

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

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PLANNED PARENTHOOD MINNESOTA, NORTH DAKOTA,
SOUTH DAKOTA, and CAROL E. BALL, M.D.,

Plaintiffs-Appellees,

v.

MIKE ROUNDS, Governor, and
MARTY J. JACKLEY, Attorney General, in their official capacities,

Defendants-Appellants,

ALPHA CENTER, BLACK HILLS CRISIS PREGNANCY CENTER,
doing business as CARENET, DR. GLENN A. RIDDER, M.D.,

and ELEANOR D. LARSON, M.A. LSWA,

Intervening Defendants-Appellants

On Appeal from the United States District Court for the District of South Dakota
Case No. 05- 4077

IN SUPPORT OF DEFENDANTS/APPELLANTS
FOR PARTIAL AFFIRMANCE AND PARTIAL REVERSAL
OF THE DISTRICT OF SOUTH DAKOTA

BRIEF OF *AMICI CURIAE*
2,211 WOMEN INJURED BY ABORTION

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CORPORATE DISCLOSURE STATEMENT

The Justice Foundation is a non-profit corporation with no parent corporations and no stockholders.

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici Curiae 2,211 Women Injured by Abortion¹ (*Amici*) suffered psychological injuries as the result of abortion. *Amici's* psychological injuries are directly attributable to non-existent, inadequate, or inaccurate disclosure by the abortionist and the nature of abortion; namely, that abortion will terminate the life of a whole, separate, unique, living human being. *Amici* know from their personal experiences that concealing the nature of abortion from South Dakota women contemplating abortion will force countless women to suffer devastating psychological injuries which may last a lifetime.

Amici have an interest in informing this Court regarding the South Dakota statutes at issue from the perspective of women who personally have experienced abortion. Every South Dakota woman considering an abortion is at risk of suffering severe emotional consequences if she is not equipped with truthful, accurate information regarding the nature of abortion prior to deciding whether to abort the child in her womb. Because a woman's experience with abortion is such a deep, dark, and painful secret, the information being offered to this Court by *Amici* is crucial. For

¹Attached as Appendix Tab 1 is the list of the initials, first names, or full names of the 2,211 *Amicus Curiae*. In order to protect their identities, some of the women have requested that we use initials only or first name only. Each of these women's sworn affidavits or declarations are on file at The Justice Foundation.

years, even decades following abortion, most women who have experienced an abortion are still not willing to publicly talk about their injuries even when they are tormented by thoughts of suicide, guilt, shame, nightmares, sleeplessness, and depression. It is from this unique perspective, that *Amici* seek to assist this Court in making its decision in this case. Clearly, the best information regarding the consequences of not being informed regarding the nature of abortion is testimony from real South Dakota women who have experienced abortion; testimony from women whose abortion experience occurred in South Dakota; and testimony from women from across the country who have experienced abortion.

The abortion experiences of *Amici* have been collected by a project of The Justice Foundation, Operation Outcry, in the form of sworn affidavits and declarations submitted under penalty of perjury. Testimony from Operation Outcry was presented by The Justice Foundation to assist the South Dakota Legislature (Appendix Tab 2, p.7) and similar testimony was presented and cited by the United States Supreme Court in *Gonzales v. Carhart*, 550 U.S.124 (2007). Citing The Justice Foundation's brief, the Supreme Court recognized the significance of the women's own testimony:

Respect for human life finds an ultimate expression in the bond of love the mother has for her child. . . . Whether to have an abortion requires a difficult and painful moral decision. *Casey, supra*, at 852-853, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (opinion of the Court). While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. See Brief

for Sandra Cano *et al.* as *Amici Curiae* in No. 05-380, pp 22-24. Severe depression and loss of esteem can follow. See *ibid.* Severe depression and loss of esteem can follow.

Id. The Supreme Court's conclusion referenced extensive quotes from women who had an abortion. See referenced pages of Brief of Sandra Cano *et al.* as *Amici Curiae* in No. 05-380, pp. 22-24 attached as Appendix Tab 3. The 180 women hurt by abortion cited as *Amici* by the U. S. Supreme Court are some of the 2,211 *Amici* herein. *Gonzales* was cited previously by this Court in *Planned Parenthood v. Rounds* for the same proposition: "[I]t seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow." *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 530 F.3d 724 (8th Cir. 2008)(citing *Gonzales v. Carhart*, 550 U.S.124 (2007)).

The 2,211 women, whose names appear in this brief, have given The Justice Foundation permission to represent them as *amicus curiae*. All of these women have given their legally admissible testimonies in the form of affidavits or declarations under penalty of perjury which consist of each woman's personal accounts of her abortion experiences. *Amici's* experiences detail the psychological injuries that resulted from not being adequately informed regarding the nature of abortion. These women discuss the aftermath of abortion which includes a wide range of psychological

injuries including suicide ideation and suicide attempts. *Amici*'s interest is to prevent other women from experiencing the emotional trauma which *Amici* have been forced to endure because they were not adequately informed regarding the nature of abortion.

SUMMARY OF THE ARGUMENT

In recent years, real women's voices virtually have been eliminated from abortion jurisprudence and replaced with the voices of the abortion industry which profess to be protecting women's interests by contesting legislation designed to inform and protect women. Consistent with this pattern, Planned Parenthood and an abortionist contest the constitutionality of South Dakota statutes which mandate that women be informed about the nature and consequences of abortion.

Amici are 2,211 women who suffered psychological injuries because they were not told the very truth which the South Dakota Legislature wants abortionists to tell women considering abortion. *Amici* have substantial evidence that women who have been inadequately informed or provided erroneous information regarding the humanity of the child prior to undergoing an abortion, frequently suffer tragic psychological consequences including severe depression, suicidal ideation, and suicide attempts. However, despite the prevalence of psychological injuries following abortion, an untold number of women's severe psychological injuries related to abortion go unreported and untreated. The nature and secrecy of abortion, combined with political

forces interested in promoting the abortion industry, have created the mis-perception that women's abortion related psychological injuries are non-existent or, at best, limited to a very small percentage of women. To overcome this mis-perception and prevent other women from suffering the same consequences following abortion, *Amici* present this Court with their personal abortion experiences.

As illustrated by the voices of these 2,211 women injured by abortion detailed below, abortion is distinct from and cannot be compared to other medical procedures.

Amici detail for this Court from their personal experiences: it is not in a woman's interest to conceal the nature of abortion and abortion dangers and prohibit a woman from making a truly informed decision regarding whether to abort her child. Implicit in freely and voluntarily choosing abortion is being provided all the information – information regarding the humanity of the child and the emotional consequences which includes an increased risk of suicide and suicide ideation.

ARGUMENT

I. Introduction

In the 1973 *Roe v. Wade* and *Doe v. Bolton* decisions, the United States Supreme Court was presented with real women using fictitious names, Jane Roe and

Mary Doe.² Today, women plaintiffs have been replaced by Planned Parenthood, the abortion industry, and abortionists, who consistently appear before the courts as plaintiffs, purportedly representing the interests of women in the abortion rights context. *Singleton v. Wulff*, 428 U.S. 106(1976).³ Consistent with this pattern, Planned Parenthood Minnesota North Dakota, South Dakota, and an abortionist, Carol E. Ball, M.D., purport to represent the interests of women in South Dakota by seeking to have this Court declare select informed consent protections afforded women by the South Dakota Legislature unconstitutional.⁴ See Brief of Plaintiff's/Appellees/Cross-

²*Roe v. Wade*, 410 U.S. 113 (1973), *Doe v. Bolton*, 410 U.S. 179 (1973). Today both those real women, Norma McCorvey and Sandra Cano, want their cases overturned and do not want abortionists representing their interests. *McCorvey v. Hill*, 385 F.3d 846, 848 (5th Cir. 2004); *Cano v. Baker*, 435 F.3d 1337 (11th Cir. 2006).

³The U.S. Circuit Court of Appeals for the Eighth Circuit decided *Wulff v. Singleton*, 508 F.2d 1211 (8th Cir. 1974) which initially established the physician standing precedent. In 1974 this Court never could have envisioned that the standing conferred on physicians to represent abortion patients could have evolved into standing to litigate *against* informed consent for patients.

⁴The portions of the district court ruling contested by Planned Parenthood and the abortionist involve the nature of abortion: “Accordingly, the court finds that before performing abortions, the physician must inform the patient “[t]hat the abortion will terminate the life of a whole, separate, unique, living human being.” SDCL 34-23A-10.1(1)(b).” *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 650 F. Supp. 2nd 972, 976 (D.S.D. 2009). The district court also found, “The informed consent abortion statute requires a physician to provide the pregnant woman with “[a] description of all known medical risks of the procedure and statistically significant risk factors to which the pregnant woman would be subjected, including . . . (ii) Increased risk of suicide ideation and

Appellants at 47.

Amici are women who personally have experienced abortion and the negative consequences which follow. *Amici* disagree with Planned Parenthood’s and the abortionist’s argument that this Court should allow the abortion industry to continue to conceal the nature⁵ and consequences of abortion from women considering abortion.⁶ In order for women considering an abortion to exercise a real decision, *Amici*, based on their very personal experiences, know informed consent regarding the nature and consequences of abortion is crucial. Appendix Tab 4.

II. “Choice” Necessarily Implies Information

True “choice” necessarily implies that a woman be provided all the information, and implicit in the abortion choice is information about the uniqueness of this choice:

The abortion decision must therefore ‘be recognized as *sui generis*, different in

suicide.” SDCL 34-23A-10.1(1)(e) (medical risk disclosures).” *Id.*

⁵Planned Parenthood and the abortionists argue it was error for the district court to interpret this Court’s prior ruling as requiring the exact language of the statute to be given to women. Brief of Plaintiffs/Appellees/Cross-Appellants at 82-88. Instead they argue that information should be limited to “the biological facts that the embryo/fetus is a member of the species *Homo sapiens*.” *Id.* 88.

⁶Planned Parenthood and the abortionist contest the constitutionality of the statutory language which requires physicians to disclose “all known medical risks of the procedure” “including” an “[i]ncreased risk of suicide ideation and suicide.” SDCL 34-23A-10.1(1)(e)(ii). (Brief of Plaintiff’s/Appellees/Cross-Appellants at 47).

kind from the others that the Court has protected under the rubric of personal or family privacy and autonomy.’ One cannot ignore the fact that a woman is not isolated in her pregnancy, and that the decision to abort necessarily involves the destruction of a fetus. . . . To look ‘at the act which is assertedly the subject of a liberty interest in isolation from its effect upon other people is like inquiring whether there is a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body’.

Planned Parenthood v. Casey, 505 U.S. 833, 952 (1992)(internal citations omitted).

Clearly abortion is unique, and consequently, the issue of informed consent within the context of abortion is also unique. The nature of abortion sets it apart from other “medical procedures” as an abortion will terminate the life of a whole, separate, unique, living human being. S.D. Codified Laws § 34-23A-10.1(b). Making the choice to terminate the life of a whole, separate, unique, living human being is fraught with consequences, and not being informed adequately regarding the reality of the nature of abortion prior to the abortion results in devastating psychological effects for women. Appendix Tab 4.

In 1973, the Supreme Court did not have 37 years of experience with legal abortion data, and the Court ruled that “the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated.” *Roe v. Wade*, 410 U.S. 113, 163 (1973). Consulting with one’s abortionist was just a theory of the Court and not reality practiced by abortion facilities, as C.L., a woman who obtained an abortion in

Sioux Falls, South Dakota on June 14, 1984, describes the extent of her “informed consent”:

I wasn't told [the abortion] could affect my future ability to have children or the daily shame and guilt I would feel. . . . I think about the child I aborted almost everyday. I feel guilt and shame for the decision I made to end her life.

Appendix Tab 4, p. 9. In response to whether she was adequately informed of the nature of abortion, B.D., a South Dakota woman responded, “I received no information other than I should have someone drive me home. Nothing stating it was a human life that I was choosing to abort.” Appendix Tab 4, p.1.

The United States Supreme Court understands that abortion is a painfully, difficult decision. *See Gonzales v. Carhart*, 550 U.S.124 (2007). Severe depression and loss of esteem can follow. *Id.* However, the Court may never fully understand the degree of pain experienced by women which is directly attributable to the *nature* of the decision. But, M.E. whose abortion occurred in Sioux Falls, South Dakota on December 8, 1999, does understand:

Abortion does hurt women – emotionally and physically. It prematurely ends life and in reality, two people die in abortion, the baby and the woman, who has the abortion, dies inside. She is left emotionally and physically wounded. Planned Parenthood is deceptive, they lie, they are cold and do not care about the welfare of women and children. Their women's health care campaign is a hoax. It's destructive, damaging and caused physical and emotional damage to women and families.

Appendix Tab 4, p. 4. If a woman is inadequately informed regarding the true nature

of the child – prior to her decision, she has not been given her right to choose, as recognized by *Casey*:

A woman considering abortion faces ‘a difficult choice having serious and personal consequences of major importance to her own future -- perhaps to the salvation of her own immortal soul.’ The authority to make such traumatic and yet empowering decisions is an element of basic human dignity. As the joint opinion so eloquently demonstrates, a woman's decision to *terminate her pregnancy* is nothing less than a matter of conscience.

Planned Parenthood v. Casey, 505 U.S. 833, 916 (1992)(internal citation omitted)(emphasis added). In such a grave decision, “having serious and personal consequences of major importance to her own future -- perhaps to the salvation of her own immortal soul” a woman needs accurate information – not terminology which obfuscates the reality of abortion.

III. The Nature of Abortion

A woman’s right to understand the nature of abortion is exemplified by the abortion experience of R.S., another injured South Dakota woman:

I was not told about any consequences – the clinic referred to the baby as “the pregnancy” not as a child. It caused me to be suicidal and severely depressed for years. I lost such respect for myself that I became very self-destructive: excessive drinking, being promiscuous and engaging in unhealthy relationships. It took me 15 years to work through all the consequences of my abortion, including my guilt and my grief over the loss of my child.

Appendix Tab 4, p. 23. While it took 15 years for R.S. to work through the consequences of her abortion, P.M., another South Dakota woman has suffered for

more than 30 years despite assurances by the abortion facility “that it would be quick, painless (as they would use a sedative), and it would all be over.” Appendix Tab 4, p. 19. P.M. was not informed of the nature of abortion: “Absolutely no one explained anything about abortion to me. It was presented as a solution to my ‘problem’ how much it would cost, where it would take place . . .” *Id.* “I was so ashamed that I never talked about it with anyone, including the father . . .” *Id.* P.M. details her experience as follows:

30 years later I have finally gone through the entire counseling [sic] program and have finally had the burdens of the “wrong choice” lifted off me emotionally,[sic] spiritually and soulfully. The list of lifestyle problems of drugs, alcohol, sex, NO self-esteem, rebellion, anger, resentment, no self-respect (and the list goes on) have been resolved through great counseling [sic]; however, these negative thoughts and behaviors [sic] absorbed more than half of my lifetime. I am currently 55 at this writing. The \$\$ price has been too high.

Id. P.M., similar to many women, did not understand the nature of her abortions until much later and would tell women considering abortion:

The day I had my first child and held him in my arms was the day I realized I had truly killed two other babies with my poor “choice.” The pain of realizing what I had done nearly killed the joy of receiving this new baby in my arms. I had to carry all this inside my head and my heart as I was too ashamed to talk to anyone about it.

Appendix Tab 4 p.20. All the South Dakota women relay abortion experiences similar to P.M.’s with varying consequences and degrees of consequences. Appendix Tab 4.

Non-existent, inadequate, or inaccurate information in the decision-making

process results in lack of informed consent as recognized by the Court in *Danforth*:

The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. The woman is the one primarily concerned, and her awareness of the decision and its significance may be assured, constitutionally, by the State to the extent of requiring her prior written consent.

Planned Parenthood v. Danforth, 428 U.S. 52, 66-68 (1976). Decades later, the Court's imperative that the decision to abort "be made with full knowledge of its nature and consequences" goes unheeded by abortionists and leaving the "one primarily concerned", the woman, vulnerable to the dangers implicit in lack of informed consent.

IV. Secrecy and Shame Obscures the Identification of Psychological Injuries

Historically, the secrecy and shame involved in abortion has prevented public disclosure of many of the ill-effects suffered by women in the aftermath of abortion, and – most notably – the psychological effects. As the words of the South Dakota women detailed above demonstrates, many years– even decades – of silent suffering may follow abortion.⁷ When a woman chooses abortion to hide the fact that she is

⁷Additionally, L.R., who underwent an abortion in Pamona, South Dakota states: "I suffered from eating disorders. I started using drugs and alcohol and being promiscuous. I am just now after 37 years beginning to deal with it. Appendix Tab 4, p. 13. E. A., another South Dakota woman whose abortion occurred in 1992, stated it "has been a long process of healing, I still have a hard time with Mother's Day and baby showers." Appendix Tab 4, p.21.

carrying a child in her womb, in all likelihood, she will attempt to hide the consequences of abortion, but her “secret” will continue to haunt her.⁸ These women are unable to share the horror of their experience with anyone and are tormented by their thoughts of suicide, guilt, shame, nightmares, sleeplessness, and depression. Appendix Tab 4. The same shame of carrying a child which they sought to destroy through abortion, prevents them from seeking help for the psychological injuries.

For example, D.H., another South Dakota woman states:

I was told it was a ‘clump of tissue’ being removed . . . I had no idea it would still be haunting me now after twenty-nine years . . . I did it thinking it would be the easy way out. By choosing abortion, I thought I could run away from my problem. It would all be behind me. In reality, the guilt, shame, depression, suicidality [sic], anxiety, nightmmares [sic], drinking, drugging, etc. were all devastating.

Appendix Tab 4, p. 5. Regardless of one’s position regarding whether or not a child in the womb is a human being worthy of legal protection, clearly, one can empathize with the grief and sorrow of a mother, D.G., who comes to believe she has murdered her child:

I have had many years of guilt or pain over the murder of my baby. I have been in counseling for five years to find forgiveness for myself to have done this.

⁸M.K.K., a South Dakota woman stated; “I more than likely will never be able to prevent women from getting an abortion, due to my concealed shame, however I can help by asking you who are the governing body in South Dakota, to make it mandatory for doctors to tell women the facts and what they may encounter before the abortion.” Appendix Tab 4, p. 24.

My abortion is the biggest regret of my life and has left me emotionally scarred for life. . . . A fetus is a person. When getting an abortion a woman might tell herself otherwise but later in life she will know what she has done – killed her own child.

Appendix Tab 4, p. 22. Because of her 1995 abortion, C.S. also believes she is a murderer:

No one has the right to choose death. If I killed my 2 hour old baby I would be imprisoned and abortion is no different. At eight weeks (actually early) my baby had a heartbeat, finger prints and brain waves all defining factors of human life. Abortion is nothing short of murder. Their decision to make abortion legal has and is making murderers out of millions of us. Thanks a lot!”

Appendix Tab 4, p. 15-16. Clearly, not every woman needs to be injured as deeply and profoundly as these women for the statute to be upheld, but the fact that a significant number of women are injured supports the Legislature’s requirement that adequate, accurate information be given to women considering abortion.

The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.

Gonzales v. Carhart, 550 U.S. 124, 159-160 (2007). The Supreme Court understands that if a woman is not told the reality of abortion and later discovers what she has done to her unborn child, her grief and suffering will be profound – this is just plain

common sense.⁹ However, because of the shame most women experience by choosing abortion, countless numbers of women's profound psychological injuries related to abortion go unreported and untreated. This phenomenon has created the mis-perception that women's abortion related psychological injuries are non-existent or, at best, limited to a very small percentage of women.

CONCLUSION

Amici urge this Court to protect women considering abortion from experiencing the emotional trauma which *Amici* 2,211 Women Injured by Abortion have been forced to endure because they were not adequately informed regarding the nature and consequences of abortion. The paternalistic arguments of the abortionists and abortion providers coincide with their financial interests and not the health of women seeking abortions. *Amici* pray this Court uphold the District Court's decision with respect to the biological disclosures, SDCL 34-23A-10.1(1)(b), and reverse the District Court's decision that the informed consent statute, SDCL 34-23A-10.1(1)(e)(ii), is untruthful and misleading and thereby provide women the protections necessary to prevent

⁹ If abortion was just the removal of a mere mass of tissue, then it would not be a painfully difficult decision. Even as Justice Ginsburg admits, "for most women, abortion is a painfully difficult decision." *Id.* at 184. Other surgical procedures may be considered "painful" but are not normally considered painfully difficult decisions. Abortion is a painfully difficult decision because the decision will terminate the life of a whole, separate, unique, living human being.

additional women from undergoing the trauma and injury *Amici* have been forced to endure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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FORM 6. CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

Certificate of Compliance with Type-Volume Limitation,
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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

This brief contains 4072 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii)

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 28A

I certify that the brief complies with Local Rule 28A(c) and (d):

The brief was prepared with WordPerfect 12.0;

A digital version of the brief, excluding the Addendum, is being provided to the court concurrently with the filing of this brief; and

The diskette has been scanned for viruses and is virus-free.

/s/Allan E. Parker, Jr.
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