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Appeals Court Blocks Enforcement of South Dakota Informed Consent Law

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Last month a split federal appeals court panel ruled that South Dakota may not enforce its 2005 informed consent law. Although the outcome was very regrettable, a brilliant 23-page dissent highlighted how and why the law was constitutional.

Last year, almost before the ink was dry, Planned Parenthood sped into court and persuaded Judge Karen E. Schreier of the Federal District Court in Rapid City, South Dakota, to issue a preliminary injunction that blocked enforcement of South Dakota's law before it ever took effect. Fast forward to October 30.

By a 2–1 vote, the St. Louis-based 8th U.S. Circuit Court of Appeals' panel largely mirrored Judge Schreier's opinion, handed down in June 2005. The effect of the ruling is to return the case to Schreier who can either schedule a trial or give Planned Parenthood what it wants—a summary judgment.

But, as almost always is the case, the dissent, written by Judge Raymond W. Gruender, made not only for more interesting reading but also for more thoughtful analysis than Judge Diana E. Murphy's and Judge Michael J. Melloy's majority opinion.

Murphy and Melloy essentially picked up on Judge Schreier's conclusions. For example (as the New York Times summarized it), "Requiring doctors to convey information that they do not believe can violate the First Amendment."

Adam Liptak then quoted from the decision written by Judge Murphy: "Governmentally compelled expression is particularly problematic when a speaker is required by the state to impart a political or ideological message contrary to the individual's own views."

Murphy also argued (Liptak wrote) that "the written exchange of information and the doctor's certification that the patient understood it may amount to an undue burden on the right of abortion."

Judge Gruender's brilliant dissent buttressed his conclusions with language found in the 2005 Ayotte decision and in the 1992 Casey decision. He did so to demonstrate that the panel shouldn't have tossed out the entire law, and "as a matter of law that the provisions in question do not violate physicians' First Amendment rights and do not impose an undue burden on patients' right to an abortion ... ."

Casey upheld the "core holdings" of Roe v. Wade and was a bitter disappointment to pro-lifers. But there were passages in the decision that have proven to be extremely helpful to the cause of systematically dismantling Roe.

The crux of the majority opinion is that requiring women to receive the information laid out in South Dakota's informed consent law constitutes an "undue burden" on the right to abortion. Gruender quoted chapter and verse from Casey to demonstrate otherwise.

For instance, in Casey, the High Court said a statute or regulation is an undue burden if it "has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." Gruender explained (quoting Casey again), "the fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it."

Also, according to Casey, "under the undue burden standard a State is permitted to enact measures which favor childbirth over abortion, even if those measures do not further a health interest." Furthermore, as Gruender observed, "Planned Parenthood has cited no case where a provision merely requiring the disclosure of information prior to the [abortion] procedure has been invalidated as an undue burden."

Perhaps the most intriguing section was Judge Gruender's response to the majority's notion that such information might exacerbate the psychological consequences of having an abortion.

"The very purpose of informed consent is to ensure that a patient understands the long-term consequence of her actions," Gruender wrote. "It often may be true that those disclosures increase anxiety at the same time that they increase the patient's understanding of the risks and consequences of her actions, but the purpose of informed consent is to ensure that the patient knows these things before, not after, she chooses to have the procedure."

Murphy and Melloy also held that in updating its 1993 law, the additional information South Dakota required to be passed on to women contemplating an abortion was "ideological," not scientific or factual.

For example, the law defines "human beings" as a "member of the species Homo sapiens ..." And, elsewhere, the law talks about abortion terminating the life of a "whole, separate, unique, living unborn member of the species of Homo sapiens," wrote Judge Gruender.

Judge Gruender explained that the "Court finds this statuary definition irrelevant because most parties, upon encountering the phrase 'human beings' are likely to construe it in the broad, general sense of 'person.'" In other words while the language is not inherently ideological, "The Court finds that it is likely to be interpreted as ideological in practice."

But as Judge Gruender explained, the language of the law "is nothing but an unremarkable tautology. It is simply a restatement of the definition of 'abortion.'"