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Cailin Harris

Boston College Law School, cailin.harris@bc.edu

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MISINFORMED CONSENT: UPHOLDING THE CONSTITUTIONALITY OF SOUTH DAKOTA'S SUICIDE ADVISORY IN *PLANNED PARENTHOOD MINNESOTA, NORTH DAKOTA, SOUTH DAKOTA v. ROUNDS*

CAILIN HARRIS*

Abstract: On July 24, 2012, in *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, the U.S. Court of Appeals for the Eighth Circuit, sitting en banc, considered the constitutionality of a suicide advisory portion of a South Dakota statute that required informed consent for abortions. The Eighth Circuit found the advisory was constitutional because the information disclosures required by the statute were truthful, non-misleading, and relevant to the patient's decision to have an abortion. The court relied in part on the Supreme Court's 2007 decision *Gonzales v. Carhart*, which held that Congress has the authority to legislate in the abortion context, even in areas of medical uncertainty. The Eighth Circuit, however, misapplied the reasoning of *Gonzales* and dangerously minimized the standard for scientific evidence in informed consent laws.

INTRODUCTION

Planned Parenthood of Minnesota, North Dakota, and South Dakota, and its medical director (Planned Parenthood) sued the state of South Dakota to prevent a 2005 statute amending the state's requirements for obtaining informed consent to an abortion from taking effect.¹ The statute required physicians to provide certain information to patients, including a written statement telling the pregnant woman that undergoing an abortion would subject her to an "[i]ncreased risk of suicide ideation and suicide" ("the suicide advisory").² Planned Parenthood argued that the suicide advisory requires physicians to disclose to patients an untrue and misleading causal link between abortion and

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¹ *Planned Parenthood Minn., N.D., S.D. v. Rounds (Rounds V)*, 686 F.3d 889, 892 (8th Cir. 2012) (en banc), *rev'g* 650 F. Supp. 2d 972 (D.S.D. 2009).

² *Planned Parenthood Minn., N.D., S.D. v. Rounds (Rounds I)*, 375 F. Supp. 2d 881, 884 (D.S.D. 2005), *vacated*, 530 F.3d 724 (8th Cir. 2008), *remanded to* 650 F. Supp. 2d 972 (D.S.D. 2009).

suicide.³ Planned Parenthood contended that this requirement imposes an undue burden on the right to obtain an abortion and violates the free speech rights of physicians.⁴

On appeal, the U.S. Court of Appeals for the Eighth Circuit upheld the constitutionality of the suicide advisory.⁵ The Eighth Circuit relied in part on the reasoning in the Supreme Court's 2007 decision *Gonzales v. Carhart*, which held that Congress had the authority to enact a law banning certain abortion procedures, despite medical uncertainty over whether the law would impose significant health risks on women.⁶ Citing this reasoning, the Eighth Circuit found that the South Dakota legislature had the authority to require the disclosure of increased risk of suicide, regardless of "medical and scientific uncertainty" as to whether abortion causes suicide.⁷

I. SOUTH DAKOTA'S INFORMED CONSENT STATUTE AND PLANNED PARENTHOOD'S LAWSUIT

In 1993, South Dakota enacted a law requiring physicians to obtain voluntary and informed consent from all patients seeking abortions, except in medical emergencies.⁸ The informed consent provision requires physicians to disclose to the patient "the medical risks associated with abortion and with carrying [the] child to term" In 2005, the State enacted House Bill 1166 ("the Act"), which amended the 1993 statute.¹⁰ The Act expanded the disclosure requirements that doctors must provide to patients when obtaining informed consent to an abortion.¹¹ The new disclosure provisions required doctors to explain the biological effects of an abortion "on a whole, separate . . . living human being" and to give "[a] description of all known medical risks of the procedure and statistically significant risk factors to which [the woman]

³ See *Rounds V*, 686 F.3d at 894; *Rounds I*, 375 F. Supp. 2d at 885.

⁴ *Rounds V*, 686 F.3d at 892.

⁵ See *id.* at 906.

⁶ See *Gonzales v. Carhart*, 550 U.S. 124, 164 (2007); *Rounds V*, 686 F.3d at 911 (Murphy, J., dissenting).

⁷ *Rounds V*, 686 F.3d at 900 (citing *Gonzales*, 550 U.S. at 164).

⁸ *Planned Parenthood Minn., N.D., S.D. v. Rounds (Rounds II)*, 467 F.3d 716, 719 (8th Cir. 2006).

⁹ *Id.*

¹⁰ *Id.* (citing S.D. CODIFIED LAWS § 34-23A-10.1 (2011)).

¹¹ *Id.*

would be subjected, including . . . [i]ncreased risk of suicide ideation and suicide”¹²

In June of 2005, Planned Parenthood and its medical director, Dr. Carol E. Ball, sued South Dakota to prevent the Act from taking effect, claiming that portions of the Act were unconstitutionally vague.¹³ Additionally, Planned Parenthood argued that several provisions of the Act, including the suicide advisory, constituted an undue burden on abortion rights and violated patients’ and physicians’ free speech rights.¹⁴ In response, South Dakota contended that the Act protects the due process liberty interests of women seeking abortions and ensures that these patients “fully appreciate[] the nature of the procedure and all of its risks to both herself and her child.”¹⁵

The U.S. District Court for the District of South Dakota preliminarily enjoined the Act on June 30, 2005, finding that the Act likely violated abortion providers’ free speech rights.¹⁶ In the district court’s view, portions of the Act comprised unconstitutional compelled speech as they required doctors to express the state’s views as if they were their own opinion.¹⁷ Initially, a divided panel of the Eighth Circuit affirmed the district court’s decision.¹⁸ After revisiting the case en banc, however, the Eighth Circuit vacated the preliminary injunction and remanded the case for further proceedings.¹⁹

On remand, the district court found that portions of the Act were constitutional.²⁰ Nevertheless, the district court granted a permanent injunction and barred enforcement of the suicide advisory, finding that it required physicians to make untrue and misleading statements to

¹² S.D. CODIFIED LAWS § 34–23A-10.1; *Planned Parenthood Minn., N.D., S.D. v. Rounds (Rounds IV)*, 650 F. Supp. 2d 972, 976 (D.S.D. 2009), *rev’d* 686 F.3d 889 (8th Cir. 2012) (explaining that the “biological disclosure” portion of the statute requires the physician to make a statement that “the abortion will terminate the life of a whole, separate, unique, living human being”).

¹³ *Planned Parenthood Minn., N.D., S.D. v. Rounds (Rounds V)*, 686 F.3d 889, 892 (8th Cir. 2012) (en banc), *rev’g* 650 F. Supp. 2d 972 (D.S.D. 2009).

¹⁴ *Id.*

¹⁵ See *Opposition to Motion for Preliminary Injunction* at 1–2, *Planned Parenthood Minn., N.D., S.D. v. Rounds (Rounds I)*, 375 F. Supp. 2d 881 (D.S.D. 2005) (No. 05–4077), 2005 WL 1792244.

¹⁶ See *Rounds V*, 686 F.3d at 892; *Rounds I*, 375 F. Supp. 2d at 887–88.

¹⁷ See *Rounds I*, 375 F. Supp. 2d at 887.

¹⁸ *Rounds V*, 686 F.3d at 892.

¹⁹ *Id.*

²⁰ See *id.* at 892–93; *Rounds IV*, 650 F. Supp. 2d at 980–81, 987–88 (holding that the biological disclosure requirement and the medical emergency exception were constitutional and that the statutory phrase “all known medical risks” was not unconstitutionally vague).

patients.²¹ The court concluded that this provision imposed an undue burden on abortion rights and facially violated doctors' right under the First Amendment not to be compelled to speak by the government.²² On appeal, a divided panel of the Eighth Circuit affirmed the district court's decision regarding the suicide advisory, but later granted a rehearing en banc only on the issue of this particular provision.²³

The en banc court vacated the permanent injunction against the enforcement of the suicide advisory provision of the Act.²⁴ The en banc majority held that the suicide advisory neither imposed an undue burden on abortion rights nor violated physicians' free speech rights, relying in part on *Gonzales v. Carhart*.²⁵ In 2007, in *Gonzales*, the Supreme Court held that Congress has the authority to enact a law that bans an abortion procedure, despite medical uncertainty regarding the procedure's necessity.²⁶ The majority's reliance on *Gonzales* however, dangerously diminishes the amount and scientific quality of information that women in South Dakota will receive after they consent to an abortion.²⁷

II. THE EIGHTH CIRCUIT VACATES THE PERMANENT INJUNCTION AGAINST THE SUICIDE ADVISORY UNDER THE CASEY STANDARD

Planned Parenthood contended that forcing doctors to tell their patients about the purported suicide risk imposed an undue burden on abortion rights and violated physicians' free speech rights.²⁸ As the Eighth Circuit explained, the standard for the constitutionality of informed consent disclosures in the abortion context was set out in the Supreme Court's 1992 decision *Planned Parenthood of Southeastern Pennsylvania v. Casey*.²⁹

In *Casey*, the Supreme Court held that a Pennsylvania informed consent law was not an undue burden on a woman's right to have access to abortion.³⁰ The Court explained that the undue burden stan-

²¹ See *Rounds V*, 686 F.3d at 906; *Rounds IV*, 650 F. Supp. 2d at 983.

²² *Rounds V*, 686 F.3d at 892.

²³ *Id.* at 893.

²⁴ *Id.* at 906.

²⁵ *Id.* at 900; *id.* at 911 (Murphy, J., dissenting).

²⁶ *Gonzales v. Carhart*, 550 U.S. 124, 146–47, 164 (2007); *Rounds V*, 686 F.3d at 911 (Murphy, J., dissenting).

²⁷ See *Rounds V*, 686 F.3d at 911 (Murphy, J., dissenting).

²⁸ *Planned Parenthood Minn., N.D., S.D. v. Rounds (Rounds V)*, 686 F.3d 889, 892 (8th Cir. 2012) (en banc), *rev'g* 650 F. Supp. 2d 972 (D.S.D. 2009).

²⁹ See *id.* at 893 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882–83 (1992)).

³⁰ See *Casey*, 505 U.S. at 887.

dard should be employed in order to protect the right to abortion access that was recognized by the Supreme Court in *Roe v. Wade*, while also protecting a state's profound interest in potential life.³¹ An undue burden exists, and a provision of law is therefore invalid, if the purpose or effect of the law is to place substantial obstacles in the path of a woman's choice to obtain an abortion.³² Although a state is permitted to "enact regulations to further the health or safety of a woman seeking an abortion," it may not impose unnecessary health regulations that present a substantial obstacle.³³ The Court further announced that the government does not impose an undue burden on abortion rights when it requires "the giving of truthful, non-misleading information about the nature of the abortion procedure, the attendant health risks and those of childbirth"³⁴

A. *Disparate Results in Applying the Casey Standard to the Suicide Advisory*

To prevail under the standard set forth in *Casey*, the Eight Circuit en banc majority in *Rounds V* explained that Planned Parenthood was required to show that the information required by the suicide advisory was untrue, misleading, or irrelevant to a patient's decision to abort her pregnancy.³⁵ Analyzing the suicide advisory using the *Casey* standard, the en banc majority found it was constitutional.³⁶ The majority first examined what disclosure the Act requires doctors to convey to patients seeking abortions.³⁷ Planned Parenthood argued that the disclosures referred to a causal link between abortion and suicide.³⁸ According to Planned Parenthood, the suicide advisory provision required physicians to tell their patients that it is "generally recognized" that undergoing an abortion causes an increased risk of suicide.³⁹

³¹ *Id.* at 878.

³² *Id.*

³³ *Id.*

³⁴ *See id.* at 838.

³⁵ *Rounds V*, 686 F.3d at 893.

³⁶ *See id.*

³⁷ *Id.*

³⁸ *Id.* at 894.

³⁹ *Id.* at 889; Brief of Plaintiffs/Appellees/Cross-Appellants at 51-52, *Planned Parenthood Minn., N.D., S.D. v. Rounds (Rounds V)*, 686 F.3d 889 (8th Cir. 2012), 2010 WL 1535951 [hereinafter Brief of Plaintiffs/Appellees/Cross-Appellants]. Planned Parenthood highlighted the Act's requirement that physicians disclose that an increased risk of suicide is a risk factor "to which the pregnant woman would be subjected." Brief of Plaintiffs/Appellees/Cross-Appellants, *supra*, at 889.

The majority, however, rejected this argument, instead interpreting the advisory to require a disclosure of an increased risk of suicide, rather than a causal link between suicide and abortion.⁴⁰ Additionally, the majority stated that the finding of an increased risk of suicide did not require conclusive proof of a causal link between abortion and suicide.⁴¹

The majority then discussed whether the disclosure of an increased risk of suicide is truthful.⁴² The court found that numerous studies published in peer-reviewed medical journals supported South Dakota's contention that women who abort their pregnancies have a higher risk of suicide than women who have not had abortions.⁴³ Such studies, the majority explained, were "sufficiently reliable to support the truth of the proposition that the relative risk of suicide and suicide ideation is higher for women who abort their pregnancies compared to women who give birth or have not become pregnant."⁴⁴ Therefore, the court concluded that the disclosure required by the Act was truthful.⁴⁵

Finally, the court asked whether the disclosure of an increased risk of suicide associated with abortions was misleading or irrelevant.⁴⁶ Planned Parenthood presented evidence that the Food and Drug Administration, two leading professional medical associations, and every provider of elective abortions in the country do not adopt the view that abortion increases the risk of suicide.⁴⁷ Additionally, Planned Parenthood presented evidence indicating that suicide may be caused by factors preexisting the abortion procedure, such as a history of mental illness, domestic violence, and young age at the time of pregnancy.⁴⁸

⁴⁰ See *Rounds V*, 686 F.3d at 898 (explaining that the advisory requires physicians to disclose "simply that the risk of suicide and suicide ideation is higher among women who abort compared to women in other relevant groups, such as women who give birth or do not become pregnant").

⁴¹ See *id.* at 895.

⁴² *Id.* at 893.

⁴³ *Id.* at 894–95, 898–99 (citing Mika Gissler et al., *Suicides After Pregnancy in Finland, 1987–94*, 313 BRIT. MED. J. 1431, 1432 (1996) (finding an "increased risk of suicide" in women who had received an induced abortion); David M. Fergusson, et al., *Abortion in Young Women and Subsequent Mental Health*, 47 J. CHILD PSYCHOL. & PSYCHIATRY 16, 19 (2006) (concluding that the women in the study "who had abortions appeared to be at moderately increased risk of both concurrent and subsequent mental health problems when compared with equivalent groups of pregnant or non-pregnant peers.")).

⁴⁴ *Id.* at 898–99.

⁴⁵ *Id.* at 899.

⁴⁶ *Rounds V*, 686 F.3d at 893.

⁴⁷ *Id.* at 908–09 (Murphy, J., dissenting); Brief of Plaintiffs/Appellees/Cross-Appellants, *supra* note 39, at 54.

⁴⁸ See *Rounds V*, 686 F.3d at 899; *id.* at 907–08 (Murphy, J., dissenting).

These factors may predispose women to have both unwanted pregnancies and suicidal tendencies, creating misleading correlations between suicide and abortion.⁴⁹ Planned Parenthood argued the suicide advisory was therefore misleading and irrelevant to patients seeking abortions.⁵⁰

The en banc majority, however, did not interpret Planned Parenthood's evidence as definitive proof of absence of a causal link between abortion and suicide.⁵¹ Instead, the court viewed the evidence as a mere admission of medical and scientific uncertainty surrounding the abortion procedure.⁵² The Eight Circuit however, found that medical and scientific uncertainty was not sufficient to establish that the suicide advisory was unconstitutionally misleading or irrelevant.⁵³ In coming to this conclusion, the en banc majority relied significantly on the Supreme Court's 2007 decision *Gonzales v. Carhart*.⁵⁴

B. *Medical Uncertainty of the Suicide Advisory and the Majority's Reliance on Gonzales*

Gonzales v. Carhart involved two consolidated cases in which Planned Parenthood and a group of doctors who perform second trimester abortions separately sued the U.S. Attorney General to enjoin the enforcement of the Partial-Birth Abortion Ban Act of 2003 ("the Ban").⁵⁵ The Ban was a federal statute that proscribed a type of abortion procedure typically performed in the second trimester of a woman's pregnancy.⁵⁶ The evidence presented showed that there was documented medical disagreement over whether the Ban's prohibitions would impose significant health risks on women who required second trimester abortions for health reasons.⁵⁷ Despite this uncertainty, the *Gonzales* Court held that there was a sufficient basis to conclude that the Ban did not impose an undue burden on abortion rights because state and federal legislatures have "wide discretion to pass legislation in areas where there is medical and scientific uncertainty."⁵⁸

⁴⁹ *Id.* at 899 (majority opinion).

⁵⁰ *Id.*

⁵¹ *Id.* at 904.

⁵² *Id.* at 900.

⁵³ *See id.*

⁵⁴ *Rounds V*, 686 F.3d at 911 (Murphy, J., dissenting).

⁵⁵ *Gonzales v. Carhart*, 550 U.S. 124, 132–33 (2007).

⁵⁶ *See id.* at 135–136.

⁵⁷ *See id.* at 162.

⁵⁸ *Id.* at 163–64.

The *Rounds* majority relied on the Court's reasoning in *Gonzales* to dispute many of Planned Parenthood's arguments that the information in the suicide advisory was misleading and untruthful.⁵⁹ Planned Parenthood presented the court with evidence that there was no causal link between abortion and suicide and that there are underlying factors that may predispose some women to have both unwanted pregnancies and suicidal tendencies.⁶⁰ The *Rounds* majority viewed this evidence as an indication that there is "medical uncertainty" surrounding the information in the suicide advisory, and according to *Gonzales*, that is a sufficient basis for the exercise of legislative power.⁶¹ The court explained that the state legislature could best weigh these differing results and come to their own conclusion about how to legislate, without the court's interference.⁶² As a result, the en banc majority held that the information in the suicide advisory did not impose an undue burden on abortion rights.⁶³

C. A Strong Dissent to the Majority's Reasoning

In response, the dissent in *Rounds V* strongly disputed the majority's claims that the suicide advisory was constitutional under the *Casey* standard.⁶⁴ It argued that the suicide advisory was unconstitutional because it did not inform the free choice of women and it was not consistent with existing medical evidence.⁶⁵ Whereas the majority found that the statute did not require the disclosure of a causal link between abortion and suicide, the dissent asserted that the statute plainly required physicians to disclose a causal relationship.⁶⁶ The dissent also argued that the evidence in the record, which the majority had characterized merely as divergent, clearly demonstrated that suicide is not a medical risk of abortion and is instead caused by preexisting factors.⁶⁷ As the dissent explained, the majority had to overcome the clear evidence in

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

⁶⁰ See *id.* at 899 (majority opinion); *id.* at 907–08 (Murphy, J., dissenting).

⁶¹ *Id.* at 904–06 (majority opinion).

⁶² See *id.*

⁶³ *Id.* To establish that the advisory was misleading, Planned Parenthood would have had to prove with medical and scientific certainty that abortion played no causal role. *Id.* at 900.

⁶⁴ See *id.* at 907 (Murphy, J., dissenting).

⁶⁵ See *Rounds V*, 686 F.3d at 907 (Murphy, J., dissenting).

⁶⁶ *Id.* at 898 (majority opinion); *id.* at 907 (Murphy, J., dissenting).

⁶⁷ See *id.* at 904 (majority opinion); *id.* at 907 (Murphy, J., dissenting).

Planned Parenthood's favor by relying on *Gonzales* to create a new standard for informed consent advisories.⁶⁸

In the dissent's view, the evidence of medical uncertainty as to the connection between suicide and abortion undermined the constitutionality of the suicide advisory.⁶⁹ Such uncertainty, however, was not fatal to the majority's reasoning because the majority created a new standard for informed consent advisories.⁷⁰ As the dissent explained, under the majority's new test, the advisory would be truthful, non-misleading, and relevant as long as a causal link between abortion and suicide could be theoretically possible.⁷¹ Planned Parenthood instead faced a greater burden of having to prove the absence of a causal link with scientifically accepted certainty in order to prevail.⁷²

The dissent argued that the majority misapplied *Gonzales* in its discussion of medical uncertainty.⁷³ Because *Gonzales* did not deal with an informed consent issue, the Court there did not evaluate the information given to an individual woman to ensure that her decision is "mature and informed."⁷⁴ Instead, the dissent pointed out that the *Gonzales* Court focused on the information that was presented to Congress.⁷⁵ The Court found that the legislature was fully informed of the contradicting medical opinions regarding the Act and could thus "balance the need to protect the state's interests in the 'ethics of the medical profession' and 'respect for dignity of human life' against the uncertain risks to women's health resulting from the ban."⁷⁶ The state's interest in *Rounds*, however, differed from the state's interests in *Gonzales*.⁷⁷ The state's interest in *Rounds* was to promote a "wise,' 'mature[,] and informed' decision by women considering an abortion."⁷⁸ In South Dakota, the law did not inform women seeking an abortion of medical evidence indicating that the information in the suicide advisory may not be true.⁷⁹ In light of this defect, a woman's ability to make a wise,

⁶⁸ *Id.* at 911 (Murphy, J., dissenting).

⁶⁹ *Id.*

⁷⁰ *See id.*

⁷¹ *Rounds V*, 686 F.3d at 911 (Murphy, J., dissenting).

⁷² *See id.*

⁷³ *Id.*

⁷⁴ *Id.* (citing *Casey*, 505 U.S. at 883).

⁷⁵ *See id.*

⁷⁶ *Id.* (quoting *Gonzales*, 550 U.S. at 157, 166).

⁷⁷ *See Rounds V*, 686 F.3d at 911 (Murphy, J., dissenting).

⁷⁸ *See id.* (quoting *Casey*, 505 U.S. at 833, 877).

⁷⁹ *Id.* at 911.

mature, and informed choice to undergo an abortion would be hindered.⁸⁰

III. THE MAJORITY'S INAPPROPRIATE RELIANCE ON *GONZALES*

The *Planned Parenthood Minn., N.D., S.D. v. Rounds* majority misapplied *Gonzales v. Carhart*, thereby creating a new standard for judging the constitutional validity of informed consent advisories.⁸¹ The holding significantly weakens *Casey*'s requirement that such advisories be truthful, non-misleading, and relevant to the patient's decision to have an abortion because the information in the disclosure is not supported by medical evidence.⁸²

The *Rounds* majority relied on *Gonzales* in part to find that the South Dakota legislature was in a better position than the court to weigh the differing opinions on the validity of the suicide advisory.⁸³ The majority, however, failed to consider the stark differences between the federal statute in *Gonzales* and the South Dakota informed consent law.⁸⁴ In *Gonzales*, the statute in question prohibited a specific abortion procedure due to its particularly gruesome nature.⁸⁵ In contrast, the South Dakota informed consent law containing the suicide advisory, does not regulate a procedure, but rather dictates the information that is directly provided to a woman to ensure that her decision is mature and informed.⁸⁶ Additionally, in *Gonzales*, Congress had passed the Partial-Birth Abortion Ban after having been fully informed of the medical uncertainty surrounding the procedure's necessity.⁸⁷ Under the South Dakota informed consent law's suicide advisory, however, women seeking abortions will not be made aware of the existence of medical uncertainty surrounding the association between abortion and suicide.⁸⁸ Instead, women seeking abortions will be told that the procedure will subject them to an increased risk of suicide, without an explanation

⁸⁰ *Id.*

⁸¹ See *Planned Parenthood Minn., N.D., S.D. v. Rounds (Rounds V)*, 686 F.3d 889, 911 (8th Cir. 2012) (en banc) (Murphy, J., dissenting), *rev'g* 650 F. Supp. 2d 972 (D.S.D. 2009).

⁸² See *id.* at 892 (majority opinion) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882–83, 911 (1992)); *id.* at 911 (Murphy, J., dissenting).

⁸³ See *id.* at 904, 906 (majority opinion); *id.* at 907 (Murphy, J., dissenting).

⁸⁴ See *id.* at 911 (Murphy, J., dissenting).

⁸⁵ *Gonzales v. Carhart*, 550 U.S. 124, 146–47 (2007).

⁸⁶ See *id.*; *Planned Parenthood Minn., N.D., S.D. v. Rounds (Rounds I)*, 375 F. Supp. 2d 881, 883–84 (D.S.D. 2005), *vacated*, 530 F.3d 724 (8th Cir. 2008), *remanded to* 650 F. Supp. 2d 972 (D.S.D. 2009).

⁸⁷ See *Rounds V*, 686 F.3d at 911 (Murphy, J., dissenting).

⁸⁸ See *id.*

that the validity of such information is in dispute among members of the medical community.⁸⁹

The majority also failed to consider an important factor that the *Gonzales* Court relied on in concluding that the Partial Birth Abortion Ban was constitutional.⁹⁰ In *Gonzales*, the Court reasoned that the Partial-Birth Abortion Ban was valid in part because there were alternative second trimester abortion procedures readily available that were not banned by the statute.⁹¹ The *Rounds* majority failed to adequately address this issue, despite the fact that the Act requires that all women in South Dakota who seek abortions be given the information in the suicide advisory.⁹² The fact that women must receive this information despite medical uncertainty shows a sharp contrast between the suicide advisory at issue in *Rounds* and the federal statute upheld by *Gonzales*.⁹³

As a result of the majority's reliance on *Gonzales*, women in South Dakota who seek abortions will not have the benefit of receiving truthful and non-misleading information about the procedure.⁹⁴ The suicide advisory, therefore, represents "an undue burden on a pregnant woman's due process rights and violates a doctor's First Amendment right against compelled speech."⁹⁵ The majority explained that the goal "of informed consent laws is to allow the patient to evaluate her condition and render her best decision under difficult circumstances."⁹⁶ By relying on *Gonzales*, the majority failed to meet these established goals of providing women with the most accurate information possible.⁹⁷ Instead, the court validated a law that requires doctors to give women medical information that is at best only a partial explanation of the issue, and at worst is untruthful, misleading, and irrelevant.⁹⁸

CONCLUSION

In validating the suicide advisory portion of South Dakota's informed consent to abortion law, the Eighth Circuit relied in part on *Gonzales v. Carhart* to find that the state's legislature had the power to

⁸⁹ See *id.*

⁹⁰ See *Gonzales*, 550 U.S. at 164; *Rounds V*, 686 F.3d at 905.

⁹¹ *Gonzales*, 550 U.S. at 164.

⁹² See *Rounds V*, 686 F.3d at 905.

⁹³ See *Gonzales*, 550 U.S. at 164; *Rounds V*, 686 F.3d at 905.

⁹⁴ See *Rounds V*, 686 F.3d. at 893; *id.* at 911 (Murphy, J., dissenting).

⁹⁵ See *id.* at 912 (Murphy, J., dissenting).

⁹⁶ See *id.* at 905 (majority opinion) (quoting *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 579 (5th Cir. 2012)).

⁹⁷ See *id.* at 905; *id.* at 912 (Murphy, J., dissenting).

⁹⁸ See *id.* at 912 (Murphy, J., dissenting).

implement the law, despite medical uncertainty surrounding the information in the advisory. Reliance on *Gonzales* was inappropriate in this case because women seeking abortions will not have the benefit of weighing the evidence regarding the association between abortions and suicide. As a result, women in South Dakota who seek abortions will be exposed to information that is potentially untruthful and misleading, and which therefore imposes an undue burden on their constitutional right to obtain an abortion.