistically significant risk factors" and not the key term "known medical risks." *Id.* at 896. Judge Colloton filed a short concurrence to clarify his view that this reading was the only doctrinally permissible way to construe the text. *Id.* at 906–07 (Colloton, J., concurring in part and concurring in the judgment). The court also dismissed Planned Parenthood's argument that the statute's legislative history evinced a legislative presumption of causation. *Id.* at 895–97 (majority opinion).

[24] *Id.* at 895. The court proposed that even if disclosure of a causal link was one plausible alternative interpretation of the provision, the court would nevertheless be called to adopt its "relative risk" saving construction. *Id.* at 897–98.

[25] *Id.* at 899.

[26] *Id.* at 898–99.

[27] *Id.* at 899.

[28] *Id.* at 900.

[29] *Id.* at 899–900.

tion or proposing cofactor explanations for the phenomenon, noting possible methodological flaws and the existence of minority opposing theories.[30]

Judge Loken concurred. While acknowledging that the statutory text "strongly suggest[s] legislative intent to require that a physician make an untruthful, misleading causation disclosure,"[31] he was satisfied that the court's opinion gave doctors sufficient discretion to contextualize any deficiencies in the mandated disclosure.[32]

Judge Murphy, writing in dissent, criticized the majority's saving construction, which she argued was contrary to the plain meaning of the statutory text.[33] In addition to defending the studies that the majority discredited, the dissent pointed to newly presented evidence that reaffirmed a lack of scientific support for the proposition that abortion causes suicide.[34] The dissent also disputed the majority's conclusion that residual "medical and scientific uncertainty" sufficed to make its pared-down "relative risk" construction true, nonmisleading, and relevant: "The record clearly demonstrates . . . that suicide is not a known medical risk of abortion and that suicide is caused instead by factors preexisting an abortion such as a history of mental illness, domestic violence, and young age at the time of pregnancy."[35]

The central premise in *Rounds* was that *Casey*'s undue burden inquiry, which concerns the due process rights of abortion seekers, simultaneously functions as a First Amendment framework for determining the constitutionality of government-compelled physician speech. This doctrinal slippage allowed the *Rounds* majority to assume that its chosen construction of "relative risk," which made the statute true, nonmisleading, and relevant in a nominal sense,[36] was also sufficient to

---

[30] The dismissed evidence included a meta-analysis conducted by the American Psychological Association concluding that "the relative risk of mental health problems among adult women who have an unplanned pregnancy is no greater if they have an elective first-trimester abortion than if they deliver that pregnancy." *Id.* at 901 (emphasis omitted) (quoting BRENDA MAJOR ET AL., AM. PSYCHOLOGICAL ASS'N, REPORT OF THE APA TASK FORCE ON MENTAL HEALTH AND ABORTION 90 (2008)) (internal quotation marks omitted). The majority also dismissed statements attributed to the American College of Obstetricians and Gynecologists, the fact that the FDA did not list suicide as a risk associated with the abortifacient drug mifepristone, and the conclusions of six recent studies disclaiming a connection between abortion and suicide. *Id.* at 900–05.

[31] *Id.* at 906 (Loken, J., concurring).

[32] *Id.*

[33] *Id.* at 908 (Murphy, J., dissenting). Judge Murphy was joined by Judges Wollman, Bye, and Melloy.

[34] *Id.* at 907–10.

[35] *Id.* at 907–08.

[36] For a substantive critique of the court's reasoning, see, for example, Michael C. Dorf, *Can the Government Require Doctors to Provide Misleading Information to Patients Seeking Abortions?*, VERDICT (Aug. 20, 2012), http://verdict.justia.com/2012/08/20/can-the-government-require-doctors-to-provide-misleading-information-to-patients-seeking-abortions.

satisfy First Amendment scrutiny. However, reading *Casey* in conjunction with, rather than to the exclusion of, existing First Amendment doctrine indicates that a more searching, contextually grounded inquiry was warranted in *Rounds*.[37] This inquiry would have asked whether mandating a "relative risk" advisory was appropriate in the discrete context of the patient-doctor speech relationship, as a matter of real-world medical practice.

An independent First Amendment inquiry would have been permissible under *Casey*, which did not offer a concrete test or blueprint for lower courts to apply in difficult cases.[38] The *Casey* Court disposed of Planned Parenthood's First Amendment claim in three brief sentences[39] and did not engage in an independent First Amendment analysis;[40] the facts of the case made a presumption of constitutionality possible, preventing the Court from modeling a more complete approach. Specifically, the *Casey* regulations merely required doctors to disclose empirically sound, medically uncontroversial information,[41] and did not compromise the ability of physicians to determine and dis-

---

[37] *See* Stuart v. Huff, 834 F. Supp. 2d 424, 430 (M.D.N.C. 2011) ("The Court in *Casey* did not, however, combine the due process/liberty interest analysis with the First Amendment analysis. . . . It seems unlikely that the Supreme Court decided by implication that long-established First Amendment law was irrelevant when speech about abortion is at issue, and this Court declines to so find." (footnote omitted)).

[38] *See* Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 773–74 (1999) (arguing that *Casey*'s analysis "provides little indication of how to resolve any professional's First Amendment claim other than the precise one at issue in *Casey*").

[39] The passage, in full, reads:

> All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, see *Wooley* v. *Maynard*, 430 U.S. 705 (1977), but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, cf. *Whalen* v. *Roe*, 429 U.S. 589, 603 (1977). We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.

Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992); *see also* Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 946 (calling the passage "puzzling" and noting that "[e]xactly how the strict First Amendment standards of *Wooley* are meant to qualify the broad police power discretion of *Whalen* is left entirely obscure").

[40] *See Stuart*, 834 F. Supp. 2d at 430 ("The Supreme Court's brief discussion of the First Amendment challenges to the Pennsylvania statute was undertaken separately and without substantial detail."); Christina E. Wells, *Abortion Counseling as Vice Activity: The Free Speech Implications of* Rust v. Sullivan *and* Planned Parenthood v. Casey, 95 COLUM. L. REV. 1724, 1734–35 (1995) (arguing that *Casey* "ignored the speech aspects of the informed consent provision").

[41] The regulations required disclosure of: (1) the nature of the procedure; (2) the probable gestational age of the fetus; (3) relevant medical risks of abortion and childbirth; and (4) the availability of a state pamphlet containing information about the biology of the fetus, the availability of medical assistance benefits related to childbirth, information about paternal child support, and a listing of organizations, including adoption agencies, serving pregnant women. *Casey*, 505 U.S. at 881.

close abortion risks on a case-by-case basis, based on individual patient needs and the physician's own medical judgment.[42] Furthermore, any potentially biasing or ideologically inflected information was printed in a pamphlet that was clearly attributed to the state — physicians were merely required to acknowledge, not endorse, that information.[43] In *Rounds*, by contrast, physicians were required to provide a specific piece of contested information to every patient, regardless of individual circumstances, as a part of their own personal disclosure obligations. In short, the *Rounds* court did not have the luxury of presuming, without analysis, that the suicide advisory represented a reasonable extension of the government's regulatory authority over medicine; the truthfulness, deceptiveness, and relevance of the advisory was itself the locus of dispute, not a self-evident premise. The language of *Casey* does not guide lower courts in deciding *how* these threshold determinations are to be made, aside from recognizing that First Amendment principles are "implicated" in the process.[44]

Casey may yet represent the prototypical case of professional-speech regulation by the government, where the scope of First Amendment protections is substantially restricted vis-à-vis regular speech.[45] Nevertheless, the Court has consistently articulated a narrow sphere of First Amendment protections for professional speakers and has identified background constitutional principles that should have been found relevant in *Rounds*. In *Rust v. Sullivan*,[46] speaking in the context of unconstitutional conditions doctrine, the Court recognized the possibility that "traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government."[47] Elsewhere, in *Florida Bar v. Went For It, Inc.*,[48] the Court noted that "[t]here are circumstances in which we will accord speech by attorneys on public issues and matters of legal representation the strongest protection our Constitution has to offer."[49] A relevant guiding principle was articulated in *Legal Services Corp. v.*

---

[42] *See id.* at 883–84 (noting a provision allowing physicians to opt out of the regulations in certain circumstances and concluding that "the statute does not prevent the physician from exercising his or her medical judgment").

[43] *See* Robert D. Goldstein, *Reading* Casey*: Structuring the Woman's Decisionmaking Process*, 4 WM. & MARY BILL RTS. J. 787, 852 (1996) (describing how one Pennsylvania clinic responded to *Casey* by stamping each state pamphlet with a statement disassociating itself from the contents).

[44] *See Casey*, 505 U.S. at 884.

[45] *See* Post, *supra* note 39, at 950–51 (explaining why traditional First Amendment values do not resonate in the context of professional speech).

[46] 500 U.S. 173 (1991).

[47] *Id.* at 200.

[48] 515 U.S. 618 (1995).

[49] *Id.* at 634 (citing Gentile v. State Bar of Nev., 501 U.S. 1030 (1991); *In re* Primus, 436 U.S. 412 (1978)).

Velazquez[50] in the Court's proclamation that "[w]here the government uses or attempts to regulate a particular medium, we have been informed by its accepted usage in determining whether a particular restriction on speech is necessary for the program's purposes and limitations."[51] The impermissible professional-speech regulation in *Velazquez* represented a "circumstance [in which] the Government [sought] to use an existing medium of expression and to control it, in a class of cases, in ways which distort its usual functioning."[52]

These cases demonstrate that the Court has been suspicious of attempts to undermine the role of professional speakers or to "determine independently the bodies of knowledge that may be accessed or the individual judgments that may be rendered in a given case."[53] Commentators have argued that this institutional focus protects the freedom, integrity, and objectivity of information flows between citizens and professionals, a dynamic that implicates broader First Amendment interests in promoting democratic self-governance and informed public deliberation.[54] Analogous concerns are manifest throughout the Court's commercial speech jurisprudence, which has often involved professional actors.[55]

The suicide advisory in *Rounds* was a unique, and largely unprecedented, legislative attempt to control the practice of medicine that allegedly compromised institutional norms and functions. The *Rounds* court should have responded by adjudicating the advisory through the

---

[50] 531 U.S. 533 (2001).

[51] *Id.* at 543.

[52] *Id.* The *Velazquez* Court cited *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984), as an example of where "[t]he First Amendment forbade the Government from using the forum in an unconventional way to suppress speech inherent in the nature of the medium." *Velazquez*, 531 U.S. at 543.

[53] Halberstam, *supra* note 38, at 773.

[54] *See* Paula Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice*, 74 B.U. L. REV. 201, 206 (1994) (criticizing speech regulations that "enable government to impose its orthodoxy on medical decision making by limiting and biasing the medical information available to patients"); Halberstam, *supra* note 38, at 772, 850–51; Post, *supra* note 39, at 974–76. Similar values may also be discerned in the Court's traditional compelled speech jurisprudence, which may be conceptualized as protecting listener- or audience-based interests in reliable, unbiased information flows. *See generally* Laurent Sacharoff, *Listener Interests in Compelled Speech Cases*, 44 CAL. W. L. REV. 329 (2008).

[55] *See, e.g.*, Thompson v. W. States Med. Ctr., 535 U.S. 357, 374 (2002) ("We have previously rejected the notion that the Government has an interest in preventing the dissemination of truthful commercial information in order to prevent members of the public from making bad decisions with the information."); Edenfield v. Fane, 507 U.S. 761, 767 (1993) ("[T]he general rule is that the speaker and the audience, not the government, assess the value of the information presented."); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976) ("It is a matter of public interest that [private economic] decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable."); *see also* Post, *supra* note 39, at 975–76; *cf.* Halberstam, *supra* note 38, at 838 ("At a minimum, professional speech should be accorded no less protection than commercial speech.").

lens of the doctor-patient speech relationship, as a communicative "medium" subject to discrete First Amendment protections.[56] Such an approach would have made it much more difficult to justify the majority's chosen "relative risk" construction of the statutory text. That understanding of "risk," drawn from "[t]he peer-reviewed medical literature in the record,"[57] is not necessarily appropriate when interposed into real-world clinical interactions. As commentators[58] and the dissent[59] have recognized, most patients would be confounded by such a disclosure of "relative" risks, especially when the causal connection is speculative and when medical authorities have aligned behind superseding cofactor explanations. More fundamentally, clinical best practices and professional standards tend to reject "one-size-fits-all" approaches to informed consent, and instead enforce a context-driven, patient-centered approach.[60] Contrary to these norms, and unlike in *Casey*, the suicide advisory mandates a specific risk disclosure that many doctors, exercising their medical judgment, would likely deem unnecessary or inappropriate in some clinical settings.[61] Considered in light of the functional distortion concerns that were articulated in *Velazquez*, these practical realities should have had bearing on the scope and substance of the *Rounds* court's First Amendment analysis.

---

[56] Courts have recognized that, in certain contexts, government prerogatives do not necessarily align with the needs and circumstances of individual patients, and have favored unregulated doctor-patient speech to facilitate informed patient decisionmaking in some cases. *See, e.g.*, Conant v. Walters, 309 F.3d 629, 632 (9th Cir. 2002) (enjoining, on First Amendment grounds, federal policy that would have punished doctors for recommending or prescribing a patient's use of marijuana).

[57] *Rounds*, 686 F.3d at 894.

[58] *See, e.g.*, Dorf, *supra* note 36.

[59] *See Rounds*, 686 F.3d at 911 (Murphy, J., dissenting).

[60] *See generally* Ian Vandewalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics*, 19 MICH. J. GENDER & L. 1 (2012); Steven E. Weinberger et al., *Legislative Interference with the Patient-Physician Relationship*, 367 NEW ENG. J. MED. 1557 (2012). The American Medical Association has adopted an explicit policy against "legislative measures that would impose procedure-specific requirements for informed consent or a waiting period for any legal medical procedure." AM. MED. ASS'N, POLICY NO. H-320.951, AMA OPPOSITION TO "PROCEDURE-SPECIFIC" INFORMED CONSENT, *available at* https://ssl3.ama-assn.org/apps/ecomm/PolicyFinderForm.pl?site=www.ama-assn.org&uri=%2fresources%2fdoc%2fPolicyFinder%2fpolicyfiles%2fHnE%2fH-320.951.HTM.

[61] This case-sensitive, relational approach runs through the existing common law doctrine of informed consent. *See, e.g.*, Natanson v. Kline, 350 P.2d 1093, 1106 (Kan. 1960) ("The duty of the physician to disclose . . . is limited to those disclosures which a reasonable medical practitioner would make under the same or similar circumstances. . . . [T]he physician's choice of plausible courses should not be called into question if it appears, all circumstances considered, that the physician was motivated only by the patient's best therapeutic interests . . . ."). Other jurisdictions determine whether the physician reasonably disclosed all information relevant to the individual patient's decisionmaking process. *See, e.g.*, Canterbury v. Spence, 464 F.2d 772, 786–87 (D.C. Cir. 1972). In these jurisdictions, courts still determine whether doctors met the standard of care that governed their specific interactions.