Nos. 21-2913 & 21-2922
IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PLANNED PARENTHOOD MINNESOTA, NORTH DAKOTA, SOUTH DAKOTA and SARAH A. TRAXLER, M.D., *Plaintiffs-Appellees,*

v.

KRISTI NOEM, Governor, JASON R. RAVNSBORG, Attorney General, KIM MALSAM-RYSDON, Secretary, South Dakota Department of Health and PHILLIP MEYER, D.O., President, Board of Medical and Osteopathic Examiners, in their official capacities, *Defendants-Appellants,*

ALPHA CENTER and BLACK HILLS CRISIS PREGNANCY CENTER, d/b/a Care Net Pregnancy Resource Center, *Intervenors/Appellants.*

Appeal from the United States District Court for the District of South Dakota, Southern Division, Case No. Civ. 11-4071-KES
The Honorable Karen E. Schreier, U.S. District Court Judge

ADDENDUM TO STATE APPELLANTS' BRIEF

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ADDENDUM 1

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

PLANNED PARENTHOOD MINNESOTA, NORTH DAKOTA, SOUTH DAKOTA and CAROL E. BALL, M.D.; Plaintiffs, vs. KRISTI NOEM, Governor, JASON RAVNSBORG, Attorney General, KIM MALSAM-RYSDON, Secretary of Health, Department of Health, and JEFFREY A. MURRAY, M.D., President of Board of Medical and Osteopathic Examiners, in their Official Capacities; Defendants, ALPHA CENTER and BLACK HILLS CRISIS PREGNANCY CENTER, d/b/a Care Net Pregnancy Resource Center, Intervenor Defendants.	4:11-CV-04071-KES ORDER DENYING MOTION TO DISSOLVE WHAT REMAINS OF THE PRELIMINARY INJUNCTION AND DENYING AS MOOT MOTION TO EXPEDITE

Defendants, Kristi Noem, Governor, Jason Ravnsborg, Attorney General, Kim Malsam-Rysdon, Secretary of Health, Department of Health, and Jeffrey A. Murray, M.D., President of Board of Medical and Osteopathic Examiners, in their Official Capacities (state defendants), and intervenors, Alpha Center and

Black Hills Crisis Pregnancy Center (pregnancy help center [PHC] intervenors), move to dissolve what remains of the preliminary injunction that the court granted on June 30, 2011 (Docket 39) and dissolved in part on June 27, 2012 (Docket 84) and June 11, 2013 (Docket 129). Docket 204. The state defendants and PHC intervenors also move to expedite resolution of their motion to dissolve. Docket 300. Plaintiffs, Planned Parenthood Minnesota, North Dakota, and South Dakota and Carol E. Ball, M.D. (Planned Parenthood), oppose both motions. Dockets 310, 321.

I. Whether Planned Parenthood Has Standing to Bring this Suit

"Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.' " *Valley Forge Christian Coll. v. Ams. United for a Separation of Church & State*, 454 U.S. 464, 471 (1982). A "case or controversy" requires "a definite and concrete controversy involving adverse legal interests at every stage in the litigation." *Gray v. City of Valley Park*, 567 F.3d 976, 983 (8th Cir. 2009) (quoting *McFarlin v. Newport Special Sch. Dist.*, 980 F.2d 1208, 1210 (8th Cir. 1992)). For a case or controversy to exist under Article III, and thus for a federal court to have jurisdiction, the plaintiff must have standing to bring suit. *Id.* Article III standing may be raised at any time during the litigation by either party or by the court. *Id.*

Whether a plaintiff has standing to bring a claim based on another's legal rights, rather than their own, is an issue of prudential standing and does not implicate Article III. *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2117

(2020). Courts generally allow plaintiffs to "assert third-party rights in cases where the 'enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' rights.' " *Id.* at 2118-19 (quoting *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (emphasis in the original)). "[T]he relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter." *Singleton v. Wulff*, 428 U.S. 106, 115 (1976).

The Supreme Court has "long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations." *June Med. Servs.*, 140 S. Ct. at 2118 (citing *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2314 (2016); *Gonzales v. Carhart*, 550 U.S. 124, 133 (2007); *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 324 (2006); *Stenberg v. Carhart*, 530 U.S. 914, 922 (2000); *Mazurek v. Armstrong*, 520 U.S. 968, 969-70 (1997) (per curiam); *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 845 (1992) (majority opinion); *Akron v. Akron Cntr. for Reproductive Health, Inc.*, 462 U.S. 416, 440 n.30 (1983), *overruled on other grounds by Casey*, 505 U.S. at 882; *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 62 (1976); *Doe v. Bolton*, 410 U.S. 179, 188-89 (1973)). This is because the abortion provider "is the party upon whom the challenged statute imposes 'legal duties and disabilities' " and is thus " 'the obvious claimant' and 'the least awkward challenger' " to laws that affect abortion access. *Id.* at 2119 (quoting *Craig v. Boren*, 429 U.S. 190, 196-97 (1976)).

Here, PHC intervenors argue, first, that Planned Parenthood would not suffer any "injury-in-fact" were the injunction to be dissolved, and that thus, it lacks third party standing. Docket 205 at 39-40. But Planned Parenthood is plainly an entity "upon whom the challenged statute imposes 'legal duties and disabilities,' " because the enjoined provisions of the South Dakota law place requirements on Planned Parenthood's physicians' practice of medicine and on the operation of clinics. *June Med. Servs.*, 140 S.Ct. at 2119; *see* SDCL § 34-23A-56(3). Further, failure to comply with the enjoined provisions would expose Planned Parenthood and its physicians to the threat of civil liability. SDCL § 34-23A-60. Thus, as the Supreme Court has repeatedly held, Planned Parenthood has standing to sue based on its own injury to enforce the Constitutional rights of its patients.

Second, PHC intervenors argue that Planned Parenthood is not an "effective proponent of the right" at issue as would be pregnant women seeking abortion or PHC intervenors themselves. Docket 205 at 40-42; *Singleton*, 428 U.S. at 115. They seem to claim that Planned Parenthood's and pregnant women's interests are at odds because Planned Parenthood challenges a law ostensibly aimed at protecting pregnant women. Docket 205 at 40. But the *June Medical Services* plurality squarely addressed this issue and found that the appearance of conflict is a "common feature of cases in which [the Court has] found third-party standing." 140 S. Ct. at 2119. Legislatures often enact restrictions on medical care and treatment to protect patients, but medical providers nonetheless continue to be the parties best positioned to challenge

those laws. *See id.* at 2119-20. Thus, the PHC intervenors' attempt to distinguish this case from the numerous instances where courts have found third party standing for abortion physicians fails.

This case is in line with decades of Supreme Court and Eighth Circuit precedent that allow abortion providers to sue to defend the rights of their patients. PHC intervenors point to no legal precedent or distinguishing facts that indicate otherwise. Thus, Planned Parenthood has standing to bring this suit and the court has jurisdiction to hear it.

II. Whether to Dissolve What Remains of the Injunction

A. Procedural Background

In 2011, the South Dakota Legislature passed the act at issue here, House Bill 1217 (HB 1217). The act is codified, following legislative amendments, at SDCL §§ 34-23A-53 through 34-23A-62. The court initially enjoined from taking effect all sections of the act except for section 5 (now SDCL § 34-23A-58, establishing registries of pregnancy help centers), subsection 1 of section 7 (now SDCL § 34-23A-53(1), defining pregnancy help center), and subsection 5 of section 9 (now SDCL § 34-23A-61(5), stating patients may not waive the act's requirements). Docket 39.

Following joint motions by the parties due to changes in the facts and law, the court later dissolved all provisions of the injunction except as to three portions of the law. *See* Dockets 82, 129. The first portion that remains enjoined, SDCL § 34-23A-56(3), states that prior to scheduling an abortion, a physician must:

> [P]rovide [the pregnant woman] with written instructions that set forth the following:
>
> (a) That prior to the day of any scheduled abortion the pregnant mother must have a consultation at a pregnancy help center at which the pregnancy help center shall inform her about what education, counseling, and other assistance is available to help the pregnant mother keep and care for her child, and have a private interview to discuss her circumstances that may subject her decision to coercion;
>
> (b) That prior to signing a consent to an abortion, the physician shall first obtain from the pregnant mother, a written statement that she obtained a consultation with a pregnancy help center, which sets forth the name and address of the pregnancy help center, the date and time of the consultation, and the name of the counselor at the pregnancy help center with whom she consulted[.]

The second enjoined portion, SDCL § 34-23A-59, states:[1]

> A pregnancy help center consultation required by §§ 34-23A-53 to 34-23A-59.2, inclusive, shall be implemented as follows:
>
> (1) The pregnancy help center shall be permitted to:
>
> (a) Interview the pregnant mother to determine whether the pregnant mother has been subject to any coercion to have an abortion, or is being pressured into having an abortion;
>
> (b) Provide counseling in connection with any coercion or pressure;
>
> (c) Inform the pregnant mother in writing or orally, or both, of the counseling, education, and assistance available to the pregnant mother to assist her in maintaining her relationship with her unborn child and in caring for the child through the pregnancy help center or any other organization, faith-based program, or governmental program;
>
> (d) Provide a statement orally and in writing to the pregnant mother that "an abortion will terminate the life of a whole, separate, unique, living human being," and provide counseling in lay terms that

[1] SDCL § 34-23A-59 was modified twice after the court's 2011 order, in 2016 (2016 S.D. Sess. Laws ch. 179 § 3) and 2018 (2018 S.D. Sess. Laws ch. 205 § 16). This text represents the law in its current form. Changes to the law and their impact on the 2011 injunction order are discussed below.

explain this disclosure, and to ascertain that the pregnant mother understands this disclosure, and for the purpose of this disclosure, the definition of human being found in subdivision 34-23A-1(4) applies; and

(e) Provide statements orally and in writing setting forth the disclosures required by subsections 34-23A-10.1(1)(c) and (d) and provide counseling in lay terms that explain those disclosures. The pregnancy help center may, if it deems it appropriate, discuss matters pertaining to adoption;

(2) The pregnancy help center, its agents, or employees may not:

(a) Discuss with any pregnant mother religion or religious beliefs, either of the mother or the counselor, unless the pregnant mother consents in writing;

(b) Discuss the physical or psychological risks to a woman posed by an abortion. However, if, during the mandatory pregnancy help center consultation interview, the pregnant mother requests the opportunity to discuss the risks of an abortion with pregnancy help center personnel, the pregnancy help center may schedule a separate and distinct appointment for the pregnant mother to meet with a physician for the purpose of discussing the physical and psychological risks of abortion. Any requests shall be evidenced in writing signed by the pregnant mother;

(3) The pregnancy help center is under no obligation to communicate with the abortion provider in any way, and is under no obligation to submit any written or other form of confirmation that the pregnant mother consulted with the pregnancy help center. The pregnancy help center may voluntarily provide a written statement of assessment to the abortion provider, whose name the woman shall give to the pregnancy help center, if the pregnancy help center obtains information that indicates that the pregnant mother has been subjected to coercion or that her decision to consider an abortion is otherwise not voluntary or not informed. The physician shall make the physician's own independent determination whether or not a pregnant mother's consent to have an abortion is voluntary, uncoerced, and informed before having the pregnant mother sign a consent to an abortion. The physician shall review and consider any information provided by the pregnancy help center as one source of information, which in no way binds the physician, who shall make an independent determination consistent with the provisions of §§ 34-23A-53 to 34-23A-59.2, inclusive, the common law requirements, and accepted medical standards;

> (4) Any written statement or summary of assessment prepared by the pregnancy help center as a result of counseling of a pregnant mother as a result of the procedures created by §§ 34-23A-53 to 34-23A-59.2, inclusive, may be forwarded by the pregnancy help center, in its discretion, to the abortion physician. If forwarded to the physician, the written statement or summary of assessment shall be maintained as a permanent part of the pregnant mother's medical records. Other than forwarding such documents to the abortion physician, no information obtained by the pregnancy help center from the pregnant mother may be released, without the written signed consent of the pregnant mother or unless the release is in accordance with federal, state, or local law;
>
> (5) Commencing on September 1, 2016, the counseling authorized pursuant to this section shall be conducted in accordance with the Uniform Policy and Procedures Guidelines developed and promulgated by the South Dakota Association of Registered Pregnancy Help Centers and adopted in 2015.
>
> Nothing in §§ 34-23A-53 to 34-23A-59.2, inclusive, may be construed to impose any liability upon a pregnancy help center. However, the failure of a pregnancy help center to comply with the conditions of § 34-23A-58.1, 34-23A-59.1 or this section for being authorized to provide the pregnancy help center counseling, if uncorrected, may result in the Department of Health removing the pregnancy help center from the state's registry of pregnancy help centers.

The third enjoined provision is that portion of SDCL § 34-23A-61(4) that is in italics, and states:

> (4) The pregnant mother has a right to rely upon the abortion doctor as her source of information, and has no duty to seek any other source of information, *other than from a pregnancy help center as referenced in §§ 34-23A-5b and 34-23A-57*, prior to signing a consent to an abortion[.]

In the 2011 order granting preliminary injunction, the court performed an analysis under the factors laid out in *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109 (8th Cir. 1981) and determined that injunction of the pregnancy help center requirement was appropriate under existing law and the facts

before the court. *See* Docket 39 at 4-61. This order was not appealed. PHC intervenors and state defendants now move to dissolve the injunction as to SDCL § 34-23A-59 and SDCL § 34-23A-56(3), citing alleged "overwhelming" changes of circumstances since the court issued the 2011 injunction. Docket 205 at 14.

B. Analysis

A preliminary injunction's purpose is to preserve the status quo until the merits of an action are resolved. *Dataphase Sys., Inc.*, 640 F.2d at 113. In determining whether to grant a preliminary injunction, the court considers "(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that the movant will succeed on the merits; and (4) the public interest." *Id.* at 114. **"**A party seeking modification or dissolution of an injunction bears the burden of establishing that a significant change in facts or law warrants . . . dissolution of the injunction." *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000); *cf. Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 383 (1992) (party moving for "modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision").

The court may determine whether to dissolve the injunction based on what is "equitable in light of subsequent changes in the facts or the law, or for any other good reason." *Movie Sys., Inc. v. MAD Minneapolis Audio Distribs.*,

717 F.2d 427, 430 (8th Cir. 1983). Whether to dissolve a preliminary injunction is within the district court's discretion. *See Waste Mgmt., Inc. v. Deffenbaugh*, 534 F.2d 126, 129 (8th Cir. 1976). Because this motion asks the court to dissolve the preliminary injunction due to changed law and facts—and is not an appeal of the original injunction or a motion for reconsideration—the court reviews whether dissolving the remaining injunction is "equitable in light of subsequent changes in the facts or the law, or for any other good reason." *Movie Sys., Inc.*, 717 F.2d at 430.[2] PHC intervenors and state defendants bear the burden of showing that changed facts or law merit dissolution of the remaining injunction.

1. Success on the Merits: Due Process and Equal Protection

The court first addresses the PHC intervenors' assertion that "Due Process *requires*" the state to mandate counseling before a woman receives an abortion. Docket 205 at 16; Docket 351 at 9-16. This argument was not raised during the original preliminary injunction briefing because PHC intervenors did not move to intervene until after the injunction was granted.

The Due Process Clause of the Fourteenth Amendment protects against "the deprivation by state action of a constitutionally protected interest in 'life,

[2] PHC intervenors and state defendants urge the court to "revisit" existing precedent, specifically *Roe v. Wade*, 410 U.S. 113 (1973) and related United States Supreme Court and Eighth Circuit cases that recognize a pregnant woman's right to access abortion. Docket 271 at 3. The court declines to do so and treats all relevant Eighth Circuit and Supreme Court case law as binding. The court considers only changes to the relevant precedent since 2011 and does not consider the correctness of higher courts' decisions.

liberty, or property' . . . without due process of law." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). The protections of the Fourteenth Amendment are triggered by state action. *See, e.g.*, *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982) ("Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence."); *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 924 (1982) ("Because the [Fourteenth] Amendment is directed at the States, it can be violated only by conduct that may be fairly characterized as 'state action.' "); *S.S. v. McMullen*, 225 F.3d 960, 962 (8th Cir. 2000) (en banc) ("[T]he constitutional right to be free from bodily harm is a right secured only against state actors, not against private ones: The purpose of the fourteenth amendment 'was to protect the people from the State, not to ensure that the State protected them from each other.' " (quoting *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 196 (1989))). There is no state action present when a pregnant woman terminates her pregnancy at a Planned Parenthood clinic. Thus, the Due Process Clause does not apply and the State is not required to provide any due process protections to a woman before she undergoes an abortion at a Planned Parenthood clinic.

PHC intervenors argue that the State "expressly authorizes" abortions via its statutory scheme and that the statutory scheme constitutes "state action." Docket 351 at 14-15. Mere "authorization" via statute does not amount to state action. The existence of a statute authorizing abortion cannot be "fairly characterized as 'state action.' " *Lugar*, 457 U.S. at 924. The due process rights

of a woman are not implicated when she consults with a doctor at Planned Parenthood and the State is not required to implement procedural safeguards consistent with due process.[3]

PHC intervenors argue that Due Process protections apply here because they apply in an adoption proceeding, where the State, via a court order, severs a parent's rights to associate with and care for their child. *Santosky*, 455 U.S. at 747-48. A court order is a state action under the Fourteenth Amendment. *Cf. Shelley v. Kraemer*, 334 U.S. 1, 14 ("That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court."). In an abortion procedure at a Planned Parenthood clinic, unlike in an adoption proceeding, no court order authorizes the abortion. Thus, there is no state action.

PHC intervenors also style their argument regarding adoption counseling as an Equal Protection claim, alleging that women terminating their parental rights via adoption enjoy greater protection in the form of mandatory counseling than do women terminating those rights via abortion. *See* Docket 205 at 46-48. South Dakota law requires that, before a birth parent "petition[s] the court for the voluntary termination of parental rights," the parent must

[3] PHC intervenors urge the court to address the "tension" between a woman's right to maintain a relationship with her child and her right to obtain an abortion and note that no court has yet addressed this tension. Docket 351 at 16-17. No court has addressed this "tension" because it is not a tension at all. A woman's right to maintain a relationship with her child free from state interference is not in tension with her right to obtain an abortion free from state interference.

obtain "counseling regarding the termination." SDCL § 25-5A-22. As discussed above, the rights terminated in an adoption proceeding are terminated by the State through a court order. Unlike in a court-ordered adoption proceeding, the State does not terminate parental rights in an abortion. While those who are similarly situated must be treated alike, *F.S. Royster Guano Co. V. Virginia*, 253 U.S. 412, 415 (1920), a woman whose parental rights are being terminated by state action is not similarly situated to one who chooses to terminate those rights via abortion of an unborn child at a private clinic. Thus, the court finds PHC intervenors unlikely to succeed on the merits of their equal protection claim.

2. Success on the Merits: First Amendment

In the 2011 injunction order, the court analyzed the pregnancy help center requirement under the strict scrutiny standard articulated in *Wooley v. Maynard*, 430 U.S. 705, 715-16 (1977), and found that the requirement "implicate[d] First Amendment protections" and was not "narrowly tailored to serve a compelling state interest." Docket 39 at 7-16 (quoting *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 733 (8th Cir. 2008) (en banc)). The court thus found that Planned Parenthood was likely to succeed on the merits of its First Amendment challenge to the pregnancy help center requirement.

a. Whether strict scrutiny applies

PHC intervenors and state defendants argue that strict scrutiny is not the appropriate standard here, because the pregnancy help center requirement

arises in the context of informed consent to a medical procedure. *See* Docket 205 at 51-52; Docket 271 at 31-34; Docket 351 at 21. " '[A] requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion' implicates a physician's First Amendment right not to speak, 'but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.' " *Rounds*, 530 F.3d at 733 (quoting *Casey*, 505 U.S. at 884); *see also Nat'l Inst. of Fam. & Life Advocs. v. Beccera*, 138 S. Ct. 2361, 2373 (2018). Where a physician is "merely [] required to give 'truthful, nonmisleading information' relevant to the patient's decision to have an abortion," there is no violation of the physician's First Amendment right not to speak and the court need not determine whether the requirement is narrowly tailored to serve a compelling interest, as required by the strict scrutiny test in *Wooley*. *Rounds*, 530 F.3d at 733 (quoting *Casey*, 505 U.S. at 882).

Here, the pregnancy help center requirement does not simply require a licensed physician to give a patient truthful, nonmisleading information relevant to the abortion decision. The pregnancy help center requirement implicates the *pregnant woman's* right not to speak, and requires her to disclose deeply personal information about her pregnancy to the pregnancy help center, along with her name and identifying information. The mandated counseling session implicates more than speech incidental to informed consent to abortion. *See Nat'l Inst. of Fam. & Life Advocs.*, 138 S. Ct. at 2373. No case in the Eighth Circuit or Supreme Court has held a *woman's* compelled

speech—rather than a licensed medical provider's—to any standard lower than strict scrutiny. The court continues to apply strict scrutiny here.

b. Whether the pregnancy help center requirements continue to implicate free speech

Under the strict scrutiny standard laid out in *Wooley*, the court first determines if the pregnancy help center requirement implicates a woman's free speech rights. *Wooley*, 430 U.S. at 715-16. The court reasoned in the 2011 injunction order that the pregnancy help center requirement compelled a pregnant woman to speak, implicating her speech rights, because it mandates her to "have a private interview to discuss her circumstances," which "necessarily requires questions *and* answers." Docket 39 at 9 (emphasis in the original). Even if the pregnancy help center requirement did not require a woman to speak during the interview itself, the court found that "the requirements on their face compel a patient to not only disclose that she is pregnant and is seeking an abortion, but also to disclose the name of her abortion physician . . . ." *Id.* at 10; *see* SDCL § 34-23A-59(4). Those compelled disclosures, the court found, implicate the protections of the Free Speech Clause. *Id.* at 10 (citing *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos.*, 515 U.S. 557, 573-74 (1995)).

Amendments to the pregnancy help center requirement since the 2011 injunction order do not ameliorate, but instead compound, the ways in which the pregnancy help center requirement implicates a pregnant woman's speech. The 2012 amendments increased the scope of counseling appointments,

adding the ability for counselors to screen whether a woman seeking an abortion has been subjected to "pressure," in addition to coercion. 2012 S.D. Sess. Laws ch. 186 § 7. That amendment broadens the scope of the counseling session and increases the personal issues that a woman may be asked to discuss.

The 2016 amendments mandate that pregnancy help center counseling be conducted in accordance with the Uniform Policy Procedures and Guidelines promulgated by the South Dakota Association of Registered Pregnancy Help Centers. 2016 S.D. Sess. Laws ch. 179 § 3. Those guidelines, in turn, require that before making an appointment, a pregnant woman give the center "her name, telephone number, name of the physician who referred her, and the address or location of the physician who referred her." Docket 246-2 at 25.

The "1217 intake form"—which pregnancy help staff are required to fill out in its entirety—also must include "sufficient space to record the following information:"

1. The reason for the phone call and the services sought by the woman;
2. Full name of the client;
3. A client identification number . . . ;
4. Client's telephone number and address;
5. Whether the 1217 client needs a translator during the counseling session, and, if so, which language she speaks;
6. A provision by which she either gives or declines permission to call her at the telephone number provided;
7. Date of birth;
8. Whether she has tested positive for pregnancy;
9. Marital status;
10. Whether she has already had a sonogram, and if so, where;
11. First day of last menstrual period, number of weeks gestation, if known, or due date, if known;

12. Whether she has been referred to a pregnancy help center by a physician with whom she met to have an abortion? Is she seeking consultation because an abortion doctor told her she must do so; [and]
13. If so, the identity of the abortion provider . . . .

Docket 246-2 at 28-29. Even without contemplating the speech a pregnant woman would be compelled to divulge *during* a pregnancy help center interview, the pre-interview requirements alone demonstrate that the pregnancy help center requirement compels a pregnant woman to speak. During the interview itself, it is likely the pregnancy help center counselor would probe further into deeply personal issues, including how the pregnant woman's parents reacted to her pregnancy, what "her boyfriend sa[id]" when informed about the pregnancy, and what advice friends had given her. Docket 322-1 at 8, 15; Docket 322-2 at 8, 15.

PHC intervenors and state defendants identify no changed law or fact that would result in the pregnancy help center requirement ceasing to implicate pregnant women's free speech rights, and changes to the law exacerbate its effect on a woman's speech rights. Thus, the pregnancy help center requirement continues to implicate pregnant women's free speech rights and the court moves to the next prong of the *Wooley* test.

c. Whether pregnancy help center requirement is narrowly tailored to achieve a compelling state interest

In the order granting preliminary injunction, the court acknowledged the "compelling state interest in protecting a woman from being forced against her will to have an abortion" and assumed without deciding that that interest was

the true goal behind the pregnancy help center requirement. Docket 39 at 12.[4] The court found, however, that the pregnancy help center requirement is not narrowly tailored towards achieving that interest. *Id.* at 12-16. The court identified "several less restrictive alternatives that are equally capable of informing the pregnant woman" to prevent her from being coerced to have an abortion. *Id.* at 13 (citing *Reno v. Am. C. L. Union*, 521 U.S. 844, 874 (1997) (holding that a statute was not narrowly tailored because there were "less restrictive alternatives [that] would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve").

[4] State defendants and PHC intervenors submitted a deluge of evidence to show how urgent and compelling the state's interest is in preventing coerced abortions. *See* Dockets 206-270; 272; 275-277; 352-365. Most of these filings are either not related to South Dakota and Planned Parenthood's operation in South Dakota and thus are not relevant to practices at abortion providers in the state, or are about events that occurred before the court's 2011 injunction order and thus do not present a change in circumstances. *See, e.g.*, Docket 275 (abortion clinic in St. Paul, Minnesota); Docket 207 (abortion performed in 2005); Docket 209 (abortion performed in 1994); Docket 218 (abortion clinic in Overland Park, Kansas); Docket 233 (abortion performed in New Jersey in 2001); Dockets 267-2 to 267-50 (excerpts from depositions taken in 2006); Dockets 211, 212, 213, 214 (Planned Parenthood's Bryan, Texas; Chapel Hill, North Carolina; Sherman, Texas; and Tampa, Florida clinics); Docket 216 (abortion that took place over 20 years ago and employment experience at the Planned Parenthood clinic of St. Louis, Missouri); Docket 215 (training of the National Abortion Federation that took place in 1996); Docket 302 (Planned Parenthood clinic in Sioux City, Iowa). One affidavit describes a coerced abortion in South Dakota in 2012, but Planned Parenthood disputes that its clinic failed to follow appropriate protocol with that patient. *See* Dockets 206, 347. Even assuming Planned Parenthood did fail to screen for coercion in that case, the court's analysis does not change. The court in 2011 acknowledged that the state has a compelling interest in preventing coerced abortions and continues to assume so here.

For example, SDCL § 34-23A-10.1 continues to require that before an abortion, disclosure must be made to a woman about resources available to her. While state defendants assert that the written materials are "no substitute for, or alternative to, in person, individualized counseling," the state does not explain why counseling must be mandatory for all women who choose abortion, rather than an available option for women who choose to receive counseling. Docket 271 at 13.

State defendants assert that the pregnancy help center requirement is narrowly tailored because Planned Parenthood "cannot be trusted" to comply with mandatory counseling and disclosure laws, and thus the State must require counseling at a third-party pregnancy help center before a woman may receive an abortion. Docket 271 at 12. But the State's own inspecting body, the South Dakota Department of Health (SDDOH), has never found Planned Parenthood deficient in its facilities or noncompliant with regulations.[5] Docket 325 ¶¶ 14-15, 17. The State provides no reason that a woman who is adequately informed of the existence of a pregnancy help center, her access to printed and website materials about abortion, and a host of other disclosures required by SDCL § 34-23A-10.1 cannot decide to voluntarily seek counseling from a pregnancy help center if she chooses. *Id.* The pregnancy help center requirement continues to fail to be narrowly tailored towards achieving the

[5] In 2018, the SDDOH initially cited Planned Parenthood following a routine annual audit. Docket 325 ¶ 17. SDDOH withdrew the citation after discussion between Planned Parenthood and SDDOH officials regarding relevant law. *Id.*

State's interests. The court finds that Planned Parenthood remains likely to succeed on the merits of its First Amendment claim.

3. Success on the Merits: Undue burden

In the order granting preliminary injunction, the court next analyzed whether the pregnancy health center requirement "operate[s] as a substantial obstacle to a woman's choice to undergo an abortion 'in a large fraction of the cases in which [it] is relevant,' " and is therefore invalid. Docket 39 at 17 (quoting *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1456-58 (8th Cir. 1995) (alteration in original) (quoting *Casey*, 505 U.S. at 895)). The undue burden framework, set forth by the plurality in *Casey*, was reaffirmed by the Supreme Court in 2016 in *Whole Women's Health*. 136 S. Ct. at 2301 "[T]here 'exists' an 'undue burden' on a woman's right to decide to have an abortion, and consequently a provision of law is constitutionally invalid, if the '*purpose or effect*' of the provision '*is to place a substantial obstacle*' in the path of a woman seeking an abortion before the fetus attains viability." *Id.* (emphasis in the original) (citing *Casey*, 505 U.S. at 878). In 2020, in *June Medical Services*, a plurality of the Court again affirmed the undue burden standard. 140 S. Ct. at 2112-13. The court will analyze the pregnancy help center requirement under the undue burden standard here.

In the 2011 injunction order, the court found that the cases where the pregnancy help center requirement is relevant are those cases where (1) a woman has chosen to undergo an abortion, and (2) she would not otherwise

consult with a pregnancy help center. Docket 39 at 18-19. State defendants argue that the court under-counted the cases where the pregnancy help center requirement is relevant and that it is actually relevant when a woman is (1) only considering abortion and (2) has not yet received third-party counseling, whether or not she plans to. *Id.* The court determined in 2011 that the "plain language of the Pregnancy Help Center Requirements establish[] that a pregnant woman must consult with a pregnancy help center only if she chooses to undergo an abortion." *Id.* at 18 n.9. The court also found that a woman who has chosen to consult with a pregnancy help center on her own would not be burdened by the requirement. *Id.* The court cited *Casey*, which held that a woman who wished to notify her husband of her intent to have an abortion was not included in the "relevant" cases when analyzing a statute that required spousal notification prior to abortion. *See Casey*, 505 U.S. at 894. State defendants have failed to show any change in the law that would call into question the court's conclusion. Thus, the court continues to view the pool of "relevant" cases as those where a woman has (1) chosen to undergo an abortion and (2) would not otherwise seek pregnancy help center counseling.

The court next found that the pregnancy help center requirement poses "a substantial obstacle to a woman's choice to undergo an abortion[]" in a large fraction of the cases where it is relevant. *Id.* at 19 (quoting *Miller*, 63 F.3d at 1458). The court found that women were likely to feel "humiliate[d] and degrade[d]" because of the requirement. *Id.* The "compulsive nature" of the requirement suggests that a woman is incapable of making the decision to have

an abortion or seek counseling on her own and is "not intelligent enough" to make such a decision. *Id.*

The parties point to no reason why the 2011 determinations by the court are now invalid. The pregnancy help center requirement is still compulsory. SDCL § 34-23A-56(3) ("[T]he physician *shall* [p]rovide the pregnant mother with [contact information] of all pregnancy help centers that are registered . . . ."; "[T]he pregnant mother *must* have a consultation at a pregnancy help center . . . ." (emphasis added)). The compulsive nature of the counseling requirement is still likely to make a woman feel "humiliate[d] and degrade[d][,]" and cause her to feel as if the state views her as incapable of making the decision to have an abortion on her own.

Women seeking an abortion who are compelled to attend pregnancy health center counseling would still be "forced into a hostile environment," and might be reluctant to attend counseling and choose to remain pregnant instead. Docket 39 at 19. The Uniform Guidelines, incorporated into law in 2012, state as a "Fundamental Consideration" that "probably most pregnant mothers considering an abortion, would prefer to keep and raise their child[ren] . . . ." Docket 246-2 at 42. A pregnancy help center counselor enters an interview with a pregnant woman under the paternalistic assumption that the woman has not decided to seek an abortion of her own volition, but rather because she is unable to make a decision on her own and is subject to societal pressures. Pregnancy help center counselors may believe that a woman would

only exercise her right to abortion if she has been "forced or manipulated into killing [her] own child[] . . . ." Docket 237 ¶ 4.

Even if, as PHC intervenors and state defendants allege, the counseling session is ideologically neutral and the counselor him or herself expresses zero signs of disapproval of the pregnant woman's choice to obtain an abortion, *see* Docket 205 at 31-32, the centers' facilities show a clear ideological opposition to abortion. One pregnancy help center, intervenor Alpha Center, boasts on its website a "Memorial Garden for the Unborn" that offers "a place of hope and recovery for women and families who are suffering the aftermath of abortion." Docket 322-4; Memorial Garden for the Unborn, Alpha Center, https://alphacenterfriends.com/memorial-garden (last visited July 29, 2021). Alpha Center's memorial garden claims that women who have had an abortion must seek "forgiveness and redemption." *Id.* This evinces Alpha Center's ideological opposition to abortion: the assumption that abortion, coerced or not, results in an "aftermath" and period of mourning and necessary "forgiveness and redemption" shows that Alpha Center considers abortion, coerced or not, immoral. A pregnant woman would be subjected to that messaging by merely attending a mandatory interview at Alpha Center's facility. "[A] woman will likely be unwilling to actually consult with a pregnancy help center because she will fear being ridiculed, labeled a murderer, and subjected to anti-abortion ideology . . . ." Docket 39 at 20. Intervenors and state defendants have not shown any factual change that would alter that conclusion.

Further, a pregnant woman required to attend counseling with a pregnancy help center might be concerned about the privacy of the sensitive information she is required to disclose. She might fear repeated contact from the pregnancy help center even after her counseling appointment, because the Uniform Guidelines now require that a copy of her photo ID be kept in her file by the center. Docket 246-2 at 40-41. And as the court stated in the initial order granting preliminary injunction, she may believe, "rightly or wrongly, that her decision to have an abortion could become public information." Docket 39 at 21. Amendments to the help center requirement have made modest improvements to a woman's privacy rights, but the privacy protections at a pregnancy help center still fall far below those at a medical clinic like Planned Parenthood. Under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), an improper disclosure of confidential patient information by a medical provider can result in substantial civil monetary penalties even when the entity "did not know and, by exercising reasonable diligence, would not have known" about the disclosure. 45 C.F.R. § 160.404(b)(2)(i).

While the Uniform Guidelines require that "the spirit and requirements of HIPPA [sic] shall be employed by the pregnancy help center," the act provides no civil enforcement mechanism for improper disclosures by pregnancy health centers, whether intentional, reckless, or negligent. Docket 246-2 at 34; SDCL § 34-23A-59; *see generally* Docket 246-2. Alpha Center has chosen to voluntarily comply with HIPAA in some regards, but voluntary compliance offers little to assure a pregnant woman that her data is secure. *See* Docket

352-1. And while the 2012 amendments to the act made it a Class 2 Misdemeanor to "knowingly and intentionally release[] any information obtained during any consultations resulting from [the pregnancy help center requirement], under circumstances not in accord with the confidentiality provisions required by [the act][,]" SDCL § 34-23A-59.2, that penalty is limited to knowing and intentional disclosures and does not protect pregnant women from negligent or unintentional disclosures. 2012 S.D. Sess. Laws ch. 186 § 9.

The lack of privacy and security protections at pregnancy help centers places an undue burden on a woman who wishes to have an abortion. A woman might decide to remain pregnant rather than risk her decision to have an abortion being shared with someone who is not supportive of that decision. A pregnant woman might reasonably be concerned that, without laws in place to encourage strong data security, a pregnancy help center may be prone to inadvertent disclosures of her sensitive information and vulnerable to data breaches.

The 2012 amendments marginally improved the quality of counseling guaranteed at a pregnancy help center, but not enough to change the undue burden calculation. The amendments added a requirement that pregnancy help centers must "ha[ve] available either on staff, or pursuant to a collaborative agreement, a licensed counselor, or licensed psychologist, or licensed certified social worker, or licensed nurse, or licensed marriage and family therapist, or physician, to provide the counseling related to the assessment for coercion . . . ." 2012 S.D. Sess. Laws ch. 186 § 4. That amendment does little to lessen

the burden on a woman seeking an abortion who would not otherwise attend counseling: she must still submit to a counselling session, against her will, at a non-medical facility that is ideologically opposed to her choice to have an abortion. Further, the requirement does not, on its face, ensure that a qualified counselor assists the pregnant woman. A "licensed nurse" who specializes in emergency room trauma but has no experience in counseling women seeking abortions, under the statute, would be permitted to conduct the counseling.

The amendments since 2011 placed an additional burden on a woman required to attend counseling by increasing the amount of time a woman is likely to be required to spend at a pregnancy help center. As incorporated in the 2012 amendments, the Uniform Guidelines authorize counseling on a broader range of topics, expanding the scope from "coercion" to both coercion and "pressure" from third parties. 2012 S.D. Sess. Laws ch. 186 § 7. While the legislature amended the definition of "coercion" following the court's 2011 order that the term was unconstitutionally vague, it left "pressure" undefined, meaning "pressure" could cover a large swath of topics that could substantially lengthen the counseling session. 2012 S.D. Sess. Laws ch. 186 § 1; *see* Docket 39 at 34-40. The 2018 amendments added a host of disclosures that counselors must provide pregnant women during the appointment, which are redundant with the disclosures provided by doctors and are likely to lengthen the counseling session. *See* 2018 S.D. Sess. Laws ch. 205. These amendments increase the burden on a woman who seeks an abortion by requiring her to attend a lengthier counseling appointment than the court contemplated in

2011. Some women might have to take a full or half day off of work or pay for child care to attend a counseling session, in addition to the time needed to attend the consultation with Planned Parenthood and the abortion procedure 72 hours later. That increased time, especially for women who live hours from the nearest Planned Parenthood clinic or pregnancy help center, contributes to the undue burden posed by the pregnancy help center requirement.

Even a short delay that comes from compliance with the pregnancy help center requirement might push a woman past the gestational age limit at which she may receive an abortion. The pregnancy help center requirement does not include a statutory timeframe by which a pregnancy help center must schedule a counseling appointment: a pregnancy help center could wait as long as it wished, stalling for time and hampering a woman's ability to access a pre-viability abortion. A woman could be prevented from receiving an abortion altogether because of the time she must wait to attend a counseling session.

State defendants argue that because pregnant women do not have "a right to be insulated from all others" in deciding to obtain an abortion, the state may implement the pregnancy help center requirement. Docket 271 at 4 (quoting *Casey*, 505 U.S. at 877). But *Casey* permits "regulations which do no more than create a structural mechanism by which the State . . . may express profound respect for the life of the unborn . . . if they are not a substantial obstacle to the woman's exercise of the right to choose." *Casey*, 505 U.S. at 877. This court found that the pregnancy help center requirement is "a substantial obstacle to a woman's decision to obtain an abortion," and more

than a mechanism by which the state may express its profound respect for life. Docket 39 at 21. "A statute which, while furthering [a] valid state interest has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." *Whole Woman's Health*, 136 S. Ct. at 2306 (quoting *Casey*, 505 U.S. at 877). Changes in the law have not altered the court's conclusion in the 2011 injunction order that the pregnancy help center requirement places an undue burden on a woman seeking abortion in a large fraction of cases where it is relevant. Planned Parenthood is likely to succeed on the merits of its undue burden claim.

d. Threat of irreparable harm

In 2011, the court found that the threat of irreparable harm weighed in favor of granting the injunction. Docket 39 at 58-59. PHC intervenors' sole argument relating to the threat of irreparable harm is that the injunction being lifted as to the *other* provisions of the act means that no harm would result from it being lifted as to *this* provision. Docket 205 at 34. The court disagrees. The factors that led to the parties stipulating to dissolve the other provisions of the 2011 injunction do not apply here.

The state defendants argue that there is no risk of irreparable harm, because *no* harm would befall a woman considering an abortion who was forced into "receiving objective, non-judgmental counseling designed to . . . inform her decision of whether to preserve her relationship with her unborn child." Docket 271 at 13. But as the court noted in 2011, "Constitutional

violations, however brief, are unquestionably irreparable." Docket 39 at 58 (citing *Kirkeby v. Furness*, 52 F.3d 772, 775 (8th Cir. 1995) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.")). The threat of irreparable harm weighs in favor of continuing the preliminary injunction.

e. Balance of the harms

In the 2011 injunction order, the court found that if the preliminary injunction was improperly denied, "many women will have been denied their right to free speech and effectively forced against their will to remain pregnant until they give birth." Docket 39 at 59. If the preliminary injunction turned out to have been improperly granted, "defendants will have been wrongly prevented from carrying out their official duties." *Id.* at 60. The court found, after balancing the harm, that the balance of the harms weighed in favor of granting the preliminary injunction. *Id.* at 60. Because the court has found that Planned Parenthood remains likely to succeed on the merits of its First Amendment claim, the balance of the harms has not changed.

f. Public Interest

The court remains convinced that the pregnancy help center requirement is likely unconstitutional. There remains a public interest in protecting women's constitutional rights to access abortion and to free speech. This factor continues to weigh in favor of maintaining the preliminary injunction.

CONCLUSION

No legal or factual change since the court's preliminary injunction in 2011 warrants dissolution of the preliminary injunction of the pregnancy help center requirement. It continues to likely infringe on women's right to free speech secured in the First Amendment, and it presents an undue burden on a woman's right to access abortion. The remaining *Dataphase* factors continue to weigh in favor of injunction.

Thus, it is

ORDERED that the motion to dissolve what remains of the preliminary injunction is denied. The injunction as laid out in the court's order at Docket 129 remains in effect. It is further

ORDERED that the motion to expedite (Docket 300) is denied as moot.

DATED August 20, 2021.

BY THE COURT:

/s/ Karen E. Schreier
KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE

34-23A-53. Definition of terms. Terms as used in §§ 34-23A-53 to 34-23A-62, inclusive, mean:

(1) "Pregnancy help center," any entity whether it be a form of corporation, partnership, or proprietorship, whether it is for profit, or nonprofit, that has as one of its principal missions to provide education, counseling, and other assistance to help a pregnant mother maintain her relationship with her unborn child and care for her unborn child, which entity has a medical director who is licensed to practice medicine in the State of South Dakota, or that it has a collaborative agreement with a physician licensed in South Dakota to practice medicine to whom women can be referred, which entity does not perform abortions and is not affiliated with any physician or entity that performs abortions, and does not now refer pregnant mothers for abortions, and has not referred any pregnant mother for abortions for the three-year period immediately preceding July 1, 2011, which entity does not place children for adoption, and which entity is in compliance with the requirements of § 34-23A-59.1;

(2) Deleted by SL 2012, ch 186, § 1;

(3) Deleted by SL 2012, ch 186, § 1;

(4) "Coercion," exists if the pregnant mother is induced to consent to an abortion by any other person under circumstances, or in such a manner, which deprives her from making a free decision or exercising her free will.

Source: SL 2011, ch 161, § 7; SL 2012, ch 186, § 1; SL 2014, ch 167, § 1.

34-23A-54. Legislative findings. The Legislature finds that as abortion medicine is now practiced in South Dakota that:

(1) In the overwhelming majority of cases, abortion surgery and medical abortions are scheduled for a pregnant mother without the mother first meeting and consulting with a physician or establishing a traditional physician-patient relationship;

(2) The surgical and medical procedures are scheduled by someone other than a physician, without a medical or social assessment concerning the appropriateness of such a procedure or whether the pregnant mother's decision is truly voluntary, uncoerced, and informed, or whether there has been an adequate screening for a pregnant mother with regard to the risk factors that may cause complications if the abortion is performed;

(3) Such practices are contrary to the best interests of the pregnant mother and her child and there is a need to protect the pregnant mother's interest in her relationship with her child and her health by passing remedial legislation;

(4) There exists in South Dakota a number of pregnancy help centers, as defined in § 34-23A-53, which have as their central mission providing counseling, education, and other assistance to pregnant mothers to help them maintain and keep their relationship with their unborn children, and that such counseling, education, and assistance provided by these pregnancy help centers is of significant value to the pregnant mothers in helping to protect their interest in their relationship with their children; and

(5) It is a necessary and proper exercise of the state's authority to give precedence to the mother's fundamental interest in her relationship with her child over the irrevocable method of termination of that relationship by induced abortion.

Source: SL 2011, ch 161, § 1.

34-23A-55. Duties of physician in addition to common law. The physician's common law duty to determine that the physician's patient's consent is voluntary and uncoerced and informed applies to all abortion procedures. The requirements expressly set forth in §§ 34-23A-53 to 34-23A-62, inclusive, that require procedures designed to insure that a consent to an abortion is voluntary and uncoerced and informed, are an express clarification of, and are in addition to, those common law duties.

Source: SL 2011, ch 161, § 2.

34-23A-56. Scheduling of abortion--Prior requirements. No surgical or medical abortion may be scheduled except by a licensed physician and only after the physician physically and personally meets with the pregnant mother, consults with her, and performs an assessment of her medical and personal circumstances. Only after the physician completes the consultation and assessment complying with the provisions of §§ 34-23A-53 to 34-23A-62, inclusive, may the physician schedule a surgical or medical abortion, but in no instance may the physician schedule such surgical or medical abortion to take place in less than seventy-two hours from the completion of such consultation and assessment except in a medical emergency as set forth in § 34-23A-10.1 and subdivision 34-23A-1(5). No Saturday, Sunday, or annually recurring holiday, as specifically named in § 1-5-1, may be included or counted in the calculation of the seventy-two hour minimum time period between the initial physician consultation and assessment and the time of the scheduled abortion procedure. No physician may have the pregnant mother sign a consent for the abortion on the day of this initial consultation and no physician, abortion provider, hospital, or clinic, at which the physician performs an abortion, may accept payment for an abortion until a consent is signed after full compliance with the provisions of §§ 34-23A-53 to 34-23A-62, inclusive. No physician may take a signed consent from the pregnant mother unless the pregnant mother is in the physical presence of the physician and except on the day the abortion is scheduled, and only after complying with the provisions of §§ 34-23A-53 to 34-23A-62, inclusive, as they pertain to the initial consultation, and only after complying with the provisions of subdivisions 34-23A-10.1(1) and (2). During the initial consultation between the physician and the pregnant mother, prior to scheduling a surgical or medical abortion, the physician shall:

(1) Do an assessment of the pregnant mother's circumstances to make a reasonable determination whether the pregnant mother's decision to submit to an abortion is the result of any coercion or pressure from other persons. In conducting that assessment, the physician shall obtain from the pregnant mother the age or approximate age of the father of the unborn child, and the physician shall consider whether any disparity in age between the mother and father is a factor when determining whether the pregnant mother has been subjected to pressure, undue influence, or coercion;

(2) Provide the written disclosure required by subdivision 34-23A-10.1(1) and discuss them with her to determine that she understands them;

(3) Provide the pregnant mother with the names, addresses, and telephone numbers of all pregnancy help centers that are registered with the South Dakota Department of Health pursuant to §§ 34-23A-53 to 34-23A-62, inclusive, and provide her with written instructions that set forth the following:

(a) That prior to the day of any scheduled abortion the pregnant mother must have a consultation at a pregnancy help center at which the pregnancy help center shall inform her about what education, counseling, and other assistance is available to help the pregnant mother keep and care for her child, and have a private interview to discuss her circumstances that may subject her decision to coercion;

(b) That prior to signing a consent to an abortion, the physician shall first obtain from the pregnant mother, a written statement that she obtained a consultation with a pregnancy help center, which sets forth the name and address of the pregnancy help center, the date and time of the consultation, and the name of the counselor at the pregnancy help center with whom she consulted;

(4) Conduct an assessment of the pregnant mother's health and circumstances to determine if any of the following preexisting risk factors associated with adverse psychological outcomes following an abortion are present in her case:

(a) Coercion;

(b) Pressure from others to have an abortion;

(c) The pregnant mother views an abortion to be in conflict with her personal or religious values;

(d) The pregnant mother is ambivalent about her decision to have an abortion, or finds the decision of whether to have an abortion difficult and she has a high degree of decisional distress;

(e) That the pregnant mother has a commitment to the pregnancy or prefers to carry the child to term;

(f) The pregnant mother has a medical history that includes a pre-abortion mental health or psychiatric problem; and

(g) The pregnant mother is twenty-two years old or younger.

The physician making the assessment shall record in the pregnant mother's medical records, on a form created for such purpose, each of the risk factors associated with adverse psychological outcomes following an abortion listed in this subdivision that are present in her case and which are not present in her case;

(4A) Inquire into whether the pregnant mother knows the sex of her unborn child and if so, whether the mother is seeking an abortion due to the sex of the unborn child.

(5) The physician shall identify for the pregnant mother and explain each of the risk factors associated with adverse psychological outcomes following an abortion listed in subdivision (4) which are present in her case;

(6) The physician shall advise the pregnant mother of each risk factor associated with adverse psychological outcomes following an abortion listed in subdivision 34-23A-56(4) which the physician determines are present in her case and shall discuss with the pregnant mother, in such a manner and detail as is appropriate, so that the physician can certify that the physician has made a reasonable determination that the pregnant mother understands the information imparted, all material information about the risk of adverse psychological outcomes known to be associated with each of the risk factors found to be present;

(7) In the event that no risk factor is determined to be present, the physician shall include in the patient's records a statement that the physician has discussed the information required by the other parts of this section and that the physician has made a reasonable determination that the mother understands the information in question;

(8) Records of the assessments, forms, disclosures, and instructions performed and given pursuant to this section shall be prepared by the physician and maintained as a permanent part of the pregnant mother's medical records.

Source: SL 2011, ch 161, § 3; SL 2012, ch 186, § 2; SL 2013, ch 157, § 1; SL 2014, ch 168, § 3; SL 2015, ch 184, § 1.

34-23A-57. Patient's written signed statement. On the day on which the abortion is scheduled, no physician may take a consent for an abortion nor may the physician perform an abortion, unless the provisions of §§ 34-23A-53 to 34-23A-62, inclusive, have been met, and the physician first obtains from the pregnant mother, a written, signed statement setting forth all information required by subsection 34-23A-56(3)(b). The written statement signed by the pregnant mother shall be maintained as a permanent part of the pregnant mother's medical records. Only the physician who meets with and consults with the pregnant mother pursuant to § 34-23A-56 can take her consent and perform her abortion unless serious unforeseen circumstances prevent that physician from taking the consent and performing the abortion.

Source: SL 2011, ch 161, § 4; SL 2012, ch 186, § 3.

34-23A-58. Registry of pregnancy help centers. The Department of Health shall maintain a registry of pregnancy help centers located in the State of South Dakota. The Department shall publish a list of all pregnancy help centers which submit a written request or application to be listed on the state registry of pregnancy help centers. All pregnancy help centers seeking to be listed on the registry shall be so listed without charge, if they submit an affidavit that certifies that:

(1) The pregnancy help center has a facility or office in the State of South Dakota in which it routinely consults with women for the purpose of helping them keep their relationship with their unborn children;

(2) That one of its principal missions is to educate, counsel, and otherwise assist women to help them maintain their relationship with their unborn children;

(3) That they do not perform abortions at their facility, and have no affiliation with any organization or physician which performs abortions;

(4) That they do not now refer pregnant women for abortions, and have not referred any pregnant women for an abortion at any time in the three years immediately preceding July 1, 2011;

(5) That they have a medical director licensed by South Dakota to practice medicine or that they have a collaborative agreement with a physician licensed in South Dakota to practice medicine to whom women can be referred;

(6) That they shall provide the counseling and interviews described in §§ 34-23A-53 to 34-23A-62, inclusive, upon request by pregnant mothers;

(7) That they shall comply with the provisions of § 34-23A-59 as it relates to discussion of religious beliefs; and

(8) That they do not place children for adoption.

For purposes of placing the name of a pregnancy help center on the state registry of pregnancy help centers maintained by the Department of Health, it is irrelevant whether the pregnancy help center is secular or faith based. The Department of Health shall immediately provide a copy of the registry of pregnancy health centers to all physicians, facilities, and entities that request it. The registry shall be regularly updated by the Department of Health in order to include a current list of pregnancy help centers and shall forward all updated lists to all physicians, facilities, and entities that previously requested the list. The Department of Health shall accept written requests or applications to be placed on the state registry of pregnancy help centers from pregnancy help centers after enactment but prior to July 1, 2011.

Source: SL 2011, ch 161, § 5; SL 2014, ch 167, § 2.

34-23A-59. Pregnancy help center consultations. A pregnancy help center consultation required by §§ 34-23A-53 to 34-23A-59.2, inclusive, shall be implemented as follows:

(1) The pregnancy help center shall be permitted to:

(a) Interview the pregnant mother to determine whether the pregnant mother has been subject to any coercion to have an abortion, or is being pressured into having an abortion;

(b) Provide counseling in connection with any coercion or pressure;

(c) Inform the pregnant mother in writing or orally, or both, of the counseling, education, and assistance available to the pregnant mother to assist her in maintaining her relationship with her unborn child and in caring for the child through the pregnancy help center or any other organization, faith-based program, or governmental program;

(d) Provide a statement orally and in writing to the pregnant mother that "an abortion will terminate the life of a whole, separate, unique, living human being," and provide counseling in lay terms that explain this disclosure, and to ascertain that the pregnant mother understands this disclosure, and for the purpose of this disclosure, the definition of human being found in subdivision 34-23A-1(4) applies; and

(e) Provide statements orally and in writing setting forth the disclosures required by subsections 34-23A-10.1(1)(c) and (d) and provide counseling in lay terms that explain those disclosures. The pregnancy help center may, if it deems it appropriate, discuss matters pertaining to adoption;

(2) The pregnancy help center, its agents, or employees may not:

(a) Discuss with any pregnant mother religion or religious beliefs, either of the mother or the counselor, unless the pregnant mother consents in writing;

(b) Discuss the physical or psychological risks to a woman posed by an abortion. However, if, during the mandatory pregnancy help center consultation interview, the pregnant mother requests the opportunity to discuss the risks of an abortion with pregnancy help center personnel, the pregnancy help center may schedule a separate and distinct appointment for the pregnant mother to meet with a physician for the purpose of discussing the physical and psychological risks of abortion. Any requests shall be evidenced in writing signed by the pregnant mother;

(3) The pregnancy help center is under no obligation to communicate with the abortion provider in any way, and is under no obligation to submit any written or other form of confirmation that the pregnant mother consulted with the pregnancy help center. The pregnancy help center may voluntarily provide a written statement of assessment to the abortion provider, whose name the woman shall give to the pregnancy help center, if the pregnancy help center obtains information that indicates that the pregnant mother has been subjected to coercion or that her decision to consider an abortion is otherwise not voluntary or not informed. The physician shall make the physician's own independent determination whether or not a pregnant mother's consent to have an abortion is voluntary, uncoerced, and informed before having the pregnant mother sign a consent to an abortion. The physician shall review and consider any information provided by the pregnancy help center as one source of information, which in no way binds the physician, who shall make an independent determination consistent with the provisions of §§ 34-23A-53 to 34-23A-59.2, inclusive, the common law requirements, and accepted medical standards;

(4) Any written statement or summary of assessment prepared by the pregnancy help center as a result of counseling of a pregnant mother as a result of the procedures created by §§ 34-23A-53 to 34-23A-59.2, inclusive, may be forwarded by the pregnancy help center, in its discretion, to the abortion physician. If forwarded to the physician, the written statement or summary of assessment shall be maintained as a permanent part of the pregnant mother's medical records. Other than forwarding such documents to the abortion physician, no information obtained by the pregnancy help center from the pregnant mother may be released, without the written signed consent of the pregnant mother or unless the release is in accordance with federal, state, or local law;

(5) Commencing on September 1, 2016, the counseling authorized pursuant to this section shall be conducted in accordance with the Uniform Policy and Procedures Guidelines developed and promulgated by the South Dakota Association of Registered Pregnancy Help Centers and adopted in 2015.

Nothing in §§ 34-23A-53 to 34-23A-59.2, inclusive, may be construed to impose any liability upon a pregnancy help center. However, the failure of a pregnancy help center to comply with the conditions of § 34-23A-58.1, 34-23A-59.1 or this section for being authorized to provide the pregnancy help center counseling, if uncorrected, may result in the Department of Health removing the pregnancy help center from the state's registry of pregnancy help centers.

Source: SL 2011, ch 161, § 6; SL 2012, ch 186, § 7; SL 2016, ch 179, § 3; SL 2018, ch 205, § 16.

34-23A-60. Civil action for failure to comply with §§ 34-23A-56 and 34-23A-57. Any woman who undergoes an abortion, or her survivors, where there has been an intentional, knowing, or negligent failure to comply with the provisions of §§ 34-23A-56 and 34-23A-57 may bring a civil action, and obtain a civil penalty in the amount of ten thousand dollars, plus reasonable attorney's fees and costs, jointly and severally from the physician who performed the abortion and the abortion facility where the abortion was performed.

This amount shall be in addition to any damages that the woman or her survivors may be entitled to receive under any common law or statutory provisions, to the extent that she sustains any injury. This amount shall also be in addition to the amounts that the woman or other survivors of the deceased unborn child may be entitled to receive under any common law or statutory provisions, including but not limited to the wrongful death statutes of this state.

Source: SL 2011, ch 161, § 8.

34-23A-61. Civil action for failure to comply with chapter. In any civil action presenting a claim arising from a failure to comply with any of the provisions of this chapter, the following shall apply:

(1) The failure to comply with the requirements of this chapter relative to obtaining consent for the abortion shall create a rebuttable presumption that if the pregnant mother had been informed or assessed in accordance with the requirements of this chapter, she would have decided not to undergo the abortion;

(2) If the trier of fact determines that the abortion was the result of coercion, and it is determined that if the physician acted prudently, the physician would have learned of the coercion, there is a nonrebuttable presumption that the mother would not have consented to the abortion if the physician had complied with the provisions of §§ 34-23A-53 to 34-23A-62, inclusive;

(3) If evidence is presented by a defendant to rebut the presumption set forth in subdivision (1), then the finder of fact shall determine whether this particular mother, if she had been given all of the information a reasonably prudent patient in her circumstance would consider significant, as well as all information required by §§ 34-23A-53 to 34-23A-62, inclusive, to be disclosed, would have consented to the abortion or declined to consent to the abortion based upon her personal background and personality, her physical and psychological condition, and her personal philosophical, religious, ethical, and moral beliefs;

(4) The pregnant mother has a right to rely upon the abortion doctor as her source of information, and has no duty to seek any other source of information, other than from a pregnancy help center as referenced in §§ 34-23A-56 and 34-23A-57, prior to signing a consent to an abortion;

(5) No patient or other person responsible for making decisions relative to the patient's care may waive the requirements of this chapter, and any verbal or written waiver of liability for malpractice or professional negligence arising from any failure to comply with the requirements of this chapter is void and unenforceable.

Source: SL 2011, ch 161, § 9; SL 2012, ch 186, § 10.

34-23A-83. Legislative finding that Planned Parenthood facility in Sioux Falls provides written disclosures that include certain statement. The Legislature finds that the physicians, agents, and employees performing or assisting in the performance of abortions at the Planned Parenthood facility in Sioux Falls, South Dakota provide written disclosures to pregnant mothers considering an abortion that include the statement:

"Politicians in the State of South Dakota require us to tell you that you are legally and constitutionally protected against being forced to have an abortion."

Source: SL 2018, ch 205, § 10.

34-23A-87. Legislative finding regarding phrase "politicians in the State of South Dakota require us to tell you that...". The Legislature finds that the use of the phrase "politicians in the State of South Dakota require us to tell you that" is antithetical to the purpose and effectiveness of the disclosures, and evidences a hostility to the required disclosures and signals to the pregnant mothers that the required disclosures, to the extent they are made at all, should be ignored.

Source: SL 2018, ch 205, § 14.

34-23A-88. Legislative finding regarding inclusion of disclosures required by subsections 34-23A-10.1(1)(b), (c), and (d) in counseling provided by registered pregnancy help centers. The Legislature finds that the physicians, agents, and employees who perform or assist in the performance of abortions at the Planned Parenthood facility in Sioux Falls, South Dakota have proven to be unreliable providers and counselors of the disclosures required by subsections 34-23A-10.1(1)(b), (c), (d), and (e)(ii), such that it is in the interests of the pregnant mothers that disclosures required by subsections 34-23A-10.1(1)(b), (c), and (d) be included in the mandatory third party counseling provided by registered pregnancy help centers as authorized by § 34-23A-59.

Source: SL 2018, ch 205, § 15.

ADDENDUM 3

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

PLANNED PARENTHOOD MINNESOTA, NORTH DAKOTA, SOUTH DAKOTA, and CAROL E. BALL, M.D.,	)	CIV. 11-4071-KES
Plaintiffs,	)	MEMORANDUM OPINION AND ORDER
vs.	)	
DENNIS DAUGAARD, Governor, MARTY JACKLEY, Attorney General, DONEEN HOLLINGSWORTH, Secretary of Health, Department of Health, and ROBERT FERRELL, President, Board of Medical and Osteopathic Examiners, in their official capacities,	)	
Defendants.	)	

Plaintiffs, Planned Parenthood Minnesota, North Dakota, South Dakota and Dr. Carol Ball, move for a preliminary injunction or temporary restraining order that would enjoin defendants, Governor Dennis Daugaard, Attorney General Marty Jackley, Secretary Doneen Hollingsworth, and Board President Robert Ferrell, in their official capacities, from enforcing South Dakota House Bill 1217 (hereinafter "the Act"), which takes effect on July 1, 2011.

BACKGROUND

In 2005, the South Dakota Legislature amended SDCL 34-23A-10.1 to include various requirements to ensure a pregnant woman's voluntary and informed consent before she underwent an abortion. Some of those amendments were challenged by plaintiffs on the grounds that they violated the First and Fourteenth Amendments of the United States Constitution. *See generally Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (en banc). That case is currently before the Eighth Circuit Court of Appeals.

In 2011, the South Dakota Legislature passed the Act at issue in this case. Plaintiffs challenge the constitutionality of the Act on the grounds that it violates the First Amendment's Free Speech Clause and the Fourteenth Amendment's Due Process Clause and Equal Protection Clause.[1] A hearing on plaintiffs' motion for preliminary injunction was held on June 27, 2011.

There are essentially four parts to the Act: (1) The Pregnancy Help Center Requirements; (2) The 72-Hour Requirement; (3) the Risk Factors Requirement; and (4) the Coercion Provisions. Generally, the Pregnancy Help Center Requirements require a pregnant woman to consult with a registered "pregnancy help center" before she is able to undergo an abortion. The 72-Hour

[1] In their brief in support of the motion for preliminary injunction, plaintiffs do not argue that certain provisions violate the Equal Protection Clause.

Requirement establishes at least a three-day waiting period between the pregnant woman's initial consultation with her physician and the abortion. The Coercion Provisions impose a duty on the physician to certify that the pregnant woman has not been "coerced" as defined in the Act. Finally, the Risk Factors Requirement establishes what information the physician must tell a pregnant woman with regard to the "complications associated with abortion."

Defendants acknowledge that no court has upheld a requirement that is similar to the Risk Factors Requirement. Defendants also acknowledge that no other state currently has requirements that are comparable to the Pregnancy Help Center Requirements, the 72-Hour Requirement, or the Coercion Provisions.

DISCUSSION

I. Preliminary Injunction Standard

When ruling on a motion for a temporary restraining order or preliminary injunction the court must consider: (1) the threat of irreparable harm to the moving party; (2) the balance of this harm with any injury a preliminary injunction would inflict on other parties; (3) the likelihood of success on the merits; and (4) the public interest. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc). *See also S.B. McLaughlin & Co. v. Tudor Oaks Condominium Project*, 877 F.2d 707, 708 (8th Cir. 1989) (noting that the trial court applied the same standard for a temporary restraining order

and the preliminary injunction). "Where a preliminary injunction is sought to enjoin the implementation of a duly enacted state statute, [] district courts [must] make a threshold finding that a party is likely to prevail on the merits."[2] *Rounds*, 530 F.3d at 732-33.

II. Likelihood of Success on the Merits

Plaintiffs challenge the constitutionality of the Act as a whole[3] and several specific provisions in the Act. The court will first analyze the threshold issue of whether plaintiffs are likely to succeed on the merits with regard to each challenged provision.

A. The Pregnancy Help Center Requirements

Section 5 of the Act sets forth the requirements for maintaining a registry of pregnancy help centers and the requirements that a pregnancy help center must satisfy in order to be on the registry. Section 7 of the Act defines "pregnancy help center" as follows:

> any entity . . . that has as one of its principal missions to provide education, counseling, and other assistance to help a pregnant mother maintain her relationship with her unborn child and care for her unborn child, which entity has a medical director who is

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[2] The "likely to prevail on the merits" standard is a "more rigorous standard for demonstrating a likelihood of success on the merits" than the "fair chance" standard that would otherwise apply. *Id.* at 733.

[3] Because the court finds that plaintiffs are likely to succeed on the merits of the narrower issue of the constitutionality of specific provisions of the Act, it will not address at this time the broader issue of the Act's constitutionality as a whole.

> licensed to practice medicine in the state of South Dakota, or that it has a collaborative agreement with a physician licensed in South Dakota to practice medicine to whom women can be referred, which entity does not perform abortions and is not affiliated with any physician or entity that performs abortions, and does not now refer pregnant mothers for abortions, and has not referred any pregnant mother for abortions for the three-year period immediately preceding July 1, 2011[.]

Subsection 3 of section 3 of the Act reads as follows with regard to the requirements that pertain to pregnancy help centers:

> During the initial consultation between the physician and the pregnant mother, prior to scheduling a surgical or medical abortion, the physician shall . . . [p]rovide the pregnant mother with the names, addresses, and telephone numbers of all pregnancy help centers that are registered with the South Dakota Department of Health pursuant to this Act, and provide her with written instructions that set forth the following:
>
> (a) That prior to the day of any scheduled abortion the pregnant mother must have a consultation at a pregnancy help center at which the pregnancy help center shall inform her about what education, counseling, and other assistance is available to help the pregnant mother keep and care for her child, and have a private interview to discuss her circumstances that may subject her decision to coercion;
>
> (b) That prior to signing a consent to an abortion, the physician shall first obtain from the pregnant mother, a written statement that she obtained a consultation with a pregnancy help center, which sets forth the name and address of the pregnancy help center, the date and time of the consultation, and the name of the counselor at the pregnancy help center with whom she consulted[.]

Section 6 of the Act then sets forth what the pregnancy help center is required and allowed to do during the required consultation. Specifically, section 6 states that a pregnancy help center:

> shall be permitted to interview the pregnant mother to determine whether the pregnant mother has been subject to any coercion to have an abortion, and shall be permitted to inform the pregnant mother in writing or orally, or both, what counseling, education, and assistance that is available to the pregnant mother to help her maintain her relationship with her unborn child and help her care for the child both through the pregnancy help center or any other organization, faith-based program, or governmental program. . . . Any written statement or summary of assessment prepared by the pregnancy help center as a result of counseling of a pregnant mother as a result of the procedures created by this Act, may be forwarded by the pregnancy help center, in its discretion, to the abortion physician. If forwarded to the physician, the written statement or summary of assessment shall be maintained as a permanent part of the pregnant mother's medical records. Other than forwarding such documents to the abortion physician, no information obtained by the pregnancy help center from the pregnant mother may be released, without the written signed consent of the pregnant mother or unless the release is in accordance with federal, state, or local law.

Section 4 of the Act then states that "no physician may take a consent for an abortion nor may the physician perform an abortion, unless the physician . . . first obtains from the pregnant mother, a written, signed statement setting forth all information required by subsection 3(b) of section 3[,]" which is set forth above.

Plaintiffs challenge these sections, hereinafter referred to as the Pregnancy Help Center Requirements, on six grounds: (1) they violate the patients' rights to obtain an abortion; (2) they violate the patients' right to free

speech; (3) they violate the patients' informational privacy rights; (4) they violate the patients' and plaintiffs' rights to equal protection of the laws; (5) they violate the Establishment Clause; and (6) they violate plaintiffs' right to free speech.[4]

1. Compelled Speech (Patient) Analysis

"[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). In analyzing whether "state action violates the right not to speak, a court first determines whether the action implicates First Amendment protections." *Rounds*, 530 F.3d at 733 (citation omitted). "If it does, the court must determine whether the action is narrowly tailored to serve a compelling state interest." *Id.*

In *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781 (1988), the Supreme Court emphasized that the Free Speech Clause applies in instances of "compelled statements of 'fact[.]' " *Id.* at 797-98 ("These cases cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of 'fact': either form of compulsion burdens protected speech."). *See also Axson-Flynn v.*

[4] At this stage of the proceedings, the court only addresses the undue burden and the patient free speech claim for purposes of determining whether plaintiffs are likely to succeed on the merits.

Johnson, 356 F.3d 1277, 1284 n.4 (10th Cir. 2004) ("The constitutional harm —and what the First Amendment prohibits—is being forced to speak rather than remain silent. . . . This harm occurs regardless of whether the speech is ideological." (citations omitted)). The First Amendment's protection against compelled speech with regard to factual statements was reaffirmed in *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995), where the Court explained: "Despite . . . the public's interest in identifying the creator of a work of art, an author generally is free to decide whether or not to disclose his or her true identity. . . . Accordingly, an author's decision to remain anonymous . . . is an aspect of the freedom of speech protected by the First Amendment." *Id.* at 341-42. Thus, in determining whether the Pregnancy Help Center Requirements implicate First Amendment protections, the court is guided by the basic principle that the First Amendment protects "not only [] expressions of value, opinion, or endorsement, but . . . statements of fact the speaker would rather avoid[.]" *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573-74 (1995) (citing *McIntyre*, 514 U.S. at 341-42; *Riley*, 487 U.S. at 797-98).

The Eighth Circuit Court of Appeals has stated that "[a] First Amendment protection against compelled speech, however, has been found only in the context of governmental compulsion to disseminate a particular political or ideological message." *United States v. Sindel*, 53 F.3d 874, 878 (8th

Cir. 1995) (citing cases). The holding in *Sindel*, however, is a narrow one: "There is no right to refrain from speaking when 'essential operations of government may require it for the preservation of an orderly society, —as in the case of compulsion to give evidence in court.' " *Id.* at 878 (citation omitted).

Here, there are no "essential operations of government" that "require" the information "for preservation of an orderly society." *See id.* Indeed, the patients' compelled statements are given to a private entity and not the government. To the extent that *Sindel* might be construed beyond this narrow holding, the Supreme Court's decision in *Hurley* would seemingly abrogate any broader holding because *Hurley* was decided after *Sindel*.

Defendants argue that the patients' free speech rights are not implicated because a pregnant woman is only required to "speak" inasmuch as she is required to disclose that she is pregnant and that she has chosen to undergo an abortion. First, the plain language of the Pregnancy Help Center Requirements contradict defendants' construction. Subsection 3(a) of section 3 states that the "pregnant mother must . . . have a private interview to discuss her circumstances that may subject her decision to coercion." An interview necessarily requires questions ***and*** answers. And defendants offer no explanation on how an interview "to discuss her circumstances" could be done without the pregnant woman actually disclosing "her circumstances."

Second, and in the alternative, if the pregnant woman does not have to actually discuss her circumstances during an interview and she only has to disclose that she is pregnant and has chosen to undergo an abortion, the Pregnancy Help Center Requirements still implicate the patient's free speech rights. At the very least, the requirements on their face compel a patient to not only disclose that she is pregnant and is seeking an abortion, but also to disclose the name of her abortion physician so the pregnancy help center knows to whom to send the written statement or summary of assessment. *See* Section 6 of the Act (authorizing a pregnancy help center to forward "documents to the abortion physician"). This compelled disclosure necessarily reveals private factual information, such as she is pregnant, she is choosing to undergo an abortion, she has spoken with an abortion physician, and the name of her abortion physician. And she is being compelled to disclose this information to someone who is opposed[5] to her decision to undergo an abortion. Even these "limited" compelled disclosures implicate the protection afforded by the First Amendment's Free Speech Clause. *See Hurley*, 515 U.S. at 573-74 (citing *McIntyre*, 514 U.S. at 341-42; *Riley*, 487 U.S. at 797-98).

[5] Under section 5 of the Act, a pregnancy help center must certify that "one of its principal missions is to educate, counsel, and otherwise assist women to help them maintain their relationship with their unborn children," and it cannot have "referred any pregnant women for an abortion at any time in the three years immediately preceding July 1, 2011."

Defendants rely on *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006), to support their argument that the First Amendment does not apply with regard to the compelled speech required by the Pregnancy Help Center Requirements. *See id.* at 62 ("This sort of recruiting assistance, however, is a far cry from the compelled speech in *Barnette* and *Wooley*."). The discussion in *Rumsfeld* about the lack of First Amendment protection must be understood in the context of what was at issue: "compelled statements of fact" such as "The U.S. Army recruiter will meet interested students in Room 123 at 11 a.m." *Id.* at 62. While the claim in *Rumsfeld* "trivialize[d] the freedom protected in *Barnette* and *Wooley*," the same cannot be said with regard to the compelled statements of fact in this case. That is, there is a clear difference between "The U.S. Army recruiter will meet interested students in Room 123 at 11 a.m." and "I am pregnant and have chosen to have an abortion. The name of my abortion physician is Dr. X." The Pregnancy Help Center Requirements are therefore an intentional and purposeful regulation of speech that compels the patient to disclose to the pregnancy help center the name of her abortion physician, her pregnancy, and her decision to obtain an abortion. The plain language therefore makes it clear that the Pregnancy Help Center Requirements are not merely an incidental regulation of speech.

The court finds that plaintiffs have met their burden of demonstrating that the Pregnancy Help Center Requirements "implicate[] First Amendment

protections." *Rounds*, 530 F.3d at 733. The burden is therefore on defendants to demonstrate that "the action is narrowly tailored to serve a compelling state interest." *Id.*

There is a compelling state interest in protecting a woman from being forced against her will to have an abortion and in informing a woman of truthful, relevant, and non-misleading information about abortion, alternatives to abortion, and pregnancy assistance. While plaintiffs dispute that these identified goals are the true goals behind the Pregnancy Help Center Requirements, there is no dispute that these goals constitute a compelling state interest. The court assumes, without deciding, that these are the real goals sought to be achieved by the Pregnancy Help Center Requirements and that they constitute a compelling state interest.

Even if the Pregnancy Help Center Requirements are directed at a compelling state interest, however, they must be narrowly tailored toward achieving those interests. *See Rounds*, 530 F.3d at 733. Physicians have been, and continue to be, fully capable of ensuring that the patient has not chosen to undergo an abortion against her will. *See* SDCL 34-23A-10.1 ("No abortion may be performed unless the physician first obtains a voluntary and informed written consent of the pregnant woman upon whom the physician intends to perform the abortion[.]"). Indeed, section 2 of the Act acknowledges the

existence of the physician's common law duty to determine that "the patient's consent is voluntary and uncoerced and informed[.]"

Moreover, when considering the goal of protecting the patient from coercion and defendants' portrayal of what the Pregnancy Help Center Requirements actually require, it becomes clear that the requirements are not tailored towards the proclaimed compelling state interest. As discussed earlier, defendants argue that the Pregnancy Help Center Requirements do not require the pregnant woman to say anything to the pregnancy help center employee other than that she is pregnant and has chosen to undergo an abortion. If this is all that is required, then the requirements do little, if anything, in terms of achieving the goal of protecting a woman from being coerced into obtaining an abortion.

With regard to the goal of informing the woman about abortions, alternatives to abortion, and pregnancy assistance, there are several less restrictive alternatives that are equally capable of informing the pregnant woman about such matters. For example, the physician or the physician's agent is already required by SDCL 34-23A-10.1 to provide the following information to the patient at least 24 hours in advance of the abortion: the name and address of a pregnancy help center near the abortion facility; that written materials produced by the state of South Dakota are available free of charge; and that a multi-media website developed by the state South Dakota

exists. *Cf. Reno v. American Civil Liberties Union,* 521 U.S. 844, 874 (1997) (holding that a statute was not narrowly tailored because there were "less restrictive alternatives [that] would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve"). If the woman wishes to consult with a pregnancy help center, read pamphlets, or study the website, she is free to do so. Because the Pregnancy Help Center Requirements only apply to women who have chosen to undergo an abortion, they do nothing to inform pregnant women who may not be seeking an abortion but are seeking information about alternatives to abortion and information about assistance for raising children.

Defendants argue that using printed materials or the patient's physician to provide information to pregnant women who have chosen to undergo an abortion have not always been successful. Thus, according to defendants, the legislature is allowed to experiment with different message delivery mechanisms in an attempt to ensure that the woman is fully informed. The court rejects defendants' underlying assumption that legislatures are allowed to use more intrusive means that regulate speech because the alternatives are not 100 percent successful in achieving a compelling state interest. *See Reno*, 521 U.S. at 875 (reaffirming the holding in *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115 (1989), that "rejected the argument that we should defer to the congressional judgment that nothing less than a total ban would

be effective in preventing enterprising youngsters from gaining access to indecent communications").

Moreover, the burden is on defendants to demonstrate that the requirements are narrowly tailored, and there is nothing in the record that supports defendants' underlying assumption that truthful, relevant, and non-misleading information given through a pregnancy help center will cause a pregnant woman to be better informed than the current existing methods from which a woman can choose on a voluntary basis. In fact, forcing a woman to listen to someone who is opposed to her decision to have an abortion is likely to cause the woman to reject the information outright.

For these reasons, the court finds that defendants have failed to demonstrate that the means chosen to achieve the identified interests are narrowly tailored toward achieving the purported compelling state interests. In accordance with recent Supreme Court decisions involving facial free speech challenges, the court concludes that plaintiffs have demonstrated that "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010) (internal quotations and citation omitted). *See also Brown v. Entm't Merchs. Ass'n*, ___ S. Ct.___, 2011 WL 2518809, at *4 (June 27, 2011) (recognizing that the holding in *Stevens* "controls this case"). *Cf. Gonzales v. Carhart*, 550 U.S. 124, 167 (2007) ("The latitude given facial challenges in the

First Amendment context is inapplicable here."). Therefore, plaintiffs have met their burden of demonstrating that they are likely to succeed on the merits of their claim that the Pregnancy Help Center Requirements violate the First Amendment's Free Speech Clause.

2. Undue Burden Analysis

Plaintiffs argue in the alternative that the Pregnancy Help Center Requirements constitute a substantial obstacle that will deter many women from exercising their constitutional right to obtain an abortion.[6] Defendants argue that plaintiffs have not demonstrated, and cannot demonstrate, that the Pregnancy Help Center Requirements will interfere with the decision to obtain an abortion for a "large fraction" of the affected women.[7]

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[6] Specifically, plaintiffs argue that the Pregnancy Help Center Requirements create an undue burden for four reasons: (1) the Act does not adequately protect the patient's confidentiality; (2) the pregnancy help centers are not required to act in an expeditious manner; (3) the pregnancy help centers are allowed to give untruthful and misleading information; and (4) the Pregnancy Help Center Requirements unduly deter physicians from offering abortion services.

[7] Defendants also argue that the Act has a legitimate purpose. Defendants acknowledge, though, that even if a statute seeks to further a legitimate governmental purpose, it may still constitute an undue burden. Docket 32 at 26. *See also Casey*, 505 U.S. at 877 ("And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends."). The court assumes, without deciding, that the Pregnancy Help Center Requirements have a legitimate purpose.

When a statute is challenged on the ground that it violates a woman's constitutional right to obtain an abortion, the burden placed on the challenger "has been a subject of some question." *Gonzales v. Carhart*, 550 U.S. 124, 167 (2007) (citations omitted). Nonetheless, the Eighth Circuit Court of Appeals has determined that the standard set out in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), applies. *See Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1456-58 (8th Cir. 1995) ("We will therefore apply the *Casey* standard to determine if South Dakota's Act to Regulate the Performance of Abortion is constitutional on its face.").[8]

Thus, the court will apply the following standard as set out in *Casey*: "If the law will operate as a substantial obstacle to a woman's choice to undergo an abortion 'in a large fraction of the cases in which [it] is relevant, . . . [i]t is an undue burden, and therefore invalid.' " *Id.* at 1458 (alteration in original) (quoting *Casey*, 505 U.S. at 895). In determining whether plaintiffs have met this burden, " '[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.' " *Id.* (alteration in original) (citation omitted).

As the applicable test makes clear, whether the Pregnancy Help Center Requirements constitute an "undue burden" depends on whether, in a large

[8] As recently noted by the Eighth Circuit Court of Appeals, "the standards enunciated by the *Casey* plurality opinion [are] controlling precedent in abortion cases." *Rounds*, 530 F.3d at 733 n.8 (citations omitted).

fraction of the cases in which they are relevant, the Pregnancy Help Center Requirements create a "substantial obstacle to a woman's choice to undergo an abortion." *See id.* There are three issues that must be resolved in order to determine whether plaintiffs have met their burden: (1) in what cases are the requirements "relevant;" (2) do the requirements create a "substantial obstacle to the woman's choice to undergo an abortion" in those cases in which the requirements are "relevant;" and (3) is the substantial obstacle present in a "large fraction" of the "relevant" cases.

As to the issue of what cases are "relevant," the Pregnancy Help Center Requirements would not apply if the woman has not chosen to undergo an abortion or is uncertain about whether or not she wishes to obtain an abortion.[9] That is, the requirements are only relevant in those instances where a woman has chosen to undergo an abortion in South Dakota. Similarly, the Pregnancy Help Center Requirements are only relevant in those instances where a woman has not chosen to consult with a pregnancy help center on her own. Thus, the relevant cases are those that involve a woman who has chosen

[9] The plain language of the Pregnancy Help Center Requirements establishes that a pregnant woman must consult with a pregnancy help center only if she chooses to undergo an abortion. There is nothing in the Act that requires a pregnant woman who does not want an abortion to consult with a pregnancy help center. There is also nothing in the Act that requires a pregnant woman who is only considering whether or not to undergo an abortion to consult with a pregnancy help center. The Pregnancy Help Center Requirements are targeted only at those pregnant women who have chosen to undergo an abortion.

to undergo an abortion and would otherwise not consult with a pregnancy help center. *Cf. Casey*, 505 U.S. at 894 (limiting the relevant cases to "married women seeking abortions who do not wish to notify their husbands of their intentions and who do not qualify for one of the statutory exceptions to the notice requirement").

With the relevant cases in mind, the next issue is whether the Pregnancy Help Center Requirements create "a substantial obstacle to a woman's choice to undergo an abortion." *See Miller*, 63 F.3d at 1458. The plain language of sections 3, 4, 5, and 6 makes it clear that a woman can obtain an abortion if, and only if, she first consults a pregnancy help center when she otherwise would not. Forcing a woman to divulge to a stranger at a pregnancy help center the fact that she has chosen to undergo an abortion humiliates and degrades her as a human being. The woman will feel degraded by the compulsive nature of the Pregnancy Help Center Requirements, which suggest that she has made the "wrong" decision, has not really "thought" about her decision to undergo an abortion, or is "not intelligent enough" to make the decision with the advice of a physician.

Furthermore, these women are forced into a hostile environment. Aside from its compulsive nature, the hostility of the consultation is evidenced by the fact that section 5 of the Act establishes that the only entities that can be listed on the state registry of pregnancy help centers are those that routinely

"consult[] with women for the purpose of helping them keep their relationship with their unborn children" and that "one of [their] principal missions is to educate, counsel, and otherwise assist women to help them maintain their relationship with their unborn children." A pregnancy help center cannot have even "referred any pregnant women for an abortion at any time in the three years immediately preceding July 1, 2011." Requiring these women to "have a consultation," and a "private interview" with a "pregnancy help center" destroys "[t]he right to avoid unwelcome speech" that is "protected in confrontational settings." *Cf. Hill v. Colorado*, 530 U.S. 703, 717 (2000). And it forces an unnecessary confrontation on one of the most volatile subjects in America. *See Stenberg v. Carhart*, 530 U.S. at 920 (acknowledging that "[m]illions of Americans believe that . . . abortion is akin to causing the death of an innocent child"); *Casey*, 505 U.S. at 852 (recognizing that "some deem [abortions as] nothing short of an act of violence against innocent human life").

There are clear ideological differences between a woman who has chosen to undergo an abortion and a "pregnancy help center." When considering these differences, a woman will likely be unwilling to actually consult with a pregnancy help center because she will fear being ridiculed, labeled a murderer, subjected to anti-abortion ideology, and repeatedly contacted by the pregnancy help center. Moreover, a woman may likely believe, rightly or wrongly, that her decision to have an abortion could become public

information. And it will not matter to her that in the future she may be able to obtain legal relief from the pregnancy help center worker who disclosed the information. By then it will be too late. Thus, rather than risk having such information being made public or to avoid "consulting" with someone who is not supportive of her decision to have an abortion, she will be forced to remain pregnant.

The Pregnancy Help Center Requirements establish that those women who choose to undergo an abortion must consult with the pregnancy help center and divulge personal information against their will in order to effectuate their decision to undergo an abortion. The court finds these requirements do "not merely make abortions a little more difficult or expensive to obtain." *Casey*, 505 U.S. at 893. Rather, the requirements constitute a substantial obstacle to a woman's decision to obtain an abortion because they force the woman against her will to disclose her decision to undergo an abortion to a pregnancy help center employee before she can undergo an abortion. *Cf. Casey*, 505 U.S. at 887, 892 (finding the spousal notification requirement to be unconstitutional partly because there are "many cases in which married women do not notify their husbands [because] the pregnancy is the result of an extramarital affair" even though the spousal notification requirement allowed the woman to "certify[] that her husband is not the man who impregnated her").

Defendants argue that the Pregnancy Help Center Requirements are not a substantial obstacle because no woman "who wants to keep her pregnancy a secret, will forgo her option to have an abortion because she does not want to reveal her pregnancy to a third party [because] she will already have disclosed her pregnancy to staff members at an abortion clinic." Docket 32 at 68. This argument is without merit. There is an inherent difference between compelling a woman to disclose her decision to undergo an abortion to a "pregnancy help center" and a woman freely disclosing this decision to someone she chose to provide her with the medical services that she seeks. *See Hill*, 530 U.S. at 717 (recognizing the significance of "confrontational settings" in the context of free speech issues). The former situation leads to the fear described above. *See Casey*, 505 U.S. at 893, 894 ("We must not blind ourselves to . . . the significant number of women who fear for their safety[.]"); *Miller*, 63 F.3d at 1463 (acknowledging that "non-abusive parents who differ from their daughters on religious or moral grounds over abortion may be prepared to prevent their daughters from obtaining abortions even when those abortions are in the daughters' best interests"). The latter situation does not. For the reasons expressed above, the court finds that the Pregnancy Help Center Requirements do create a substantial obstacle in the relevant cases.

The next issue is whether this substantial obstacle is present in a "large fraction" of the "relevant" cases. Defendants argue that a "large fraction" means

"at least half of the group in question." *See* Docket 32 at 32. If the plurality opinion in *Casey* intended "large fraction" to mean a majority, it would have said majority. Indeed, *Casey's* use of the phrase "large fraction" at most indicates that the number of women affected by the requirements must be more than a "small" fraction of the group in question. Admittedly, this construction of "large fraction" does little in terms of establishing the phrase's scope. *See Casey*, 505 U.S. at 973 n.2 ("The joint opinion concentrates on the situations involving battered women and unreported spousal assault, and assumes, without any support in the record, that these instances constitute a 'large fraction' of those cases in which women prefer not to notify their husbands (and do not qualify for an exception)." (Rehnquist, White, Scalia, Thomas, JJ. dissenting). Nonetheless, some guidance as to the rigidity of the phrase "large fraction" is available.

In *Casey*, the Supreme Court addressed the constitutionality of, among other provisions, a "spousal notification requirement." 505 U.S. at 887. The relevant cases in *Casey* with regard to that requirement were "married women seeking abortions who do not wish to notify their husbands of their intentions and who do not qualify for one of the statutory exceptions to the notice requirement." *Id.* at 895. The Court held that the requirement was unconstitutional under the "large fraction" test after it found that the requirement was "likely to prevent a ***significant*** number of [those] women from

obtaining an abortion." 505 U.S. at 893, 894 (emphasis added). This language and reasoning indicates that the term "large fraction" should not be construed as some numerical threshold that must be established.[10]

While certainly not establishing the bottom end of what constitutes a "large fraction," it appears that the Eighth Circuit Court of Appeals' decision in *Miller* comes the closest.[11] In *Miller*, the Eighth Circuit Court of Appeals addressed the validity of South Dakota's bypass procedure for minors seeking an abortion without parental consent. 63 F.3d at 1458. In the opinion, two different sets of relevant cases were analyzed. The first set involved those pregnant minors who did not have access to a "bypass procedure" because they did "not fall under [the] abuse exception," even though they "could show that an abortion is in their best interests." *See id.* at 1462. The second set involved pregnant minors who had access to a "bypass procedure" because they were abused, but were nonetheless unable "to use the abuse exception" due to the

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[10] The other case in which the Supreme Court has found a statute to be unconstitutional is *Stenberg v. Carhart*, 530 U.S. 914 (2000). That case is of little help with regard to this issue because the defendant did "not deny that the statute impose[d] an 'undue burden' ***if*** it applies to the more commonly used . . . procedure[.]" *Id.* at 938. Thus, the central issue was essentially a statutory interpretation issue.

[11] In *Carhart v. Stenberg*, 192 F.3d 1142 (8th Cir. 1999), the Eighth Circuit Court of Appeals held that the statute "impose[d] an undue burden on a woman's right to choose to have an abortion" because it "prohibit[ed] the most common procedure for second-trimester abortions[.]" *Id.* at 1151. Thus, this decision does little in terms of establishing what is meant by a "large fraction."

minor "blam[ing] themselves for the abuse" or being "very protective of the abusive parent." *See id.* at 1463. The Eighth Circuit Court of Appeals found that the challengers had "shown that a large fraction of minors seeking pre-viability abortions would be unduly burdened by South Dakota's parental-notice statute, despite its abuse exception." *Id.*

With regard to the first set of relevant cases, which involved the "best interest" minors, the court rejected the argument that "the minor could simply notify her other parent" because "many of them, as a practical matter, have only one parent to notify." *Id.* at 1462 n.10. According to the Eighth Circuit Court of Appeals, approximately 18 percent warranted use of the descriptive term "many." *See id.* ("Roughly eighteen [percent] of South Dakota's minors live in single-parent homes; many of them, as a practical matter, have only one parent to notify."). The Eighth Circuit Court of Appeals struck down this portion of the statute because the challengers had "shown that a large fraction of [these] minors seeking pre-viability abortions would be unduly burdened by South Dakota's parental-notice statute, despite its abuse exception." *Id.* at 1463.

With regard to the second set of relevant cases, which involved minors that were abused, the Eighth Circuit Court of Appeals recognized that "[a] minor faced with the untenable choice of turning in her parent or forgoing an abortion will often delay her decision until it is too late; she may even commit

suicide rather than choose between two such agonizing choices." *Id.* (emphasizing that "[e]ven if South Dakota's exception were otherwise acceptable, its failure to provide an alternative procedure for these minors would doom it"). The number of the abused minors who would choose not to utilize the "bypass procedure" was not explicitly identified. Nonetheless, it stands to reason that many of those minors would be hesitant to report their parents.

Here, in nearly every instance where the Pregnancy Help Center Requirements are relevant, a woman who chooses to undergo an abortion will experience a high degree of degradation because she will be forced to disclose her decision to someone who is fundamentally opposed to it. Women will also be afraid of being berated, belittled, or confronted about their decision, being subsequently contacted by the pregnancy help center, and having their decision to have an abortion become public information. As a result, women will delay or refrain from consulting with the pregnancy help centers, which will prevent them from being able to carry out their decision to undergo an abortion. *See Casey*, 505 U.S. at 893-95; *Miller*, 63 F.3d at 1462-63. Thus, the Pregnancy Help Center Requirements constitute a substantial obstacle for a large fraction of the relevant cases.

Plaintiffs have therefore demonstrated that they are likely to succeed with regard to their claim that the Pregnancy Help Center Requirements violate

the Fourteenth Amendment's Due Process Clause because they create an undue burden on the woman's choice to obtain a legal abortion. *See Casey*, 505 U.S. at 877 ("A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.").

To summarize, plaintiffs have demonstrated that they are likely to succeed on their challenges to the Pregnancy Help Center Requirements because the Requirements compel patients to speak in violation of the First Amendment's Free Speech Clause and because they constitute an undue burden on a woman's choice to undergo an abortion in violation of the Fourteenth Amendment's Due Process Clause.

B. The 72-Hour Requirement—Undue Burden Analysis

The beginning portion of section 3 of the Act establishes that before obtaining an abortion, a patient must wait at least 72 hours between her initial consultation and an abortion. Specifically, section 3 reads in relevant part as follows:

> No surgical or medical abortion may be scheduled except by a licensed physician and only after the physician physically and personally meets with the pregnant mother, consults with her, and performs an assessment of her medical and personal circumstances. Only after the physician completes the consultation and assessment complying with the provisions of this Act, may the physician schedule a surgical or medical abortion, but in no instance may the physician schedule such surgical or medical

> abortion to take place in less than seventy-two hours from the completion of such consultation and assessment except in a medical emergency[.]

Section 3 also limits when and how a patient can consent to the medical procedure. This portion of section 3 states:

> No physician may take a signed consent from the pregnant mother unless the pregnant mother is in the physical presence of the physician and except on the day the abortion is scheduled, and only after complying with the provisions of this Act as it pertains to the initial consultation, and only after complying with the provisions of subdivisions 34-23A-l0.1(1) and (2).[12]

Finally, section 4 establishes that "no physician may . . . perform an abortion[] unless the physician has fully complied with the provisions of this Act[.]"

Plaintiffs challenge these portions of section 3 and 4, hereafter identified as the 72-Hour Requirement, on two grounds: (1) they create an undue burden on women's rights to obtain an abortion; and (2) they violate the patients' and plaintiffs' rights to equal protection of the laws. Because plaintiffs do not brief their equal protection claim, the court will only conduct an undue burden analysis.

Similar to the other provisions in the Act, whether the 72-Hour Requirement constitutes an "undue burden" depends on whether, in a large

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[12] Portions of SDCL 34-23A-10.1(1) were found by the district court to be unconstitutional in *Planned Parenthood Minn., N.D., S.D., v. Rounds*, 650 F. Supp. 2d 972 (D.S.D. 2009). That case is currently before the Eighth Circuit Court of Appeals.

fraction of the cases where it is relevant, the 72-Hour Requirement creates a "substantial obstacle to a woman's choice to undergo an abortion." *See Miller*, 63 F.3d at 1458. There are three issues that must be resolved in order to determine whether plaintiffs have met their burden: (1) in what cases is the 72-Hour Requirement "relevant;" (2) does the requirement create a "substantial obstacle to the woman's choice to undergo an abortion" in those cases where the 72-Hour Requirement is "relevant;" and (3) is the substantial obstacle present in a "large fraction" of the "relevant" cases.

On its face, the 72-Hour Requirement applies to every woman who chooses to undergo an abortion. According to defendants, the requirement is therefore relevant to every woman who chooses to undergo an abortion. Because the 72-Hour Requirement imposes a substantial obstacle on almost every woman who chooses to undergo an abortion, the court assumes, without deciding, that defendants' broad construction of the relevant cases is proper. *But see Casey*, 505 U.S. at 894 ("The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.").

With regard to whether the 72-Hour Requirement constitutes a substantial obstacle, plaintiffs argue with supporting evidence that women could be forced to wait up to one month between their initial consultation and the abortion procedure if the same physician is required to conduct both the

initial consultation and the abortion. *See* Docket 10-6 at 6 ("[D]ue to the physicians' schedules, a woman could be delayed up to a month in order to have two appointments with the same physician."). This is because there is only one clinic in South Dakota, which provides abortions one day a week on average. Docket 10-6 at 4. And the three to four physicians who perform the abortions take turns flying into Sioux Falls about once a month. Docket 10-6 at 4. Defendants argue that such a delay will not occur because there is no requirement that the initial consultation be performed by the same physician who performs the abortion.

Section 4 of the Act states that "no physician may . . . perform an abortion, unless the physician has fully complied with the provisions of this Act and first obtains from the pregnant mother, a written, signed statement setting forth all information required by subsection (3)(b) of section 3 of this Act." Defendants' argument that "the physician" actually means "a physician" is without merit because when a statute is "not ambiguous," "[i]t is to be assumed that [the statute] means what it says and that the legislature has said what it meant." *Kreager v. Blomstrom Oil Co.*, 298 N.W.2d 519, 521 (S.D. 1980) (citation omitted). Such an alteration is therefore beyond the court's authority.

Even if the physician who performed the abortion was not required to have conducted the initial consultation, the 72-Hour Requirement still creates a substantial obstacle considering the circumstances that surround many of

the women who choose to undergo an abortion in South Dakota. For example, 56 percent of women who chose to undergo an abortion "during the year beginning March 1, 2010," had "incomes that [were] 100% or less than the federal poverty level." Docket 10-6 at 4. And 87 percent of the women who chose to undergo an abortion during that same time period lived "at or below 200 percent of the [Federal Poverty Level]." Docket 10-6 at 4. Furthermore, approximately 30 percent of the women who chose to undergo an abortion during this time period traveled more than 150 miles to the abortion clinic, for a total of 300 miles. Docket 10-6 at 3.

Because the 72-Hour Requirement effectively requires two trips, almost every woman will be forced to cope with the financial burdens created by the additional trip. These burdens are great when considering the fact that approximately 87 percent of the women are at or below 200 percent of the Federal Poverty Level. For many of these women, it stands to reason that they will be unable to afford the second trip and will abstain from obtaining an abortion even though they have chosen to undergo one. And women who live farther away are even more likely to be unable to afford a second trip. The inability to pay for the additional trip also becomes worse for the women who are stay-at-home mothers because they will be required to make additional arrangements for childcare. Docket 10-6 at 4. And if a pregnant woman has a job, she will be required to take twice as much time off from work. Docket 10-6

at 4. The court finds that these financial circumstances constitute a substantial obstacle for a large fraction of the relevant cases.

The effective doubling of the financial burden created by the 72-Hour Requirement is arguably insignificant when compared to the other obstacles created by the 72-hour delay. For example, even if the delay between the initial consultation and the abortion is only one week, pregnant women who choose to undergo an abortion can be denied the ability to undergo a medication abortion, which may be their chosen method of abortion, because of the delay. Docket 10-6 at 2-3. A medication abortion is only available until 9 weeks after the first day of the woman's last menstrual period, after which time a surgical abortion is required. Docket 10-6 at 2. For those women who refuse to undergo a surgical abortion in such situations, the 72-Hour Requirement effectively denies them of their right to an abortion. As to those women who choose a surgical abortion near the end of the first trimester, the delay created by the 72-Hour Requirement will prevent them from being able to obtain any abortion in South Dakota because these abortions are only available through the first 13.6 weeks after the first day of the woman's last menstrual period. Docket 10-6 at 2-3. It stands to reason that the number of women who are effectively denied their right to undergo an abortion increases as the required period of delay increases.

Moreover, it is generally accepted that women are often the victims of abuse. And abusers often forcibly impregnate their partners to maintain control or increase their control over their women. Docket 10-7 at 7-8. The abusers in such relationships closely monitor the women. Docket 10-7 at 9. For example, the abuser will often keep track of the mileage on the car or remove the distributor cap on the car to prevent the woman from leaving the house. Docket 10-7 at 9. Abusers will call the woman numerous times at work or home to ensure that she is there. Docket 10-7 at 9. An abuser will also regularly appear at the woman's place of work unexpectedly "to check up on her." Docket 10-7 at 9. For those women who are in such relationships, the 72-Hour Requirement creates an incredible obstacle because it requires them to make separate trips, which for many is effectively impossible to do because two trips double the chances of being "caught" and punished by the abusive partner. Docket 10-7 at 9-10.

In summary, all women who choose to undergo an abortion will be forced to wait between 7 to 30 days before actually being able to obtain an abortion. That constitutes a substantial obstacle for those women who have chosen to undergo an abortion near the end of the first trimester because there are no second trimester abortions available in South Dakota. Moreover, because every woman will be forced to make two trips, many women will not undergo an abortion because they will be unable to financially afford a second trip.

Furthermore, the 72-Hour Requirement creates a substantial obstacle for those women who are unable to make a second trip because it places them in greater risk of being caught by their abuser.

When considering the numerous substantial obstacles created by the 72-Hour Requirement, there can only be one conclusion: it creates a substantial obstacle for a large fraction of the women who choose to undergo an abortion in South Dakota. Plaintiffs have therefore demonstrated that they are likely to succeed on their claim that the 72-Hour Requirement constitutes an undue burden on a woman's ability to obtain an abortion.

C. The Coercion Provisions—Unconstitutionally Vague

Subsection 1 of section 3 of the Act reads, in relevant part, as follows:

> During the initial consultation between the physician and the pregnant mother, prior to scheduling a surgical or medical abortion, the physician shall [d]o an assessment of the pregnant mother's circumstances to make a reasonable determination whether the pregnant mother's decision to submit to an abortion is the result of any coercion, subtle or otherwise. In conducting that assessment, the physician shall obtain from the pregnant mother the age or approximate age of the father of the unborn child, and the physician shall determine whether any disparity in the age between the mother and father is a factor in creating an undue influence or coercion.

Subsection 4 of section 7 states that "coercion," for purposes of the Act, "exists if the pregnant mother has a desire to carry her unborn child and give birth, but is induced, influenced, or persuaded to submit to an abortion by another person or persons against her desire." The Act further states that

"[s]uch inducement, influence, or persuasion may be by use of, or threat of, force, or may be by pressure or intimidation effected through psychological means, particularly by a person who has a relationship with the pregnant mother that gives that person influence over the pregnant mother."

As part of the Pregnancy Help Center Requirements, section 6 of the Act states:

> The pregnancy help center may voluntarily provide a written statement of assessment to the abortion provider, whose name the woman shall give to the pregnancy help center, if the pregnancy help center obtains information that indicates that the pregnant mother has been subjected to coercion or that her decision to consider an abortion is otherwise not voluntary or not informed. . . . The physician shall review and consider any information provided by the pregnancy help center as one source of information, which in no way binds the physician, who shall make an independent determination consistent with the provisions of this Act, the common law requirements, and accepted medical standards.

Section 6 further explains that "[a]ny written statement or summary of assessment prepared by the pregnancy help center . . . as a result of the procedures created by this Act[] may be forwarded by the pregnancy help center, in its discretion, to the abortion physician." Once the statement or summary is sent to the physician, it must "be maintained as a permanent part of the pregnant mother's medical records."

Section 8 recognizes a civil cause of action with "a civil penalty in the amount of ten thousand dollars, plus reasonable attorney's fees and costs," for "[a]ny woman who undergoes an abortion, or her survivors, where there has

been an intentional, knowing, or negligent failure to comply with the" Coercion Provisions in the Act. This is in addition to damages for injuries sustained under any common law or statutory provisions. And subsection 2 of section 9 provides that "[i]f the trier of fact [in a civil action] determines that the abortion was the result of coercion, and it is determined that if the physician acted prudently, the physician would have learned of the coercion, there is a nonrebuttable presumption that the mother would not have consented to the abortion if the physician had complied with the provisions of this Act[.]" The Act does not establish a time frame as to when the pregnancy help center's written statement or summary will be submitted to the physician. And section 6 of the Act concludes by establishing that "[n]othing in this Act may be construed to impose any duties or liability upon a pregnancy help center."

Plaintiffs challenge these sections, hereafter identified as the Coercion Provisions, on the following three grounds: (1) they violate a woman's right to obtain an abortion because they create an undue burden; (2) they are impermissibly vague; and (3) they violate the patients' and plaintiffs' rights to equal protection of the laws.[13]

[13] Plaintiffs did not discuss in their brief how the Coercion Provisions violate the Fourteenth Amendment's Equal Protection Clause. The court therefore expresses no opinion as to whether plaintiffs are likely to succeed on the merits with regard to that claim. The court does not reach the undue burden claim because the Coercion Provisions are unconstitutionally vague.

Plaintiffs argue that the term coercion, as defined in the Act, is unconstitutionally vague. In a challenge against a statute on the basis that it is unconstitutionally vague, the challenger "must demonstrate that the law is impermissibly vague in all of its applications, and that the statute could never be applied in a valid manner." *Planned Parenthood of Minn. v. Minn.*, 910 F.2d 479, 482 (8th Cir. 1990) (internal quotations and citations omitted). The standard for determining whether a statute is unconstitutionally vague is whether it gives people of common intelligence fair notice that certain conduct is prohibited. *Id.* at 482. If the forbidden conduct is so poorly defined that a person of common intelligence must necessarily guess at its meaning and differ as to its application, the statute is unconstitutionally vague. *Id.* (citations omitted). And the statute cannot be so vague as to allow for arbitrary or discriminatory enforcement. *Id.* (citations omitted).

For purposes of the Act, coercion exists if the pregnant woman "is induced, influenced, or persuaded to submit to an abortion by another person or persons ***against her desire***." While coercion is explicitly defined in the Act, the term "desire" is not. The common meaning of desire is "to long or hope for." *See Merriam-Webster Dictionary* (2011). An individual's longing or hope is an amorphous standard that is difficult for a physician to ascertain and is not synonymous with the concept of depriving someone of their free will that is generally considered when determining whether someone acts under coercion.

See State v. Willis, 370 N.W.2d 193, 199 (S.D. 1985) (affirming jury instruction that explained coercion as "exist[ing] where one is . . . induced to do or perform some act under circumstances which deprive her of the exercise of her free will").

Recognizing that the phrase "against her desire" does not give a physician fair notice of what is meant by "coercion" as defined in the Act, defendants argue that "against her desire" actually means "against her will." As the Eighth Circuit Court of Appeals recently noted, however, "South Dakota recognizes the well-settled canon of statutory interpretation that " '[w]here [a term] is defined by statute, the statutory definition is controlling.' " *Rounds*, 530 F.3d at 735 (alteration in original) (quoting *Bruggeman v. S.D. Chem. Dependency Counselor Certification Bd.*, 571 N.W.2d 851, 853 (S.D.1997)). The Eighth Circuit Court of Appeals emphasized that "[w]hen a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning." *Id.* (citations omitted). Thus, the court cannot "redefine" how the legislature defined "coercion."

Furthermore, defendants' argument that the Coercion Provisions only apply when the abortion is conducted against the pregnant woman's "will," instead of "desire," is generally irrelevant when considering the fact that private individuals can bring suit against the physician and argue that the legislature meant what it said. *Stenberg v. Carhart*, 530 U.S. at 940 ("[O]ur precedent

warns against accepting as 'authoritative' an Attorney General's interpretation of state law when 'the Attorney General does not bind the state courts or local law enforcement authorities.' " (citation omitted)). *See also Simpson v. Tobin*, 367 N.W.2d 757, 763 (S.D. 1985) ("While we have in the past recognized that Attorney General's opinions should be considered when construing statutes, such opinions are not binding on the courts.").[14] The court therefore finds that defendants' attempt to have the court alter the "explicit definition" of coercion is fundamentally unreasonable because it goes against the express language used by the legislature in defining a term in the Act. *See Kreager*, 298 N.W.2d at 521 ("It is to be assumed that . . . the legislature has said what it meant." (citation omitted)).

Moreover, subsection 1 of section 3 of the Act requires the physician to determine whether the decision to undergo an abortion "is the result of any coercion, ***subtle or otherwise***." Because the Act defines "coercion" as "exist[ing] if the pregnant mother has a desire to carry her unborn child and give birth, but is induced, influenced, or persuaded to submit to an abortion by another person or persons against her desire," "subtle or otherwise" must mean something different. *See Delano v. Petteys*, 520 N.W.2d 606, 609 (S.D. 1994) ("This court will not construe a statute in a way that renders parts to be

[14] It is questionable whether the argument made by defendants even constitutes an official opinion by the Attorney General.

duplicative and surplusage." (citing *Farmland Ins. Co. v. Heitmann*, 498 N.W.2d 620 (S.D. 1993); *Revier v. Sch. Bd. of Sioux Falls*, 300 N.W.2d 55, 57 (S.D. 1980))). If it means "subtle" inducement, influence, or persuasion, then a physician will be forced to guess whether a patient is the victim of coercion because the pregnant woman herself is likely unaware of the "subtle coercion." If "subtle or otherwise" does not mean "subtle inducement, influence, or persuasion," then the court, and presumably "a person of common intelligence," must "guess" what the phrase actually means. *See Planned Parenthood of Minn. v. Minn.*, 910 F.2d at 482. This uncertainty will cause physicians to refuse to offer abortion services out of fear of being subjected to severe civil sanctions. *Cf. Miller*, 63 F.3d at 1467 ("The potential civil liability for even good-faith, reasonable mistakes is more than enough to chill the willingness of physicians to perform abortions in South Dakota." (citations omitted)). Plaintiffs have therefore demonstrated that "the law is impermissibly vague in all of its applications, and that the statute could never be applied in a valid manner." *Planned Parenthood of Minn. v. Minn.*, 910 F.2d at 482.

The court finds that plaintiffs have met their burden of demonstrating that they are likely to succeed on the merits of their claim that the Coercion Provisions are unconstitutionally vague.

D. The Risk Factors Requirement

Subsections 4 and 5 of section 3 of the Act require the physician, "[d]uring the initial consultation between the physician and the pregnant mother, prior to scheduling a surgical or medical abortion[,]" to:

> (4) Conduct an assessment of the pregnant mother's health and circumstances to determine if any of the risk factors associated with abortion are present in her case, completing a form which for each factor reports whether the factor is present or not; [and]
>
> (5) Discuss with the pregnant mother the results of the assessment for risk factors, reviewing with her the form and its reports with regard to each factor listed[.]

Subsection 6 of section 3 of the Act describes what the physician must do in the event that "any risk factor is determined to be present."

> (6) In the event that any risk factor is determined to be present, discuss with the pregnant mother, in such manner and detail as is appropriate so that the physician can certify that the physician has made a reasonable determination that the mother understands the information, all material information about any complications associated with the risk factor, and to the extent available all information about the rate at which those complications occurs both in the general population and in the population of persons with the risk factor[.]

And subsection 7 of section 3 of the Act describes what the physician must do in the event that "no risk factor is determined to be present."

> (7) In the event that no risk factor is determined to be present, the physician shall include in the patient's records a statement that the physician has discussed the information required by the other parts of this section and that the

> physician has made a reasonable determination that the mother understands the information in question[.]

The Act defines "risk factor associated with abortion" as "any factor, including any physical, psychological, emotional, demographic, or situational factor, for which there is a statistical association with an increased risk of one or more complications associated with legal abortion, such that there is a less than five percent probability that the statistical association is due to sampling error." And the Act defines "complications associated with abortion"[15] as "any adverse physical, psychological, or emotional reaction, for which there is a statistical association with legal abortion, such that there is a less than five percent probability that the statistical association is due to sampling error."

In order "[t]o be recognized as a risk factor" or "complication associated with legal abortion," "the statistical information must have been published in the English language, after 1972, in at least one peer-reviewed journal indexed by the search services maintained by the United States National Library of Medicine (PubMed or MEDLINE . . .) or in at least one peer-reviewed journal indexed by any search service maintained by the American Psychological Association (PsycINFO . . .)[.]" *See* Section 7(2)-(3) of the Act. And "the date of

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[15] The phrase "complications associated with abortion" does not appear anywhere else in the Act. The court presumes that the legislature meant to define the term "complications associated with ***legal*** abortion" because this phrase is used in defining what is meant by "risk factor associated with abortion." *See* Section 7(2) (emphasis added).

first publication [of the article] must be not less than twelve months before the date of the initial consultation described in section 3 of this Act." *See* Section 7(2)-(3).

Plaintiffs challenge these sections, hereinafter referred to as the Risk Factors Requirement, on four grounds: (1) they violate the patients' rights to obtain an abortion; (2) they violate plaintiffs' right to free speech; (3) they violate the patients' and plaintiffs' rights to equal protection of the laws; and (4) they are unconstitutionally vague.[16]

1. Compelled Speech (Physician) Analysis

"In general, to address a claim that a state action violates the right not to speak, a court first determines whether the action implicates First Amendment protections." *Rounds*, 530 F.3d at 733. If the state action does implicate First Amendment protections, then "the court must determine whether the action is narrowly tailored to serve a compelling state interest." *Id.*

The Eighth Circuit Court of Appeals has determined that *Casey* and *Gonzales v. Carhart*, 550 U.S. 124 (2007), "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,

[16] The court expresses no opinion as to whether plaintiffs are likely to succeed on the merits with regard to their claim that the Risk Factors Requirement violates patients' and physicians' rights to equal protection of the laws or that the Risk Factors Requirement is unconstitutionally vague.

non-misleading information relevant to a patient's decision to have an abortion[.]" *Rounds* at 734-35. According to the Eighth Circuit Court of Appeals, plaintiffs have the burden of demonstrating that the Risk Factors Requirement compels a physician to disclose untruthful, misleading, or irrelevant statements to a patient when consulting with her about whether or not to have an abortion. *See id.* at 735 ("Therefore, Planned Parenthood cannot succeed on the merits of its claim that § 7(1)(b) violates a physician's right not to speak unless it can show that the disclosure ***is either untruthful, misleading or not relevant*** to the patient's decision to have an abortion." (emphasis added)). *But see Casey*, 505 U.S. at 882 ("If the information the State requires to be made available to the woman ***is truthful and not misleading***, the requirement may be permissible." (emphasis added)).[17]

A "risk factor associated with abortion" is "any factor, including any physical, psychological, emotional, demographic, or situational factor, for which there is a statistical association with an increased risk of one or more complications associated with legal abortion[.]" And "complications associated with [legal] abortion" are "any adverse physical, psychological, or emotional reaction, for which there is a statistical association with legal abortion[.]" The

[17] The burden explicitly imposed on the challenger by the Eighth Circuit in *Rounds* appears to be inconsistent with the burden implicitly imposed on the government in *Casey*. This court must follow the most recent decision of the Eighth Circuit Court of Appeals.

definition of a "risk factor associated with abortion" therefore contains within it the definition of "complications associated with [legal] abortion." Thus, when read in conjunction, a "risk factor associated with abortion" is "any factor, including any physical, psychological, emotional, demographic, or situational factor, for which there is a statistical association with an increased risk of" "any adverse physical, psychological, or emotional reaction, for which there is a statistical association with legal abortion, such that there is a less than five percent probability that the statistical association is due to sampling error."

Applying the Act's plain language, a physician must inform a patient about the adverse reaction if the patient has a physical, psychological, emotional, demographic, or situational factor that is statistically associated with any adverse physical, psychological, or emotional reaction when the adverse reaction is statistically associated with legal abortion. That is, as long as the patient has a "factor" that is statistically associated with an "adverse reaction," and the "adverse reaction" is statistically associated with legal abortion, the doctor must inform the patient about those factors and their association to the adverse reactions.

Under South Dakota law, when a statute is "not ambiguous," "[i]t is to be assumed that [the statute] means what it says and that the legislature has said what it meant." *Kreager v. Blomstrom Oil Co.*, 298 N.W.2d 519, 521 (S.D. 1980) (citation omitted). Thus, the Act requires the physician to tell the patient about

"any factor . . . for which there is a statistical association with an increased risk of" "any adverse physical, psychological, or emotional reaction, for which there is a statistical association with legal abortion, such that there is a less than five percent probability that the statistical association is due to sampling error" that can be found anywhere in the nearly forty years of published literature covered by the Act. The literature covered by the Act also includes studies conducted in countries where abortion may be legal, but not practiced as safely as in the United States. And nothing in the text of the statute permits physicians to use their medical judgment to avoid disclosing information that is untrue, misleading, or irrelevant.

For example, the literature covered by the Act includes articles that find a statistical association between abortion and breast cancer for patients with certain risk factors. *See* Docket 10-3, Declaration of Jill L. Meadows, M.D., at ¶ 10 (citing M.C. Pike et al., *Oral Contraceptive Use and Early Abortion as Risk Factors for Breast Cancer in Young Women*, 43 Brit. J. Cancer 72 (1981)). The cited article finds that for women having a first-trimester abortion without a prior full-term pregnancy, the risk of breast cancer increases nearly two-and-a-half times. Thus, under the Act a physician would be required to tell a patient in her first trimester who had not previously carried a pregnancy to full term that an abortion would increase her risk of having breast cancer by nearly two-and-a-half times. This information is misleading.

In the intervening twenty years, national organizations with specialized expertise in cancer and reproductive health such as the National Cancer Institute, the American Cancer Society, and the American College of Obstetricians and Gynecologists, have reached a consensus that having an abortion does ***not*** increase patients' risk of breast cancer. *See* Docket 10-3 at ¶ 12. These organizations have found that the methodology of the earlier study was flawed and unreliable. Other examples exist of misleading, irrelevant, and untruthful information that must be disclosed under the Risk Factors Requirement. *See* Docket 10-3 at ¶¶ 16-25.

Defendants argue that the physician is free to explain to the patient that this type of forced disclosure is untruthful or misleading. The court rejects this argument because even if the physician is allowed to tell the patient that the previously disclosed information is untruthful or misleading, then that information is irrelevant to the patient. And a physician cannot be forced to disclose information that is "untruthful, misleading or not relevant to the patient's decision to have an abortion." *See Rounds*, 530 F.3d at 735.

Under the analytical framework established in *Rounds,* this court must now evaluate whether the Act is "narrowly tailored to serve a compelling state interest." 530 F.3d at 733. The Act's title states that the purpose of the Act is "to establish certain procedures to better insure such decisions are voluntary, uncoerced, and informed." The court assumes, without deciding, that this is a

compelling state interest. But defendants are unlikely to be able to demonstrate that the Act is narrowly tailored to serve this interest.

The Risk Factors Requirement is not narrowly tailored because it forces physicians to disclose all "risk factors" and "adverse reactions" identified, even if the study demonstrating the statistical association is subsequently discredited and is therefore untruthful, misleading, or irrelevant. Plaintiffs have therefore demonstrated that they are likely to succeed on their challenge to the Risk Factors Requirement because it violates the First Amendment's Free Speech Clause.

2. Undue Burden Analysis

As discussed above, whether the Risk Factors Requirement constitutes an "undue burden" depends on whether, in a large fraction of the cases in which it is relevant, it creates a "substantial obstacle to a woman's choice to undergo an abortion." *See Miller*, 63 F.3d at 1458. There are three issues that must be resolved in order to determine whether plaintiffs have met their burden: (1) in what cases is the requirement "relevant;" (2) does the requirement create a "substantial obstacle to the woman's choice to undergo an abortion" in those cases that are "relevant;" and (3) is the substantial obstacle present in a "large fraction" of the "relevant" cases. *Id.*

With regard to the first issue, determining the relevant cases, it is clear that the Risk Factors Requirement applies to every woman who chooses to

undergo an abortion. That is, if a woman chooses to undergo an abortion, the physician must provide her with certain information before performing an abortion. Thus, the relevant cases are those instances where a pregnant woman has chosen to undergo an abortion.

The second issue is whether the Risk Factors Requirement constitutes a substantial obstacle. The Risk Factors Requirement departs from standard medical practice by mandating that physicians identify, retrieve, and review every article published in English, after 1972, in every peer-reviewed journal indexed by PubMed or MEDLINE or PsycINFO that could trigger an assessment or disclosure obligation because it could include a "risk factor" or "complication" as defined in the Act. After this undertaking, physicians are required to assess every patient for the resulting list of "risk factors," discuss the assessment, and disclose the associated "complications," as well as "the rate at which those complications occur both in the general population and in the populations of persons with the risk factor." *See* Section 3(6) of the Act.

PubMed is an online, searchable database of approximately 20 million journal article citations (including articles from MedLine). Docket 10-12, Declaration of Kelly Blanchard, at ¶ 14. PsycINFO is a database covering the psychological literature that includes over 3 million records from approximately 2,500 journals. *Id.* But neither PubMed nor PsycINFO contains full coverage of every indexed journal. Docket 10-12 at ¶ 18. Thus, to access all of the English

language post-1972 articles published in every peer-reviewed journal indexed by either database, a physician would have to figure out which journals and articles are not fully covered back to 1973 on PubMed or PsycINFO and find some other means to access and search those articles. Docket 10-12 at ¶ 19. This could entail searching each individual journal online or through a library or publisher. Docket 10-12 at ¶ 19. Finally, neither PubMed nor PsycINFO searches the full text of articles. Docket 10-12 at ¶ 20. Instead, each searches only a series of fields (including article title, abstract, author, and certain terms or keywords). Therefore, unless the article contains the relevant search term in one of the fields, it would not turn up in a search. But if a physician misses ***even one*** responsive "factor" mentioned ***anywhere***—even in a footnote—in just ***one article*** the physician could be subject to civil and professional penalties under the Act.

Even if a physician could formulate a search and retrieve all of the required materials, the volume of articles the physician would have to review and analyze would be prohibitive. For example, a search for the term "abortion," restricted to journals published in English between January 1973 and July 2010 yields more than 45,000 results in PubMed and more than 2,000 results in PsycInfo. Docket 10-12 at ¶ 24. Even ignoring the fact that some responsive articles will be missed in the above search, no physician could review the thousands of articles yielded by searching the two databases.

Defendants argue that when these requirements are properly construed, a physician can comply with the Risk Factors Requirement. They assert that "the relevant databases are easily searched" and that "a number of comprehensive reviews have been published since 1973 which would identify most, if not all, of the relevant literature." Docket 32-1, Declaration of Byron C. Calhoun, M.D., at ¶ 31. Defendants do not identify or describe these "comprehensive reviews." And the plain language of the Act places the burden on physicians to identify and review ***all*** of the relevant literature, not ***most*** of it. Thus, plaintiffs have shown that they are likely to demonstrate that compliance with the Risk Factors Requirement is impossible or nearly impossible to satisfy.

The barrier imposed by the Risk Factors Requirement is compounded by the Act's provisions imposing civil liability on physicians who perform abortions. The Act creates a new civil action by the woman or her survivors against both the physician and the facility where the abortion was performed if the physician fails to comply with any of the Act's requirements, including the Risk Factors Requirement. Future plaintiffs may receive a wide range of damages and attorneys' fees.[18] Moreover, the Act creates a presumption that a

[18] Future plaintiffs may "obtain a civil penalty in the amount of ten thousand dollars, plus reasonable attorney's fees and costs, jointly and severally from the physician who performed the abortion and the abortion facility[.]" This amount is "in addition to any damages that the woman or her survivors may be entitled to receive under any common law or statutory

woman would not have had the abortion if the physician had complied with the Act's requirements.

This presumption is a rebuttable presumption. But the Act provides that if a physician presents evidence rebutting the presumption, the "finder of fact" must determine whether the woman would have consented to the abortion "if she had been given . . . all information required by this Act to be disclosed[.]" *See* Section 9(3) of the Act. And as explained above, this includes information that is presented in an article as being true but is actually untrue and therefore misleading or irrelevant. Understandably, physicians will be unwilling to perform abortions when faced with likely litigation that will include this type of situation. *See Planned Parenthood of the Heartland v. Heineman*, 724 F. Supp. 2d 1025, 1044 (D. Neb. 2010).

As Judge Smith Camp found when assessing similar legislation in Nebraska, "[t]he threat of such litigation is real, and imminent." *Id.* at 1045. Because the Risk Factors Requirement is impossible or nearly impossible to comply with, women may lose a constitutional right because no physician may be willing to perform an abortion in South Dakota. *See id.* at 1044 (recognizing that a similar impossible requirement "plac[ed] women in immediate jeopardy of losing access to physicians who are willing to perform abortions" by "placing

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provisions, . . . [and] in addition to the amounts that the woman or other survivors of the deceased unborn child may be entitled to receive under any common law or statutory provisions[.]" *See* Section 8 of the Act.

physicians who perform abortions in immediate jeopardy of crippling civil litigation"). "If this statutory provision is allowed to stand, there may not be any provider willing to subject himself to the vagaries of the statute for those women who desire to exercise their constitutional rights consistent with *Roe* and *Casey*." *Planned Parenthood, Sioux Falls Clinic v. Miller*, 860 F. Supp. 1409, 1418 (D.S.D. 1994). Thus, plaintiffs have demonstrated that the Risk Factors Requirement poses a substantial obstacle to a woman's choice to undergo an abortion.

The third issue in the undue burden analysis is whether the Risk Factors Requirement is a substantial obstacle in a large fraction of the relevant cases. Every woman who chooses to undergo an abortion will be unable to obtain one because the Risk Factors Requirement applies to every woman who seeks an abortion in South Dakota and no physician will be able, or willing, to perform an abortion without violating these requirements. The Risk Factors Requirement is therefore a substantial obstacle in a large fraction of the relevant cases. Thus, plaintiffs are likely to demonstrate that the Risk Factors Requirement constitutes an undue burden on a woman's constitutional right to a pre-viability abortion.

For the reasons stated above, the court finds that plaintiffs have met their burden of demonstrating that they are likely to succeed on the merits with regard to their challenges against the Pregnancy Help Center Provision,

the Risk Factors Provision, the Coercion Provisions, and the 72-Hour Requirement.

E. Separability Issues

Section 11 of the Act states that "[i]f any provision of this Act is found to be unconstitutional or its enforcement temporarily or permanently restrained or enjoined by judicial order, the provision is severable." As plaintiffs correctly point out, "[t]he 'doctrine of separability' requires [a] court to uphold the remaining sections of a statute if they can stand by themselves and if it appears that the legislature would have intended the remainder to take effect without the invalidated section." *Dakota Sys., Inc. v. Viken*, 694 N.W.2d 23, 32 (S.D. 2005) (citations omitted). This doctrine applies even when the legislature enacts a separability provision as it did here. *See Application of Nelson*, 163 N.W.2d 533, 537 (S.D. 1968) (applying "doctrine of separability" when the legislature enacted a similar separability clause). A two-part test applies under the doctrine of separability: (1) whether "the remaining sections can stand by themselves;" and (2) whether "the Legislature would have intended the remaining sections to take effect." *Dakota Sys., Inc.*, 694 N.W.2d at 32 (citation omitted).

Section 2 of the Act states that "[t]he requirements expressly set forth in this Act, that require procedures designed to insure that a consent to an abortion is voluntary and uncoerced and informed, are an express clarification

of, and are in addition to, th[e] common law duties" of a physician. Because each of the requirements imposed on a physician by the Act are likely to be unconstitutional as explained above, this section cannot stand on its own.

Section 3 contains the 72-Hour Requirement and is likely to be unconstitutional. Section 3 also contains portions of the Coercion Provisions, the Risk Factors Provisions, and the Pregnancy Help Center Requirements. And each of these is likely to be unconstitutional. Those portions of Section 3 that are record keeping requirements associated with the unconstitutional provisions cannot stand by themselves.

Section 4 depends on the other provisions in the Act, including the Risk Factors Requirement, Pregnancy Help Center Requirements, 72-Hour Requirement, and the Coercion Provisions, and is therefore likely to be unconstitutional.

Section 5 of the Act establishes that the Department of Health shall maintain a registry of pregnancy help centers located in South Dakota and identifies the requirements associated with the registry. Plaintiffs have not challenged this section of the Act in their motion for preliminary injunction.[19] Moreover, this section can stand on its own because there is nothing in

[19] By itself, section 5 does not regulate abortions, women seeking abortions, or physicians who perform abortions.

section 5 that is likely to be unconstitutional.[20] And there is nothing to suggest that the legislature did not intend for this section to remain in effect.

Section 6 of the Act cannot stand on its own because it consists entirely of the Pregnancy Help Center Requirements that are likely to be unconstitutional.

Section 7 of the Act defines several terms used in the Act that are part of the Risk Factors Requirement, the Coercion Provisions, and the Pregnancy Help Center Requirements. With the exception of the pregnancy help center definition, the legislature clearly did not intend for this section to take effect on its own because the definitions are limited to the Act. The pregnancy help center definition, however, can stand on its own because it relates to section 5, which is valid, and it regulates which entities can register to become a "pregnancy help center." Thus, subsection 1 of section 7 is severable because it can stand on its own and is intended to take effect on its own.

Section 8 of the Act creates a civil cause of action for violations of sections 3 and 4 of the Act, which are likely to be unconstitutional. Thus, this section cannot stand on its own.

Section 9 of the Act establishes different "presumptions" that apply in a civil action that arises from a failure to comply with any of the provisions of

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[20] Subsection 7 of section 5 references "section 11 of this Act as it relates to discussion of religious beliefs," but section 11 does not deal with religion.

Chapter 34-23A. Subsection 2 of section 9 contains portions of the Coercion Provisions and establishes a "nonrebuttable presumption that the mother would not have consented to the abortion if the physician had complied with the provisions of this Act." Because the Coercion Provisions are likely to be unconstitutional, this subsection cannot stand on its own.

Subsection 3 of section 9 provides that if a physician produces evidence to rebut the presumption created in subsection 1, then the finder of fact is required to consider "all information required by this Act to be disclosed." The information that is required by "this Act" includes information provided under the Pregnancy Help Center Requirements and the Risk Factors Requirement, which are likely to be unconstitutional. Thus, subsection 3 cannot stand on its own.

Although on its face subsection 1 of section 9 appears to be capable of standing alone, it is clear that the legislature did not intend for it to take effect on its own because subsection 3 explicitly refers to subsection 1 and explains what needs to be shown for a physician to overcome the presumption created in subsection 1.

Subsection 4 of section 9 of the Act cannot stand on its own because it imposes a duty on a pregnant woman to consult with a "pregnancy help center as referenced in sections 3 and 4 of this Act," which are likely to be unconstitutional.

Subsection 5 of section 9 has not been challenged by plaintiffs. Moreover, it can stand on its own because it does not reference any of the other provisions in the Act that are likely to be unconstitutional. The legislature intended for it to take effect on its own because it extends to "the requirements of this chapter," rather than just the Act.

Sections 1, 10, and 11 cannot stand on their own and were obviously not intended by the legislature to take effect on their own.

To summarize, the following portions of the Act are severable from those portions that are likely to be unconstitutional: section 5; subsection 1 of section 7; and subsection 5 of section 9. The remaining portions of the Act are likely to be struck down and are not severable as explained above. Having found that plaintiffs have satisfied the threshold requirement for enjoining a duly enacted statute, the court will now consider the remaining *Dataphase* factors.

III. Threat of Irreparable Harm

As discussed above, plaintiffs have established that they are likely to succeed on the merits with regard to their challenges against the Pregnancy Help Center Requirements, the 72-Hour Requirement, the Risk Factors Requirement, and the Coercion Provisions. Constitutional violations, however brief, are unquestionably irreparable. *See Kirkeby v. Furness*, 52 F.3d 772, 775 (8th Cir. 1995) (" 'The loss of First Amendment freedoms, for even minimal

periods of time, unquestionably constitutes irreparable injury.' " quoting *Elrod v. Burns*, 427 U.S. 347, 373, (1976)). Thus, the court finds that this factor, the threat of irreparable harm, weighs in favor of granting the preliminary injunction.

IV. Balance of the Harms

The balance of the harms factor calls for the court to balance the harms that would result in the following scenarios: (1) if the preliminary injunction was improperly denied because plaintiffs prevailed on the merits of the case; and (2) if the preliminary injunction was improperly granted because defendants prevailed on the merits of the case. *See Scotts Co. v. United Indus. Corp.*, 315 F.3d 264, 284 (4th Cir. 2002) ("[W]hile cases frequently speak in the short-hand of considering the harm to the plaintiff if the injunction is denied and the harm to the defendant if the injunction is granted, the real issue in this regard is the degree of harm that will be suffered by the plaintiff or the defendant if the injunction is ***improperly*** granted or denied."); *see also Hillerich & Bradsby Co. v. Christian Bros., Inc.*, 943 F. Supp. 1136, 1142 (D. Minn. 1996) (balancing the harms by looking at what the harm to the defendant would be if the injunction were "improperly granted").

If the preliminary injunction is improperly denied, many women will have been denied their right to free speech and effectively forced against their will to remain pregnant until they give birth. The extent of the harm if the preliminary

injunction turns out to have been improperly granted is that defendants will have been wrongly prevented from carrying out their official duties.

After balancing the harm to the parties, the court finds that both are potentially exposed to harm if the preliminary injunction is found to have been improperly granted or denied. Nonetheless, when considering the nature of the parties' interests that are at stake, the potential harm to plaintiffs' interests are more severe because the harms directly affect personal liberty interests. Thus, the court finds that the balance of the harms weighs in favor of granting the preliminary injunction.

V. Public Interest

As discussed above, plaintiffs have demonstrated that the Act and its specified provisions are "likely" unconstitutional. There is a public interest in protecting a woman's constitutional right to choose an abortion and in protecting the constitutional right to free speech. And the public has a clear interest in ensuring the supremacy of the United States Constitution. While the public also has an interest in the enforcement of duly enacted state laws, that interest is secondary to the public interests expressed above. Thus, the court finds that this factor weighs in favor of granting the preliminary injunction.

CONCLUSION

In weighing the four factors set out in *Dataphase*, as modified by *Planned Parenthood v. Rounds*, 530 F.3d at 732-33, the court finds that plaintiffs have sufficiently demonstrated the need for a preliminary injunction.

Accordingly, it is

ORDERED that plaintiffs' motion for a preliminary injunction is granted as to all sections of the Act except for section 5, subsection 1 of section 7, and subsection 5 of section 9.

Dated June 30, 2011.

BY THE COURT:

/s/ Karen E. Schreier
KAREN E. SCHREIER
CHIEF JUDGE