No.11-50814

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TEXAS MEDICAL PROVIDERS PERFORMING ABORTION SERVICES, doing business as Reproductive Services of San Antonio, a class represented by Metropolitan OBGYN, P.A.; on behalf of itself and its patients seeking abortions; ALAN BRAID, on behalf of himself and his patients seeking abortions,

Plaintiffs-Appellees,

v.

DAVID LAKEY, Commissioner of the Texas Department of State Health Services, in his official capacity; MARI ROBINSON, Executive Director of the Texas Medical Board, in her official capacity,

Defendants-Appellants.

On appeal from the United States District Court for the Western District of Texas, Austin Division

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AMICUS CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE AND THE HOUSTON COALITION FOR LIFE, IN SUPPORT OF THE APPELLANTS AND SUPPORTING REVERSAL

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No. 11-50814

TEXAS MEDICAL PROVIDERS PERFORMING ABORTION SERVICES, et al.,

Plaintiffs-Appellees,

v.

DAVID LAKEY, et al.,

Defendants-Appellants.

SUPPLEMENTAL CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Name	**Interest**
American Center for Law & Justice	Amicus supporting appellants; the ACLJ has no parent corporation and issues no stock
Houston Coalition for Life	Amicus supporting appellants; HCL has no parent corporation and issues no stock
Jay Alan Sekulow Stuart J. Roth Walter M. Weber CeCe Heil	Counsel for Amici

s/ Walter M. Weber
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INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued in numerous cases involving the First Amendment before the Supreme Court of the United States and other federal and state courts. *See*, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *McConnell v. FEC*, 540 U.S. 93 (2003). The ACLJ is concerned with the proper resolution of this case because it involves determination of the proper balancing between individuals' First Amendment interest not to speak, and the state's interest in insuring the communication of truthful and relevant information to patients so that patients may make fully informed medical decisions. The ACLJ also supports sensible measures for regulating abortion and opposes the distortion of normal legal rules in the abortion context.

The Houston Coalition for Life (HCL) owns and operates a mobile

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[1] No party's counsel in this case authored this brief in whole or in part. No party or party's counsel contributed any money intended to fund preparing or submitting this brief. No person, other than amici, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief.

Crisis Pregnancy Center which provides free sonogram services to expectant mothers. The HCL organizes Stand & Pray events outside abortion facilities in Houston, Texas.

Appellants consented to the filing of this amicus brief but appellees declined to consent. Amici therefore are moving for leave to submit this brief.

SUMMARY OF ARGUMENT

Informed consent requirements, while they may literally compel speech, do not trigger strict constitutional scrutiny. Rather, the First Amendment requires only that such measures be reviewed for reasonableness. There is no exception to this rule just because the context involves abortion.

ARGUMENT

The district court erred by applying "strict scrutiny" to informed consent requirements. To the contrary, under the First Amendment such requirements need only represent "reasonable . . . regulation by the state." *Planned Parenthood of SE Pennsylvania v. Casey*, 505 U.S. 833, 884 (1992).

I. INFORMED CONSENT REQUIREMENTS FOR PHYSICIANS ARE SUBJECT TO REASONABLENESS REVIEW, NOT STRICT SCRUTINY.

The informed consent doctrine is a familiar and established principle of American jurisprudence, especially in the medical context. *See* Aaron D. Twerski & Neil B. Cohen, *The Second Revolution in Informed Consent: Comparing Physicians to Each Other*, 94 Nw. U.L. Rev. 1, 1 (1999) (doctrine is over four decades old). Informed consent requirements are recognized in both the common law of torts and by state statutes.[2] If a physician does not disclose the required information to the patient

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[2] *See, e.g.*, Tex. Civ. Prac. & Rem. Code Ann. § 74.107 (West 2011) (hysterectomy patient must be provided and sign written materials describing the risks and hazards involved in the performance of the procedure); N.Y. Pub. Health Law § 2496 (Consol. 2011) (physician must provide hysterectomy patient with a written summary containing information including possible alternative treatments, risks of the procedure, and benefits of the procedure); Cal. Health and Safety Code § 109275 (Deering 2011) (upon diagnosis of breast cancer, physicians and surgeons required to provide the patient with a written summary including statistics on the incidence of breast cancer and the problems, benefits and alternatives to the surgical procedure); Ariz. Rev. Stat. Ann. § 36-1702 (LexisNexis 2011) (statute requires the physician to obtain written and oral consent after informing a patient providing her human eggs of potential risks including notice that the magnitude of associated risks are unknown); Colo. Rev. Stat. § 12-37-105(5) (2011) (a midwife must obtain informed consent, evidenced by a written statement, before accepting a client by communicating the midwife's educational background and training, available alternatives to utilizing a midwife, a description of the risks of birth, and information relating to liability insurance); Mich. Comp. Laws Serv. § 333.17520(1), (2) (LexisNexis 2011) (before performing genetic testing, statute requires physician to explain the nature, purpose, effectiveness, limitations, risks, and benefits of genetic testing and to receive a signed informed consent writing from the tested individual before testing).

concerning the anticipated procedure, that physician is liable for the consequences of this failure to speak.

Informed consent requirements are such an established part of the legal landscape that constitutional challenges to such regulations on the grounds of compelled speech are rare, indeed virtually nonexistent. While there have lately been some attempts, in the context of abortion regulations, to impose strict constitutional scrutiny upon informed consent requirements, the Supreme Court's decisions in *Casey* and in *Gonzalez v. Carhart*, 550 U.S. 124 (2007), plainly foreclose such arguments.

In *Casey*, the Supreme Court addressed and rejected 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." *Casey*, 505 U.S. at 884. The statute at issue in *Casey* required physicians to inform the patient of

> (i) The nature of the proposed procedure or treatment and of those risks and alternatives to the procedure or treatment that a reasonable patient would consider material to the decision of whether or not to undergo the abortion.
>
> (ii) The probable gestational age of the unborn child at the time the abortion is to be performed.

(iii) The medical risks associated with carrying her child to term. *Id*. at 902 (quoting statute). The Supreme Court held that, "[t]o be sure, the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to *reasonable* licensing and *regulation* by the State." *Id*. (citations omitted; emphasis added). Hence, the standard of constitutional review is *reasonableness*, not strict (or heightened) scrutiny.

Such a standard is analogous to the standard applied to compelled commercial speech. The Supreme Court has established that the state may compel disclosure of information in the commercial context when that information is "purely factual." *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 650-51 (1985). In mandating certain disclosures, the state protects the consumer and does not "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein," but merely "prescribe[s] what shall be orthodox in commercial advertising." *Id*. (quoting *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

Similarly, in the medical informed consent context, the state is not prescribing an orthodox political or religious ideology; it is prescribing an orthodox medical practice in order to protect the state's and the patient's clearly established interests. *Gonzales v. Carhart*, 550 U.S. at 159-60 ("The State has a interest in ensuring so grave a choice is well informed," and "it is self-evident" that the mother has an interest in information relating to the details of the abortion procedure). As the *Casey* Court explained:

> It cannot be questioned that psychological wellbeing is a facet of health. Nor can it be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision. In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.

Casey, 505 U.S. at 882.

II. THE SAME REASONABLENESS STANDARD APPLIES TO INFORMED CONSENT REQUIREMENTS FOR ABORTION.

If there were an exception to the normal rules in the abortion context, that exception would necessarily flow from the recognition of abortion as a distinct right -- *i.e.*, the "privacy" jurisprudence. Yet *Casey* --

itself an abortion case -- establishes that there is *no* special "abortion exception" to the constitutional standards governing informed consent. "Thus, a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure." 505 U.S. at 884.

Lest there be any doubt on this score, the Supreme Court reaffirmed the point in *Gonzales v. Carhart*:

> The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community. In *Casey* the controlling opinion held an informed-consent requirement in the abortion context was "no different from a requirement that a doctor give certain specific information about any medical procedure."

550 U.S. at 163.[3] Hence, the Supreme Court's abortion precedents make

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[3] Following these precedents, the en banc Eighth Circuit rejected physicians' compelled speech claim and applied the *Casey* and *Gonzales* standard to uphold a South Dakota informed consent law. That law required an abortion doctor to inform the patient that, among other things, "the abortion will terminate the life of a whole, separate, unique, living human being." The court held: "*Casey* and *Gonzales* establish that, while the State cannot compel an individual simply to speak the State's ideological message, it can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion." *Planned Parenthood v. Rounds*, 530 F.3d 724, 734-35 (8th Cir. 2008) (en banc).

clear that the abortion context does *not* trigger any heightened level of constitutional review for informed consent requirements.

III. SUBJECTING INFORMED CONSENT REQUIREMENTS TO STRICT SCRUTINY WOULD PROFOUNDLY UNDERMINE SETTLED LAW.

To hold, as the district court did, that medical informed consent requirements trigger strict scrutiny as "compelled speech," would throw into disarray an entire area of law. Suddenly, in every case alleging a breach of informed consent requirements, the state -- or more typically, a malpractice plaintiff[4] -- would be required to show a "compelling interest" supporting each particular disclosure which the physician failed to make. Further, the litigant would have to show that each required disclosure was "narrowly tailored" to that interest. Obviously, such scrutiny would doom a host of commonly accepted informed consent requirements, as strict scrutiny imposes a strong presumption *against* state action and erects nearly insurmountable hurdles for regulation. This Court should not embrace such a jurisprudential revolution.

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[4] The First Amendment restrains government action regardless of whether that action comes in the form of a legislative act or judicial enforcement of common law duties. *New York Times v. Sullivan*, 376 U.S. 254, 265 (1964).

CONCLUSION

This Court should reverse the district court's grant of a preliminary injunction.

Respectfully submitted,

s/ Walter M. Weber

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Nov. 4, 2011

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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s/ Walter M. Weber
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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2011, I filed the Amicus Curiae Brief electronically with the Clerk of the United States Court of Appeals for the Fifth Circuit, using the CM/ECF system. I certify that the following participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system:

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