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

STATE APPELLANTS' BRIEF

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SUMMARY OF CASE AND REQUEST FOR ORAL ARGUMENT

The record in this case reveals that pregnant women are being railroaded into abortions they do not want. Planned Parenthood of Minnesota, North Dakota and South Dakota (PPMNS), focused on the volume of abortions and bottom line revenue, cannot be counted on properly to inform a pregnant woman's consent to abortion or to screen for or prevent coercion, and in fact will facilitate coerced abortions. To protect women against coerced abortions and to fill the void created by PPMNS's deficient informed consent and screening practices, South Dakota enacted a statutory program providing women considering abortion free counseling at independent, third-party, tightly regulated pregnancy help centers (PHCs). PPMNS challenged the third-party counseling requirement as unconstitutionally compelling speech and unduly burdening abortion. The district court granted a preliminary injunction in 2011 and, in 2021, after ten years of discovery and statutory amendments, denied defendants' and intervenors' joint motion to dissolve that injunction. This appeal followed.

In light of the interplay of important constitutional doctrines, and the size and importance of the record in this case, the state defendants request 30 minutes of oral argument each for the state defendants/appellants and intervenors/appellants and 45 minutes for plaintiffs/appellees.

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JURISDICTIONAL STATEMENT

The present lawsuit was filed under 42 U.S.C. § 1983. The District Court had jurisdiction under 28 U.S.C. §§ 1331, 1343. The state timely appealed from an August 20, 2021, order denying the joint motion of state defendants and intervenors to dissolve the District Court's preliminary injunction. SAPX 3100-29, R. Doc. 374. This Court has jurisdiction under 28 U.S.C. §1292(a)(1).

STATEMENT OF ISSUES

1. Whether the district court erred by ruling that the First Amendment likely bars South Dakota from enacting its third-party counseling requirement to protect women from being coerced into abortions? *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Gonzales v. Carhart*, 550 U.S. 124 (2007)

2. Whether the district court erred by ruling that independent third-party counseling to protect women from being coerced into abortions they do not want likely imposes an undue burden on abortion? *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Maher v. Roe*, 432 U.S. 464 (1977)

3. Whether the district court erred by refusing to dissolve its preliminary injunction against South Dakota's third-party counseling requirement? *Ahmad v. City of St. Louis*, 995 F.3d 635 (8th Cir. 2021); *Movie Systems, Inc. v. Mad Minneapolis Audio Distributors*, 717 F.2d 427 (8th Cir. 1983)

STATEMENT OF THE CASE

Statute at issue

PPMNS challenges the third-party counseling requirements of South Dakota law, namely, SDCL §§ 34-23A-53 to -62. SAPX 165-66, R. Doc. 191, at ¶1 (5th Am'd Cplt.).[1] These provisions

- define "pregnancy help center" and "coercion," SAPX 182, R. Doc. 191-1, at 2 (§ 53);
- make legislative findings, SAPX 183, R. Doc. 191-1, at 3 (§ 54);
- express a legislative intent to preserve common law duties, SAPX 184, R. Doc. 191-1, at 4 (§ 55);
- require, *inter alia*, that no abortion be scheduled before an initial consultation and that no consent be taken before the pregnant woman satisfies the third-party counseling requirements, SAPX 185-87, R. Doc. 191-1, at 5-7 (§§ 56, 57);

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[1]The Fifth Amended Complaint was the operative complaint when the motion to dissolve the remainder of the preliminary injunction, at issue in this appeal, was filed. SAPX 24-25, R. Docs. 191, 204. PPMNS also purported, SAPX 166, R. Doc. 191, at ¶2, to challenge legislative findings in SDCL §§ 34-23A-74 to -88. SAPX 194-208, R. Doc. 191-1, at 14-28. However, those sections contain no operative provisions, and there is no current injunction against them; their constitutionality is therefore not before this Court.

- establish a pregnancy help centers (PHCs) registry, SAPX 188, R. Doc. 191-1, at 8 (§ 58);[2]
- set rules governing PHC practices, SAPX 189, R. Doc. 191-1, at 9 (§ 59);[3]
- create a civil remedy for women whose abortions did not comply with the statute, SAPX 191-92, R. Doc. 191-1, at 11-12 (§§ 60, 61);[4] and,
- specify no repeal of other provisions, SAPX 193, R. Doc. 191-1, at 13 (§ 62).

The district court initially granted a preliminary injunction against most of these sections, but subsequently dissolved the bulk of the injunction. SAPX 3104, R. Doc. 374, at 5 (district court describing procedural history). The remaining preliminary injunction enjoined only three portions of the South Dakota law, namely,

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[2]On this issue, the legislature subsequently added §§ 58.1 to 58.4, 59.1.

[3]On this issue, the legislature subsequently added § 59.2.

[4]The state defendants have no authority to enforce this section; hence, any harm to plaintiffs would be traceable only to private civil litigants. PPMNS therefore has no justiciable claim against the civil remedies sections. *Digital Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 957-59 (8th Cir. 2015). In any event, there is no current injunction against §60, §61(1)-(3), (5), and most of §61(4); hence, those provisions are not before this Court. *See infra* pp. 3-4 (describing scope of remaining injunction). For the reasons stated in this footnote, the injunction against one phrase in §61(4), which applies only to civil actions by third parties, is improper for lack of justiciability. As the district court acknowledged, subject matter jurisdiction is always a proper question for a court, even if the parties do not raise it. SAPX 3101, R. Doc. 374, at 2. However, since the challenge to the third-party counseling requirement fails on the merits in its entirety, this Court need not address the jurisdictional question.

§56(3) (third-party counseling requirement), §59 (scope of required third-party counseling), and one phrase in §61(4). SAPX 3104-07, R. Doc. 374, at 5-8 (district court cataloguing provisions that remain enjoined).

Statement of the facts

The record in this case – evidence almost entirely submitted subsequent to the issuance of the preliminary injunction at issue – convincingly demonstrates that the state had every reason to be concerned about coerced abortions and the consistent failure of PPMNS properly to inform consent to abortion or to screen for, or even try to hinder, coerced abortions. The record indicates that the profit-driven, ideologically-inclined abortion practices in the abortion industry in general, and at PPMNS in particular, are wholly unsuitable to prevent pregnant women from being railroaded into abortions that they do not want, and that, if anything, PPMNS will assist the perpetrators in pushing pregnant women into abortions they do not want. *See, e.g., infra* pp. 27-28. Indeed, PPMNS *admitted* that it performs coerced abortions so long as it informs a woman that she will be at risk for adverse mental health consequences. SAPX 3197, 3220 (BALL DEPO. at 229/10-231/7; BALL DEPO. EX. 21). The state's requirement of independent, highly regulated, third-party counseling responds to these grave concerns.

Notably, much of the key evidence in this case comes from those with inside experience with Planned Parenthood in general[5] and PPMNS in particular, including:

- Dr. Patricia Giebink, who did abortions at PPMNS for about 3 years (SAPX 568-69, R. Doc. 232);
- Susan Thayer, who worked for 17-1/2 years at Planned Parenthoods in Iowa (SAPX 356, R. Doc. 210);
- Abby Johnson, who worked for 8 years at a Planned Parenthood in Texas (SAPX 377, R. Doc. 211);
- Ramona Trevino, clinic manager for over 3 years at a Planned Parenthood in Texas (SAPX 397, R. Doc. 213); and,
- Annette Lancaster, former health center manager for a Planned Parenthood in North Carolina (SAPX 389, R. Doc. 212).

A. Women *Considering* Abortion vs. PPMNS *Selling* Abortions

To begin with, PPMNS assumes – incorrectly, as shown in the evidence discussed below – that a woman who appears at a PPMNS clinic has already "chosen" an abortion. SAPX 573, 575-76, R. Doc. 232, at ¶¶23, 34 (GIEBINK); SAPX 1637,

[5]Planned Parenthood affiliated clinics follow nationally set protocols and have common practices across the country. SAPX 357, 365, 368-72, R. Doc. 210, at ¶¶4, 20, 32-42 (THAYER); SAPX 377-81, 385, R. Doc. 211, at 1-5, 9 (JOHNSON); SAPX 569, R. Doc. 232, at ¶13 (GIEBINK).

R. Doc. 266, at ¶65; SAPX 1758, R. Doc. 266-26, at 117 (ADAMS DEPO.); SAPX 382, R. Doc. 211, at ¶15 (JOHNSON).[6] The district court embraced the same erroneous assumption. *E.g.*, SAPX 83-85, 87, R. Doc. 39, at 9-11, 13. *See also infra* p. 50-51.

But the record starkly illustrates the clearly different mindsets of, on the one hand, a woman who is undecided or ambivalent about abortion and, on the other, PPMNS, whose business model is to generate revenue from and "sell" abortions. SAPX 573. R. Doc. 232, at ¶23 (GIEBINK); SAPX 358-60, 367, R. Doc. 210, at ¶¶7-8, 11, 28 (THAYER) (abortion "quotas" imposed on local clinics by Planned Parenthood's national organization; staff were directed to persuade ambivalent women to abort); SAPX 384, R. Doc. 211, at ¶18 (JOHNSON) (pressure to meet abortion quotas "prevented any real counseling").

Contrary to the operating assumption of PPMNS and the district court, a woman has not "chosen" an abortion simply by walking through PPMNS's door. In fact, "very few" of the women who enter an abortion clinic are "firm in their decisions" to have an abortion. SAPX 393, R. Doc. 212, at ¶12 (LANCASTER)

[6]PPMNS's briefing in the district court reflects the same assumption. *See, e.g.,* PP Opp. to Mot. to Dissolve (R. Doc. 321) at 26 ("her decision to have an abortion"), 36 ("her . . . desire to seek an abortion"), 40 ("their desire to have an abortion"), 42 ("her abortion decision").

("[a]bout half" were "uncertain"); SAPX 400, R. Doc. 213, at ¶9 (TREVINO) ("clear majority" of women who visited Planned Parenthood "did not know what they wanted to do"). "At least half of the women who came for their post-abortion evaluation indicated they were struggling with the fact that they had an abortion." SAPX 367, R. Doc. 210, at ¶27 (THAYER). As a long-time Iowa PP employee testified,

> the "perfect" abortion patient who had no moral or religious objection to abortion, was not experiencing pressure or coercion from others, had no pre-existing mental health condition, and had firmly decided to have an abortion was virtually nonexistent.

SAPX 366, R. Doc. 210, at ¶23 (THAYER).

Multiple studies confirm that many, perhaps most, women are ambivalent about abortion or feel pressured into abortion. Between 33% and 41% of women who had abortions report ambivalence prior to undergoing the procedure, while only 45% felt certain at the time. Törnbom, Ingelhammar, Lilja, Svanberg & Möller, "Decision Making About Unwanted Pregnancy," *Acta Obstet. Gynecol. Scand.* 78:636-41 (1999), SAPX 2504-2509, R. Doc. 271-2; Husfeldt, Hansen, Lynberg, Nøddebo & Petersson, "Ambivalence Among Women Applying for Abortion," *Acta Obstet. Gynecol. Scand.* 74:813-17, 816 (1995), SAPX 2510, 2511, R. Doc. 271-3.

Ambivalence can arise from multiple factors. A study of 80 post-abortive women found that 29 [36%] reported "male partner does not favor having a child at

the moment" as a reason for the abortion, 20 [25%] reported "pressure from male partner," 42 [52%] reported "financial reasons," and 29 [36%] reported "housing conditions." Broen, Moum, Bödtker & Ekeberg, "Reasons for Induced Abortion and Their Relation to Women's Emotional Distress," *Gen. Hosp. Psych*. 27:36-43, 39 (2005), SAPX 2515, 2518, R. Doc. 271-4; SAPX 364, R. Doc. 210, at 19 (THAYER) (during counseling "it was common for women to report that they were pressured or coerced by someone to have an abortion they did not want"). The Törnbom study likewise reported ambivalence attributable to pressure and coercion and socio-economic and religious reasons. SAPX 2509, R. Doc. 271-2, at 641. Far from having "chosen" abortion simply by walking into a PPMNS clinic, 55% of women actually are there simply to explore abortion as an option because of socio-economic and/or interpersonal pressures exerted on them by circumstances and/or others. SAPX 2513, R. Doc. 271-3, at 816 (HUSFELDT).

The district court was therefore flatly wrong, as a factual matter, when it declared that the third-party counseling requirements "only apply to women who have chosen to undergo an abortion," SAPX 88, R. Doc. 39, at 14. To the contrary, the requirement applies to all those *considering* abortion, whether firmly decided, uncertain, or being pushed into abortion by others – precisely the rationale for third-party counseling as an essential anti-coercion measure.

Abortion is already a risk factor for mental health problems, including suicide. *Planned Parenthood v. Rounds*, 686 F.3d 889, 905 (8th Cir. 2012) (en banc) ("a disclosure that the relative risk of suicide and suicide ideation is higher for women who abort compared to women in other relevant groups, . . . is truthful, . . . non-misleading and relevant"). An unwanted abortion, done in response to outside pressures, not only needlessly "aborts . . . infant life" but also puts the woman at risk of "[s]evere depression and loss of [self-]esteem," *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007). A tragic illustration of the mental health risks is the case of Stacy Zallie, who took her own life after being coerced into an abortion by her boyfriend's father. SAPX 584-91, R. Doc. 233 (GEORGE ZALLIE). *See also* SAPX 587, R. Doc. 233, at ¶15 (after the abortion, Stacy went from being "a happy, well adjusted, active, out-going young woman . . . to suddenly being deeply depressed and suicidal").

PPMNS's medical director and abortionist each *admitted* that risk factors like coercion, pressure, ambivalence, conflict with personal or religious values, preference to keep the baby, and preexisting mental issues all increase the odds of psychological harm. SAPX 1674-76, R. Doc. 266-9, at 177-79 (BALL DEPO.); SAPX 1679-82, R. Doc. 266-10, at 130-33 (MOORE DEPO.). *See also Gonzales*, 550 U.S. at 159 ("it seems unexceptionable to conclude that some women come to regret their choice to abort the infant life" and that "[s]evere depression and loss of esteem can follow").

Morover, multiple studies confirm that "ambivalent women run a greater risk of suffering negative emotional sequelae, such as depression and guilt." SAPX 2510, R. Doc. 271-3, at 813 (HUSFELDT); SAPX 2505, R. Doc. 271-2, at 637 (TÖRNBOM) ("[t]he presence of ambivalence is . . . associated with post-abortion emotional problems"). "[T]he strongest predictor of emotional distress [6 months] and [2 years post-abortion] was 'pressure from male partner.'" SAPX 2515, 2520, 2521, R. Doc. 271-4, at 36, 41, 42 (BROEN); Broen, Moum, Bödtker & Ekeberg, "Predictors of Anxiety and Depression Following Pregnancy Termination," *Acta Obstet. Gynecol. Scand.* 85:317-23 (2006), SAPX 2523, R. Doc. 271-5. "For women with induced abortion, doubt about the decision to abort was related to depression at [2 years], while negative attitude towards induced abortion was associated with anxiety at [2 years] and [5 years]" after the event. SAPX 2523, R. Doc. 271-5, at 317 (BROEN). "D]epression scores in the induced abortion group were significantly higher than the scores of the general population at [6 months] and [2 years]" post-abortion. SAPX 2528, R. Doc. 271-5, at 322 (BROEN). Because women who experience "induced abortion have more anxiety and depression, they should be screened for emotional distress" pre-abortion. SAPX 2529, R. Doc. 271-5, at 323 (BROEN).

Sadly, among ambivalent women, "[t]he decision [to abort] could have been changed, in most cases, if the partner had wanted the baby or if personal finances had been better." SAPX 2512, R. Doc. 271-3 at 815 (HUSFELDT). Many post-abortive women "felt that they did not know enough about their legal rights if they chose to have the baby." SAPX 2513, R. Doc. 271-3. at 816 (HUSFELDT). "Of 854 women who when interviewed about a year after the abortion, not less than 650 (76.1%) said that they would not consider an abortion if they became pregnant again." Söderberg, Janzon & Sjöberg, "Emotional Distress Following Induced Abortion," *Euro. J. Obstet. Gynec.* 79:2:173-78 (1998), SAPX 2536, R. Doc. 271-6, at 7.

It is hardly surprising then that the Törnbom study found that "[c]ounseling seems to be important among a considerable number of women finding it hard to make a decision about abortion" and that "[s]pecial attention is required for women feeling influenced by someone else." SAPX 2504, R. Doc. 271-2 at 636 (TÖRNBOM). "Women who are screened for coercion and pressure are more likely to make autonomous decisions." Coyle, *Peace Psychology: Perspectives on Abortion* 21 (2016), SAPX 2846, R. Doc. 271-1. at 27. Like Törnbom and Coyle, Husfeldt concluded that "[b]etter maternity support . . . may induce more women to be able to carry through their pregnancies." SAPX 2513, R. Doc. 871-3, at 816 (HUSFELDT).

In enacting the challenged counseling provisions and in subsequent amendments thereto, the South Dakota legislature made detailed findings (based in part on discovery conducted earlier in this case and in prior litigation) identifying practices at PPMNS clinics that abuse the privilege of exercising medical judgment on behalf of patients. SAPX 183, 195-208 (SDCL §§ 34-23A-54, and -75 *et seq.*). PPMNS patients have experienced the very harms that studies associate with deficient informed consent and coercion screening practices:

- B.H. was forced by her father to have an abortion at PPMNS's Sioux Falls clinic. SAPX 312-16, R. Doc. 206, at 2-6. PPMNS's ostensible counselor "did not ask if anyone was pressuring [her] or forcing [her] to have an abortion that [she] didn't want." SAPX 314-16, R. Doc. 206, at ¶¶14, 18. Afterward, B.H. experienced frequent panic attacks and nightmares in which she "would relive seeing parts of my baby pass through the tube [she] was hooked up to." SAPX 317, R. Doc. 206, at ¶¶23-27.
- 22-year-old Brittany Weston was pressured by her married-with-children, 41-year-old boyfriend "Joe" to have an abortion at PPMNS's Sioux Falls clinic. SAPX 325-27, R. Doc. 207, at ¶¶8-20. PPMNS's "counselors" did not show "the least bit of interest in determining that [she] was being forced to have an abortion," SAPX 322, 328-29, R. Doc. 207, at ¶¶2, 21, 23. The

function of PPMNS's brief "counseling" was simply to obtain her signature on the forms necessary to perform the abortion. SAPX 330-31, R. Doc. 207, at ¶¶29-30.[7] Afterward, Weston "had an emotional breakdown," was "distraught," "angry, sad, felt deep guilt and great shame, and was unable to put the abortion and the baby out of [her] mind," and "started drinking heavily." SAPX 336, R. Doc. 207, at ¶¶48-51.

- 19-year-old Alyssa Carlson was pressured by her mother to have an abortion at the PPMNS Sioux Falls clinic. SAPX 353-54, R. Doc. 209, at ¶¶7-8, 16. PPMNS did the abortion even though Carlson was crying throughout the procedure. SAPX 353, R. Doc. 209, at ¶9. Carlson "had this innate sense that something horrible was happening." *Id.* Afterward, Carlson "began having serious problems with alcohol," "became more promiscuous," and eventually began having "a recurring nightmare that [she] gave birth to a tiny baby girl that was so small that she could not find her." SAPX 353-54, R. Doc. 209, at ¶¶10, 13.

[7] *Accord* SAPX 361, R. Doc. 210, at ¶13 ("pre-abortion counseling" was "to make sure that the pregnant mother signed all the necessary documents" and "to overcome any misgivings") (THAYER); SAPX 383, R. Doc. 211, at ¶15 (JOHNSON).

- S.C. was deeply uncertain about what to do when she left her husband but was pregnant. She went to the PPMNS clinic in St. Paul, Minnesota. PPMNS essentially put her on a conveyor belt to an abortion without probing her decision and even though she asked in the procedure room about whether she could still change her mind. Only at the last second, during the second day of her abortion, did she muster the nerve to back out and keep her baby. SAPX 342-48, R. Doc. 208, at 1-7. As S.C. explained,

> During my entire time at Planned Parenthood's St. Paul abortion clinic, nobody asked me the reasons why I had "scheduled" an abortion or why I had waited so long to get one. Nobody explained what resources might be available to help me keep and raise my child or that I could carry the child to term to preserve my option to keep my baby. Instead, everyone assumed that abortion was my only option. . . . During the first day of my procedure, I asked if I could change my mind two times. . . . It certainly should have been clear to the Planned Parenthood staff how ambivalent I was, and that I wanted my baby. . . . Instead, Planned Parenthood just rushed me through their process.

SAPX 348-49, R. Doc. 208, at ¶20.

As the South Dakota legislature found, SAPX 183, 208, R. Doc. 191-1, at 3, 28 (SDCL §34-23A-54, -88), the only effective antidote for PPMNS's improper (or non-existent) counseling is proper counseling by someone else, SAPX 375, R. Doc. 210, at ¶50 (THAYER) ("Planned Parenthood affiliates cannot be trusted to comply with laws designed to protect women"). Informing a woman's consent to abortion,

effective screening for coercion, and imparting information regarding agencies and organizations offering alternatives to abortion are individualized processes. SAPX 3197 (BALL DEPO. 230/11, 230/23). Such individualized counseling cannot be performed with a generic pamphlet, interactive website, brochure, questionnaire, or checklist. SAPX 3234 (BALL DEPO. EX. 32 at 4) (describing how assessment for coercion cannot be performed via questionnaires or computerized videos but needs to be done verbally).

Even assuming PPMNS physicians are "capable" of obtaining informed and voluntary consent to abortions performed in their facilities, discovery has revealed that they refuse to do so. SAPX 340, R. Doc. 207, at ¶65 (WESTON) (PPMNS "unwilling to counsel pregnant women properly"). As reflected by PPMNS's intake procedures, internal manuals and guidelines, and actual practices (as detailed in declarations and depositions, including from PPMNS practitioners, clinic managers, and patients), PPMNS has been derelict in its duty to fully inform its patients' consent and contemptuous of proper coercion screening. SAPX 359-60, R. Doc. 210, at ¶¶9-10 (THAYER) (clinics trained counselors "always" to "focus on abortion as the best option"; "our job . . . was to convince women to have abortions"); SAPX 384, R. Doc. 211, at ¶19 (JOHNSON) (philosophy of Planned Parenthood clinics is that any

"unmarried [woman] with an 'unplanned' pregnancy . . . was best off having an abortion").

B. Flawed PPMNS Protocols

i. PPMNS Intake Process

PPMNS's dereliction of basic duties toward its patients starts with its operating assumption, demonstrated above, that every woman who walks through its door has already "chosen" to have an abortion. "It violates medical ethics to presume that a patient who appears at your facility has already made a knowing and voluntary decision to submit to a medical procedure which has not yet been explained to her." SAPX 2379, R. Doc. 269, at ¶145 (HARTMANN). Nevertheless, PPMNS's policies and practices rest upon this erroneous assumption.

But the reality is that many, many women who have abortions feel uncertain about aborting. SAPX 393, R. Doc. 212, at ¶12 (LANCASTER) (half of the women counseled at Planned Parenthood clinic "were uncertain" about having an abortion; "very few" were "firm in their decisions"); SAPX 344, R. Doc. 208, at ¶2 (S.C.) (consulted PPMNS even though she "was undecided" whether to have an abortion). Even among the "certain," they may feel "certain" because they are led to believe they have no other option because of pressure, whether from controlling parents, an abusive boyfriend, meddling peers, or a sex trafficker. SAPX 364, R. Doc. 210, at ¶19

(THAYER) ("it was common for women to report that they were being pressured or coerced by someone to have an abortion that they did not want").

The destructive assumption that a woman has "chosen" an abortion simply by appearing at a PPMNS clinic curtails meaningful examination of consent or coercion, assuming PPMNS was ever inclined to do so. SAPX 332, R. Doc. 207, at ¶35 (WESTON) ("treated from start to finish as someone who had already decided she wanted an abortion before [she] ever arrived at the clinic"); SAPX 546, R. Doc. 227, at ¶15 (HURGUY) (wrong to "just assume that if a pregnant woman appears at an abortion clinic, she really wants an abortion"). But discovery has revealed that PPMNS does not meaningfully probe for consent or coercion.

ii. PPMNS Manuals and Guidelines

PPMNS's internal manuals and guidelines govern its counseling practices. SAPX 3191 (BALL DEPO. at 219/1-4) (staff/client interaction must conform to manuals and guidelines). But these manuals and guidelines do not mandate or encourage fully-informed consent or proactive inquiry into whether anyone is forcing or pressuring a woman to have an abortion. SAPX 3192-95, 3200, 3208, 3210, 3235 (BALL DEPO. at 219-21, 242/11-18; BALL DEPO. EX. 18, EX. 20 at 1, EX. 32 at 5). Instead, these documents adopt narrow concepts of "consent" and "coercion," and

prescribe ineffectual procedures, so that PPMNS can *claim* that it properly informs a woman's consent to abortion and screens for coercion without actually doing so.

- The concept of informed consent in PPMNS's abortion manual does not adhere to the reasonable patient standard, which requires disclosure of information that the patient would need to know in order to be an informed participant in the decision *whether* to abort. Instead, PPMNS focuses on the question of *how* to abort: the Abortion Manual deems a patient's consent to abortion to be informed simply if she is informed of (1) her options for medication versus surgical abortion procedures, (2) the efficacy, risks, benefits, and alternative methods of abortion, (3) ultrasound evidence of fetal demise or failed pregnancy, and (4) post-procedure care instructions. SAPX 3223-24 (BALL DEPO. EX. 31 at 013-014).
- The flaws in PPMNS's parsimonious concept of informed consent are self-evident. For one, as described above, PPMNS assumes the woman is going to have an abortion, SAPX 3189 (BALL DEPO. at 215/3-17), so the decision *whether* to abort is not informed; the only question is *which* abortion *method* to select. This approach excludes alternatives to the abortion itself, such as carrying the child to term, parenting, or adoption. SAPX 3188-89 (BALL DEPO. at 214-15). Above all, there is nothing in PPMNS's concept of

informed consent that ensures that women considering abortion are not subject to duress or coercion of any kind. SAPX 3190 (BALL DEPO. at 216/4-15).

Though conceding that "informed consent does not follow from duress and coercion," SAPX 3187 (BALL DEPO. at 204/16-18), PPMNS's duress and coercion screening guidelines are plainly deficient:

- PPMNS does not screen for all forms of coercion, only those forms of coercion which, if found, would help PPMNS to push a woman toward abortion. The concept of "coercion" adopted by PPMNS's Manual of Medical Standards and Guidelines (MMSG) is restricted to whether a man has forced a woman to become pregnant against her will or placed her in fear of informing him she has a sexually transmitted disease. SAPX 3192-93, 3210, 3235 (BALL DEPO. at 219-20; BALL DEPO. EX. 20 at 1; BALL DEPO. EX. 32 at 5). The MMSG's concept of "coercion" does not encompass the unfortunately common scenario of a woman being pressured by her intimate partner (or someone else) to have an abortion against her will. SAPX 3193-94, 3200 (BALL DEPO. at 220-21, 242/11-18).
- The MMSG's section on "Important Concepts and Sample Scripts for Harm Reduction" relating to reproductive coercion also avoids the scenario of a woman being pressured by someone to have an abortion against her will.

SAPX 3193-94, 3200, 3208, 3215-16 (BALL DEPO. at 220-21, 242/11-18; BALL DEPO. EX. 18; EX. 31 at 076-077). When instructing PPMNS personnel what "must" be done if a client has experienced, or feels unsafe due to, intimate partner violence, the MMSG does not affirmatively instruct PPMNS personnel not to do an abortion if her intimate partner is pressuring her to have it. SAPX 3193-94 (BALL DEPO. at 220-21).

- To the minimal extent PPMNS probes for pressure or coercion, it does not do so proactively. Instead PPMNS puts the burden on the woman to volunteer the presence of coercion and pressure on questionnaires; PPMNS willfully disregards signs of ambivalence, distress, or moral reservations. SAPX 383, R. Doc. 211, at ¶16 (JOHNSON) (Planned Parenthood employees told not to take crying as a sign the woman does not want to abort). *See also infra* pp. 27-28. Even direct evidence of coercion may not be enough for Planned Parenthood. Margie Ayers testified that she repeatedly told a Planned Parenthood clinic her parents were forcing her to abort, but the clinic staff and abortionist did nothing except try to convince her to abort, and then do the abortion. SAPX 480-89, R. Doc. 218, at ¶¶2, 5, 7, 13-14, 18, 21-22, 25, 30, 33.
- PPMNS's questionnaires are not written to encourage or reliably produce accurate disclosures about pressure or coercion. The questionnaires inform a

woman that "[t]he State of South Dakota requires" PPMNS to ask whether anyone is forcing or pressuring the woman to have an abortion. SAPX 3206, 3220 (BALL DEPO. EX. 15 at 1; EX. 21 at 1). This makes it seem that it is the state, not PPMNS, that needs this information, which (1) signals to a woman that PPMNS does not consider the information relevant to the abortion procedure, and (2) discourages women who may be afraid of reporting their male partners' abuse to the state from checking the boxes. SAPX 328, R. Doc. 207, at ¶22 (WESTON) (describing how characterizing advisements as something PPMNS was "required" to impart "gave [Weston] the impression that [PPMNS] didn't think the information was important and read the script only because it was a technicality [it] had to satisfy").

- Even if PPMNS's questionnaires reliably produced accurate responses, the evidence shows that PPMNS disregards the answers. A woman who checks these boxes is simply informed that coercion and pressure are associated with an increased risk of negative psychological or emotional reactions and then will be given an abortion if she indicates that she understands the risk. Amazingly, PPMNS will thus – admittedly – proceed to do an abortion it *knows* is being coerced. SAPX 3197, 3220 (BALL DEPO. at 229/10-231/7; BALL DEPO. EX. 21). *See also infra* pp. 27-28 (same).

iii. PPMNS Practices

PPMNS's mode of conducting informed consent and coercion counseling is more deficient than its ostensible "guidelines." According to former PPMNS practitioners and clinic managers, this is a direct byproduct of PPMNS's revenue- and ideology-driven business model:

- Planned Parenthood operates on the assumption that a woman made the decision to have an abortion before she arrived at the clinic so "consent" and "counseling" are afterthoughts. *Supra* pp. 5-6, 17. Planned Parenthood views the informed consent process as a nuisance and imposition. SAPX 576, R. Doc. 232, at ¶34 (GIEBINK).
- Planned Parenthood conducts no "real counseling" or actual screening for coercion. SAPX 386, R. Doc. 211, at ¶22 (JOHNSON); SAPX 574, R. Doc. 232, at ¶¶29-30 (GIEBINK); SAPX 359, R. Doc. 210, at ¶9 (THAYER); SAPX 401, R. Doc. 213, at ¶10 (TREVINO). Planned Parenthood has adopted a "don't ask, don't tell" policy toward probing for pressure or coercion. SAPX 365, R. Doc. 210, at ¶20 (THAYER); SAPX 383-84, R. Doc. 211, at ¶¶16-17 (JOHNSON); SAPX 393, R. Doc. 212, at ¶13 (LANCASTER). Planned Parenthood staff ignore indications and cues that a woman is conflicted or ambivalent, such as actual disclosures by, or overt indicia of pressure on, the

patient or crying during intake or the procedure. SAPX 383, R. Doc. 211, at ¶¶16-17 (JOHNSON); SAPX 353, R. Doc. 209, at ¶9 (CARLSON).

- PPMNS "counselors" are, in reality, sales agents for abortion. They have no expertise in medicine, biology, embryology, psychology, or even counseling. Their principal training is in overcoming a woman's misgivings about abortion. "Counselors" do not actually counsel for consent or coercion or a woman's options for keeping her child. The objective of that "counseling" is to probe for factors that might dispose a woman toward abortion, employ them to persuade her that abortion is her "best option," and secure her signature on the necessary forms. SAPX 359-63, R. Doc. 210, at ¶¶9-11, 13, 16 (THAYER); SAPX 379, 381-86, R. Doc. 211, at ¶¶6, 13-22 (JOHNSON); SAPX 391-93, R. Doc. 212, at ¶¶8, 10-12 (LANCASTER); SAPX 399-401, R. Doc. 213, at ¶¶8, 10 (TREVINO); SAPX 569-70, R. Doc. 232, at ¶14 (GIEBINK); SAPX 3210, 3234-35 (BALL DEPO. EX. 20 at 1; EX. 32 at 4-5). Post-abortive women have reported feeling that "people at the abortion clinic thought it was best for me to have an abortion," and that "the abortion counselor just wanted me to go through with the procedure." SAPX 1236-37, R. Doc. 257, at ¶30, Table 2; ¶79 (COLEMAN).

- Planned Parenthood counselors are instructed to "hurry through" counseling and trained not to discuss a woman's options for keeping her child or supply information about agencies that can help. SAPX 359, R. Doc. 210, at ¶9 (THAYER); SAPX 399-400, R. Doc. 213, at ¶8 (TREVINO). Planned Parenthood counseling aims to overcome a woman's misgivings and steer her into abortion. SAPX 361, R. Doc. 210, at ¶13 (THAYER); SAPX 384-85, R. Doc. 211, at ¶¶17, 21 (JOHNSON).
- Planned Parenthood's clinics pressure staff to "sell" abortions via monthly quotas and revenue targets imposed on affiliate clinics by the national organization. SAPX 573, R. Doc. 232, at ¶23 (GIEBINK); SAPX 358, 367, R. Doc. 210, at ¶¶7, 28 (THAYER); SAPX 384, R. Doc. 211, at ¶18 (JOHNSON); SAPX 398-99, R. Doc. 213, at ¶¶5, 7 (TREVINO). Clinics that meet corporate quotas are rewarded with pizza parties. SAPX 367, R. Doc. 210, at ¶28 (THAYER). This places the financial interests of PPMNS and its staff in direct conflict with the interests of pregnant mothers. SAPX 375, R. Doc. 210, at ¶50 (THAYER); SAPX 393, R. Doc. 212, at ¶13 (LANCASTER). Planned Parenthood's revenue-driven business model interferes with proper counseling of women. *Id.*; SAPX 573, R. Doc. 232, at ¶23 (GIEBINK).

- Planned Parenthood's "informed consent" and "counseling" practices are substandard by design, oriented toward persuading a woman to submit to an abortion procedure. SAPX 362-63, R. Doc. 210, at ¶15 (THAYER). Planned Parenthood cannot be trusted to comply with laws designed to protect women. SAPX 375, Doc. 210, at ¶50 (THAYER). Planned Parenthood operates in "an abortion culture, not a health care culture." SAPX 393, R. Doc. 212, at ¶12 (LANCASTER).

The compelling goal of "protecting a woman from being forced against her will to have an abortion and . . . informing a woman['s]" consent to abortion, SAPX 86, R. Doc. 39, at 12, is not, according to the reports of its own former personnel and patients, being met via PPMNS's practices and procedures.

iv. Reports of PPMNS's Former Personnel and "Patients"

However "capable" PPMNS might in theory be of informing a woman's consent to an abortion or screening for coercion or pressure, its former personnel and "patients" report, as described above, that it is resistant to appropriate counseling to the point that it fails to provide it. PPMNS's interest, according to veteran personnel from its facilities and former "patients," is to perform as many abortions as possible with as little "counseling" as possible. This business model precludes appropriate attention to the interests of both women who feel certainty about the abortion decision

(but who might feel differently if properly informed of their options and screened for coercion) and women who feel ambivalent toward, or even morally or religious object to, the procedure. SAPX 366, R. Doc. 210, at ¶23 (THAYER).

The reality of the practices at PPMNS clinics is far from *Roe*'s ideal of a "woman and her responsible physician" making the abortion decision in "consultation" with each other. *Roe v. Wade*, 410 U.S. 113, 153 (1973). SAPX 362, R. Doc. 210, at ¶14 (THAYER). Instead, at PPMNS "counseling" is performed by non-medical personnel with no particular expertise in abortion counseling who impart the minimum information necessary in a hurried fashion and who seek to overcome a woman's misgivings about abortion and secure her signature on the necessary forms. *Supra* pp. 23-24; SAPX 314-15, R. Doc. 206, at ¶14 (B.H.). The function of counseling at PPMNS is "convincing women to have abortions." SAPX 384-85, R. Doc. 211, at ¶20 (JOHNSON).

In an environment that "move[s] each woman through the process as quickly as possible," where women are herded toward abortions like "cattle in the chute," there is no opportunity to form a meaningful physician/patient relationship or effectively avoid doing coerced abortions. SAPX 362-64, R. Doc. 210, at ¶¶15, 18 (THAYER). Planned Parenthood "deliberately structur[es its] appointment schedule to be at maximum capacity," so counselors and physicians "ha[ve] very little time

with each client so [they] never discuss[] the women's situations or needs." SAPX 399, R. Doc. 213, at ¶6 (TREVINO).

Abortions are performed even when women are obviously ambivalent, conflicted, or being subject to coercion or pressure.

> Frequently, we would see older men accompanying younger girls whose pursuit of an abortion did not appear to be voluntary. You could almost always spot these women by their countenance or body language which suggested that they were just doing what they had been told to do. When the controlling male figure insisted on being present for any "counseling" so that the woman would never be alone with the "counselor," we were trained to comply with that request. In this situation, we were directed not to ask any questions. We simply hurried them along and moved on to the next woman who was always waiting.

SAPX 366, R. Doc. 210, at ¶24 (THAYER). Another former employee confirmed this deliberate avoidance:

> Frequently, the pre-abortion counseling would reveal that the woman was being subjected to coercion or pressure by other people to have an abortion that she did not want. Usually, it was the father of the child or the woman's parents who were forcing her to have an unwanted abortion. When these situations arose, we hurried through the counseling session to avoid asking any questions which would confirm that she was being forced to have an abortion.

SAPX 393, R. Doc. 212, at ¶13 (LANCASTER).

Worse still, Planned Parenthood would even *take the side of those forcing the abortion*. As one former employee testified:

> One common example would be parents of a young woman, 16 or 17 years of age, demanding that their daughter have an abortion. The parents would take

> the girl into our clinic and when they could not convince their daughter to get the abortion, we would take over the job of convincing the woman that their parents were right. We had ways to persuade them to have the abortions. This philosophy came from Houston and New York and is systemic throughout Planned Parenthood nationwide.

SAPX 384-85, R. Doc. 211, at ¶20 (JOHNSON). Sadly, but unsurprisingly, this happened at PPMNS. *Supra* pp. 12-14 (citing instances).

PPMNS's practice of not fully informing the consent of women who obtain abortions exposes those women to traumatizing experiences. One woman who obtained a medication abortion at a Planned Parenthood clinic called the clinic afterward "yelling and cursing . . . things like 'what the hell, I just saw a f------ baby in the toilet!'" SAPX 364, R. Doc. 210, at ¶18 (THAYER). Another woman came into a Planned Parenthood clinic and "pulled a Ziplock bag from her pocket with a seven to nine week old baby in it and screamed, 'you never told me it was a baby!'" *Id.* Other women, like Stacy Zallie, suffer after the fact to the point that they become suicidal. SAPX 584-86, R. Doc. 233, at ¶¶2, 9 (ZALLIE) (suicide committed by 21-year-old woman after being pressured by boyfriend and his father to have an abortion; suicide note said "Now I can be with my unborn child"); SAPX 471-72, R. Doc. 217, at ¶2 (MEKALA) (attempted suicide after being forced to abort).

Proper counseling does not just wave through women whom proper screening would protect from coercion or from profound misunderstanding of what abortion

entails. "[I]t is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know" but that might have affected her decision, *Gonzales v. Carhart,* 550 U.S. at 159-60. The likelihood and severity of regret and grief are even greater when the woman did not even want the abortion in the first place. *Supra* pp. 9-11.

An organization that systemically seeks to "perform as many abortions as possible" and "treats the informed consent process as a nuisance" clearly does not have the interests of women in mind. SAPX 573, 576, R. Doc. 232, at ¶¶23, 34 (GIEBINK); SAPX 384, R. Doc. 211, at ¶17 (JOHNSON). PPMNS has embraced the ideological line that abortion is "best" for every woman who enters its clinics for so long that it now conflates what is best for PPMNS with what is "best" for women. The reality is that PPMNS's "financial and ideological interests are in direct conflict with the interests of pregnant mothers." SAPX 388, R. Doc. 211, at ¶25 (JOHNSON). Planned Parenthood insiders report that "Planned Parenthood is the last place a pregnant mother should be making the decision of whether or not to terminate her relationship with her child." *Id.*; SAPX 1132, R. Doc. 255, at ¶¶55, 56 (CASEY) ("abortion clinic is the worst place" for a woman to be counseled on her interest in

carrying her child to term). The experiences of former PPMNS "patients" bear this out:

- B.H. "desperately needed" PPMNS to counsel her properly to "protect [her]" from pressure from her father to abort her child. SAPX 318-19, R. Doc. 206, at ¶¶32, 35. Instead, PPMNS steered her into an abortion she did not want. Today, B.H. is heartbroken by the realization that, had South Dakota's counseling statute not been enjoined at the time, she would have had "a chance to go to [counseling and] would have [her] child today." SAPX 318-19, R. Doc. 206, at ¶¶32, 33. As she explained:

  > What is especially upsetting and offensive to me, is that I now understand that Planned Parenthood claimed that they had the right to go to court to litigate *my rights,* or what *they* claimed were my rights. . . . Planned Parenthood didn't represent me and my interests, and they don't represent the interests of other women like me. . . . Planned Parenthood does not care about my rights . . . . Without Planned Parenthood's interference, my baby would probably be alive, and I could have enjoyed a lifetime with my child. Planned Parenthood made sure my father got what he wanted and ensured that I alone would suffer the emotional consequences of being forced to have an abortion that I didn't want.

  SAPX 319-20, R. Doc. 206, at ¶35, 36 (emphasis in original).

- Similarly, Brittany Weston felt "helpless" to resist pressure from her boyfriend to abort her child. SAPX 332, R. Doc. 207, at ¶32. "I was being pressured to have an abortion, and all Planned Parenthood was doing was making that

abortion happen." *Id.* Though she was "bawling" and "totally distraught" during the five-minute "counseling" session, "there wasn't a single question about . . . whether anyone was pressuring [her]." SAPX 330-32, R. Doc. 207, at ¶¶29, 31, 33. Though she had cried out "I feel like I'm killing my baby if I go through with this," there was no "effort to understand what [she] was feeling or why [she] was crying." SAPX 332, R. Doc. 207, at ¶35. Though the physician had been informed that she had been distraught during the "counseling," the physician "never asked [her] why she was so upset." SAPX 333-34, R. Doc. 207, at ¶¶38, 43. In fact, the physician "really didn't talk to [her] at all" except for "a technical explanation of how he would place a tube in [her] and how a machine would vacuum the 'pregnancy' from [her] uterus." SAPX 334, R. Doc. 207, at ¶41. Weston saw the physician "for about a total of five minutes." *Id.* (¶39). Later, Weston read "a 'certification' in which [the physician] certifie[d] that [Weston] had 'given informed consent freely and without coercion to this abortion,'" which Weston did not understand because the physician "never discussed anything with [her], and [she] d[id] not know how he could make such a certification." SAPX 335, R. Doc. 207, at ¶46.

- S.C. narrowly averted an unwanted abortion at a PPMNS clinic in St. Paul, Minnesota. S.C. was pregnant by her estranged husband and was concerned

about supporting a new child on her own in addition to her two-year-old daughter. SAPX 343, R. Doc. 208, at ¶3. PPMNS personnel scheduled an abortion for S.C. over the phone without any discussion about how she arrived at a decision to abort, whether her decision was definite, or what was involved in the abortion procedure. *Id.* (¶5). S.C. arrived at PPMNS's clinic "undecided" and "want[ing] someone to talk to." SAPX 344, R. Doc. 208, at ¶8. Nevertheless, S.C. "was permitted to start an abortion without [her] seeing a doctor or receiving any semblance of meaningful counseling." SAPX 351, R. Doc. 208, at ¶25. S.C. was "extremely nervous," but the nurse "didn't ask any questions about whether [S.C.] wanted to have an abortion," "what [S.C.'s] circumstances were, or whether [she] had given any thought to the possibility of raising [her] baby." SAPX 344, R. Doc. 208, at ¶¶7, 8. S.C. "didn't feel that anyone there was interested in helping [her]." *Id.* (¶8). "Even though [S.C.] indicated that [she] may not want the abortion, [the nurse] gave [her] the [pre-abortion] pill anyway and had [her] swallow it," without answering S.C.'s question "if [her] baby could be hurt if [she] took the pill" and even though she openly "talked about stopping the procedure." SAPX 344, R. Doc. 208, at ¶10. In the procedure room, as the doctor fumbled to inject a fluid "which would stop the fetus's heartbeat," "the reality of the abortion procedure was brought

home to [S.C.]. It finally dawned on [her] that [she] was allowing the doctors to kill [her] baby." SAPX 347, R. Doc. 208, at ¶¶14-15. What S.C. "really wanted was for somebody – anybody – to show that they cared about [her] and help [her] figure out how to keep the baby that [she] wanted." *Id.* (¶14). The physicians "[n]ever appreciated the fact that [she] never really decided to have an abortion but had been swept along by Planned Parenthood's process." SAPX 348, R. Doc. 208, at ¶18. S.C. was crying and "[f]inally, the doctors relented and agreed to remove the dilators." *Id.* During the entire time S.C. was at PPMNS's clinic, "nobody asked [her] the reasons why [she] had 'scheduled' an abortion" or "what resources might be available to help [her] keep and raise [her] child," SAPX 348-49, R. Doc. 208, at ¶20. "Instead, everyone assumed that abortion was [her] only option." *Id*. S.C. had "asked if [she] could change [her] mind two times – before taking the pill to stop the baby's development and before having the dilators inserted," so "[i]t certainly should have been clear to the Planned Parenthood staff how ambivalent [she] was, and that [she] wanted [her] baby." *Id.* PPMNS "never bothered to find out what [S.C.'s] interests really were." SAPX 350, R. Doc. 208, at ¶24. "It was all about abortion, not about how [PPMNS] could help [S.C.], or any woman in [her] situation, keep their baby." *Id.*

- L.M.'s experience reveals that PPMNS continues to abdicate its responsibility of properly informing the consent of its "patients" and screening them for coercion or pressure. SAPX 2649-50, R. Doc. 302, at 3-4. L.M. describes being emotionally and economically blackmailed by her older boyfriend to have an abortion she did not want. Though she was openly crying at PPMNS's clinic and talked on speakerphone with her boyfriend, in the presence of a PPMNS counselor, trying to convince the boyfriend not to force her to abort, PPMNS performed the abortion anyway. *Id*.

The experiences of these women are not merely anecdotal. According to PPMNS personnel, 25% of the pregnant mothers arrive at PPMNS clinics teary eyed, some with tears running down their cheeks and some openly weeping. SAPX 2207, 2210-11, R. Doc. 267-52, at 161, 267-54, at 163-64 (JAIME DEPO.). PPMNS performed abortions on them anyway. SAPX 2236, R. Doc. 267-60, at 70 (JAIME DEPO.). *See* SAPX 1132, R. Doc. 255, at ¶55 (CASEY) ("abortion practitioner only sees his or her role as one of terminating the mother's relationship [with the child] by abortion"). Post-abortive women report that they wished that someone had offered the support they needed to carry their baby to term. SAPX 1236, R. Doc. 257, at Table 2, No. 6 (COLEMAN).

Women who "rely upon Planned Parenthood to do [what] was in [their] interest[s] in making an informed decision" learn too late that PPMNS's plan for them is not parenthood. PPMNS "do[es] not care about [their] most important interests and rights and the things they do care about conflict directly with [their] interests and rights." SAPX 324, 339, R. Doc. 207, at ¶¶6(c), 62 (WESTON). Women's experiences with Planned Parenthood reveal "that Planned Parenthood is not a proper party to [be] represent[ing their] interests and rights in court," SAPX 350, R. Doc. 208, at ¶24 (S.C.) (expressing outrage "that Planned Parenthood claims to represent the interests of women like me" and questioning how "can Planned Parenthood represent my interests when they never bothered to find out what my interests really were" and do "not respect my right to keep and raise my child").

The discovery in this case thus starkly illustrates the divergence of interest between PPMNS and the women who turn to it for help.

v. PHC Practices and Guidelines

Meanwhile, the district court erroneously presumed that pregnancy help centers would permit their ideology to interfere with objective, non-judgmental counseling. The district court assumed pregnant women will be "compelled" to disclose information to a person who "is opposed to her decision to undergo an abortion." SAPX 84, Doc. 39, at 10 (footnote omitted). The court below further assumed that

a pregnancy help center client will fear being "berated, belittled," "ridiculed, labeled a murderer, subjected to anti-abortion ideology and repeatedly contacted by the pregnancy help center" and subjected to "having their decision to have an abortion become public information." SAPX 94, 100, R. Doc. 39, at 20, 26. These assumptions and fears are entirely unfounded.

The governing South Dakota pregnancy help center guidelines are more sensitive and developed toward a woman's autonomy than PPMNS's. As expert witness Dr. Elizabeth Flanagan of Yale Medical School testified, "The [PHC] counseling guidelines provide one of the most stringent regulatory frameworks for counseling that I have ever seen." SAPX 2928, R. Doc. 358, at ¶19. These Policy and Procedure Guidelines, SAPX 794 *et seq.*, R. Doc. 246-2 (RIDDER Ex. 2), establish important bounds on PHC counseling under the law. Consistent with a woman's right not to abort because of coercion or deception, the "main purpose of the [PHC] counseling is to help the pregnant mother keep her child, if that is what she truly prefers." SAPX 845, R. Doc. 246-2, at 47. To that end, PHC clients receive counseling in the statutorily-required areas of coercion screening and explaining what programs exist to assist in caring for a child should a client choose to not terminate her pregnancy. SAPX 804, R. Doc. 246-2, at 6. "The entire session must be welcoming and warm, and one that reaffirms [a woman's] autonomous decision

making, without any signs of disapproval of her desires or preferences." SAPX 830, R. Doc. 246-2, at 32. Indeed, per applicable guidelines, "[i]t is inconsistent with the purpose of the counseling session for a counselor to attempt to persuade a pregnant mother who truly wants an abortion to forgo an abortion." SAPX 829, R. Doc. 246-2, at 31. "[T]he entire purpose of the counseling . . . is to reinforce the pregnant mother's autonomous decision making." SAPX 829-30, R. Doc. 246-2, at 31-32.

Consequently, a counselor "should not express disapproval of abortion" to the client. SAPX 829, R. Doc. 246-2, at 31. "Under no circumstances may the . . . counselor discuss the abortion procedure or the risks of abortion" with a client. SAPX 846, R. Doc. 246-2, at 48. Such medical considerations are left to a physician. Also, "[i]t is not legal to subject a pregnant mother to a religious discussion against her will." SAPX 805, R. Doc. 246-2, at 7. Counselors "may not discuss religious beliefs of either those of the pregnant mother, or those of the counselor, unless the pregnant mother signs a written consent prior to any such discussion." SAPX 843, R. Doc. 246-2, at 45. Such written consent can be sought "[o]nly if the pregnant mother first raises the topic of religion, or makes it clear that she believes her decision, of whether or not to have an abortion, involves a moral issue in her mind," *Id*. A client's consultation is subject to "strict confidentiality" and HIPAA standards. SAPX 808, 826, R. Doc. 246-2, at 10, 28.

The sensitivity of the applicable counseling guidelines exposes the error of the district court's speculation that in "nearly every instance" women who "had not chosen to consult with a pregnancy help center on [their] own" would be "forced into a hostile environment" and "experience a high degree of degradation" from "someone who is fundamentally opposed to" her presumed ultimate preference to abort. SAPX 92-93, 100, R. Doc. 39, at 18-19, 26.

Course of proceedings

Plaintiffs PPMNS *et al.* challenged in federal district court various provisions of South Dakota abortion law. Pertinent to the present appeal, the district court granted a preliminary injunction against the third-party counseling requirement on June 30, 2011. SAPX 75, R. Doc. 39. After PHCs joined the case as intervenors and after nearly ten years of discovery, motion practice, other litigation, and amendments to the relevant statutes, the state defendants and intervenors filed a joint motion to dissolve the preliminary injunction against the third party counseling requirement. SAPX 244, R. Doc. 204. The district court denied that motion on August 20, 2021. SAPX 3100, R. Doc. 374. The state and intervenors then appealed. R. Doc. 375, 376.

SUMMARY OF ARGUMENT

1. The state has a compelling interest in preventing coerced abortions.

a. Abortion is unique. The Supreme Court has said so repeatedly, and it is correct. No other procedure involves the intentional termination of the life of "a whole, separate, unique, living human being," *Planned Parenthood v. Rounds*, 530 F.3d 724, 735, 738 (8th Cir. 2008) (en banc), "a child assuming the human form," *Gonzales v. Carhart*, 550 U.S. at 160. No other procedure *irretrievably* severs the bond between a mother and the child she carries and eliminates, prospectively, that entire lifelong relationship. Moreover, the mother's genuine, informed, voluntary consent is what distinguishes abortion from potential tort liability.

b. Safeguarding the woman who gives the consent to an abortion from coercion, like preventing deception or ill-informed decision-making, is therefore both understandable and compelling. A woman who aborts when she does not want to, when she is being pressured or coerced, or when, had she had adequate information about alternatives, would not have wanted to abort, suffers the catastrophic and irrevocable loss of her freedom, her own child, and a lifelong relationship with that child, potentially leading to unimaginable suffering over an act she cannot undo.

2. The record in this case shows that abortion providers, specifically the national Planned Parenthood chain, and PPMNS in particular (the only provider in South Dakota), are completely unreliable – incorrigibly, even willfully so – in securing full, free, informed consent. On the contrary, their priority is to maximize

the volume of abortions done, including meeting abortion quotas and incentives, even if that involves disregarding signs of ambivalence or coercion or even helping to railroad women into abortions they do not want.

3. To counteract PPMNS's deficient practices, the state requires women considering abortion to meet with independent, highly regulated third-party counselors as a precondition to giving final consent for abortion. For those women who are resolute about having abortions and who remain so when informed of resources and alternatives, it may seem the exercise was a sidetrack and annoyance – though even these women may benefit from making a more informed decision. For those women who are ambivalent or uninformed, however, the visit to the pregnancy center may be a lifesaver.

4. As a matter of balancing harms or assessing burdens, the scales are lopsided in favor of the third-party counseling requirement. On one side is the inconvenience to those for whom third-party counseling turns out not to seem beneficial. On the other side is the profound and irreversible injustice and harm done to many women – perhaps a majority – who undergo coerced or uninformed abortions that the women do not want and that take the lives of theses women's children. Thus, even assuming PPMNS has standing, despite its obvious conflict of interest, to raise the rights of

patients against this patient protection law, the balance of harms weighs heavily – overwhelmingly – in favor of South Dakota's measure.

5. The district court was wrong to conclude that requiring third party counseling likely runs afoul of the First Amendment. By its nature, informed consent requires verbal give and take. The state has a strong interset in assuring that women are not railroaded into abortions through pressure or ignorance of alternatives. Here, the record demonstrates that PPMNS is precisely the wrong entity to depend upon for counseling and screening to safeguard informed consent and prevent coerced abortions.

6. Abortion is a medical procedure, and hence regulation of informed consent in this context is subject to a less demanding standard of First Amendment review "as part of the practice of medicine, subject to reasonable licensing and regulation by the State." *Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992). This case is therefore quite unlike the compelled speech cases upon which the district court relied.

7. PPMNS has no legitimate right to do abortions on women who are coerced or deceived into them. Ultimately, what PPMNS is saying is that a fairly minor annoyance to those women who are dead set on aborting – and a loss of PPMNS's revenue – outweighs the immeasurable tragedy, guilt, and sorrow of those women for whom abortion is not a free, fully informed choice, not to mention the needless deaths

of children whom those women wanted to keep. To state the competing harms is to answer the question.

The preliminary injunction as to third-party counseling should be dissolved. The order of the district court must be reversed.

ARGUMENT

The central question on appeal is whether the state must stand by while women are railroaded into abortions they do not want. PPMNS insists the state must essentially tolerate forced abortions because it would be an inconvenience to PPMNS, and perhaps to some women set on getting abortions, to require those considering abortion to visit an independent counseling facility that will screen for coercion. As a matter of justice, constitutional law, and balance of harms, South Dakota must be permitted to take the quite modest step of requiring independent counseling before a pregnant woman consents to the irremediable abortion of her offspring. No more women should have to suffer the grievous loss and harm undergone by women, some having submitted declarations in this case, who were pressured into abortions they did not want, while abortion providers were deliberately indifferent or even hostile to such women's plight.

1. Abortion Standards in General

Though *Roe v. Wade* is one of the Supreme "Court's most notoriously incorrect decisions, *Timbs v. Indiana*. 139 S. Ct. 682, 692 (2019) (Thomas, J., concurring in the judgment), and should be overruled,[8] South Dakota's counseling statute can be upheld within the framework of existing abortion jurisprudence. Even *Roe* acknowledged that its "concept of personal liberty" is "broad enough to encompass a woman's decision . . . *not* to terminate her pregnancy." *Roe*, 410 U.S. 113, 153 (1973) (emphasis added). *Casey* pointedly underscored that *Roe*'s holding was fully compatible with the a woman's right to reject coerced abortions. *Casey*, 505 U.S. at 859. The district court therefore rightly recognized the "compelling" state interest in preventing coerced abortions. SAPX. 86, R. Doc. 39, at 12. Likewise, this Court has recognized that a pregnant woman "is legally and constitutionally protected against being forced to have an abortion." *Planned Parenthood v. Rounds*, 653 F.3d 662, 669 (8th Cir. 2011).

Moreover, it is "desirable and imperative" that a woman make such a profound decision as the one to abort "with full knowledge of its nature and consequences." *Planned Parenthood v. Danforth*, 428 U.S. 52, 67 (1976). *Roe* recognized that a

[8]South Dakota has joined with other states in calling upon the Supreme Court to overrule *Roe* in a currently pending case. *See* Brief for the States of Texas *et al.*, *Dobbs v. Jackson WHO*, U.S. No. 19-1392 (July 29, 2021).

"pregnant woman cannot be isolated in her privacy." *Roe*, 410 U.S. at 159, and that a right to abort was "not a right to be insulated from all others in doing so." *Casey*, 505 U.S. at 877. A state "has legitimate interests from the outset of the pregnancy," *id*. at 846, "in the health of the woman and in protecting the potential life within her," *id.* at 871. *Accord Gonzales v. Carhart*, 550 U.S. at 159.

And while acknowledging "the right of [a] physician to administer medical treatment according to his professional judgment," *Roe* extended this right only "up to the point where important state interests provide compelling justifications for intervention." 410 U.S. at 165-66. Such justifications exist when a "practitioner abuses the privileges of exercising proper medical judgment," *id.* at 165-66. Here, PPMNS's abuses necessitated the state's intervention.

2. Standards Applicable to Dissolution of a Preliminary Injunction

When seeking to prevent "implementation of a duly-enacted state statute," a movant must make a "more rigorous showing" than usual "that it is likely to prevail on the merits." *Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953, 957-58 (8th Cir. 2017). "This is necessary to ensure that preliminary injunctions that thwart a state's presumptively reasonable democratic processes are pronounced only after an appropriately deferential analysis." *Id*. at 958.

"When considering whether to modify a preliminary injunction, a district court is not bound by a strict standard of changed circumstances but is authorized to make any changes in the injunction that are equitable in light of subsequent changes in the facts or the law," *Ahmad v. City of St. Louis*, 995 F.3d 635, 640 (8th Cir. 2021) (internal quotation marks and citation omitted), "or for any other good reason," *Movie Systems, Inc. v. Mad Minneapolis Audio Distributors*, 717 F.2d 427, 430 (8th Cir. 1983). Good reason exists when the plaintiffs have made an "inadequate" showing of entitlement to a preliminary injunction. *Minnesota Ass'n. of Nurse Anesthetists v. Unity Hosp.*, 59 F.3d 80, 84 (8th Cir. 1995). An inability to meet any element of injunctive relief is grounds to dissolve it. *E.g., Local Union No. 884 v. Bridgestone/Firestone, Inc.*, 61 F.3d 1347, 1355 (8th Cir. 1995) ("the absence of irreparable harm is sufficient grounds for vacating a preliminary injunction") (internal quotation marks and citation omitted); *Siebersma v. Vandeberg*, 64 F.3d 448, 450 (8th Cir. 1995) (party's failure to establish the requisite likelihood of success required dissolution of injunction, even where all other prerequisites were met). Since plaintiffs on the current record cannot satisfy the elements for preliminary injunctive relief, the preliminary injunction must be dissolved. This Court should accordingly reverse the district court and remand with instructions to vacate the remainder of the preliminary injunction.

The standard of review governing the issuance or maintenance of a preliminary injunction is abuse of discretion. *Ahmad*, 995 F.3d at 640. Factual findings are examined for clear error, and legal conclusions are considered *de novo*. *Brakebill v. Jaeger*, 932 F.3d 671, 676 (8th Cir. 2019).

I. STATES HAVE A COMPELLING INTEREST IN PROTECTING WOMEN FROM COERCED ABORTIONS.

The district court acknowledged what should be obvious: "There is a compelling state interest in protecting a woman from being forced against her will to have an abortion." SAPX. 86, R. Doc. 39, at 12. Indeed, there is "no dispute" about this. *Id.* Lest this point be too hastily passed, however, it merits pausing to look more closely at this interest.

"Abortion is a unique act." *Planned Parenthood v. Casey*, 505 U.S. 833, 852 (1992). "[I]t is an act fraught with consequences for others[, including] for the woman who must live with the implication of her decision." *Id.* "Abortion is inherently different from other medical procedures," *Harris v. McRae*, 448 U.S. 297, 325 (1980), as it terminates the life of "a child assuming the human form," *Gonzales v. Carhart*, 550 U.S. at 160, indeed of "a whole, separate, unique, living human being," *Planned Parenthood v. Rounds*, 530 F.3d 724, 735, 738 (8th Cir. 2008) (en banc) (PPMNS failed to show that this assertion "is anything but truthful [and] non-

misleading"). As the *Casey* Court acknowledged, abortion is a procedure "some deem nothing short of an act of violence against innocent human life," 505 U.S. at 852. No other procedure, moreover, leaves women pondering what the children they aborted would have been like. SAPX 403, R. Doc. 213, at ¶15 (TREVINO); SAPX 317, R. Doc. 206, at ¶27 (B.H.) ("during a quiet time, I sat and cried for over an hour just thinking about all the joy I could have had with my daughter which has been forever lost"). *Compare Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982) (a mother's interest in her relationship with her child is "far more precious than any property right");[9] *Gonzales v. Carhart*, 550 U.S. at 159 ("Respect for human life finds an ultimate expression in the bond of love the mother has for her child").

Further, some jurists have observed that abortion, absent genuine informed consent, is potentially a wrongful death or battery under tort law. *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2373 (2018) (quoting Justice Cardozo for the proposition that an operation done without consent is an assault); *Wiersma v. Maple Leaf Farms*, 1996 SD 16, 543 N.W.2d 787 (SD 1996). Because the mother's *consent* to the abortion is all that stands between the abortionist and potential tort liability, the state "has an interest in ensuring that so grave a choice is well informed,"

[9]Plaintiff Ball concedes the preciousness of this right. SAPX 1640, R. Doc. 266-1, at 49.

Gonzales, 550 U.S. at 159 – and freely given. Coerced or uninformed abortions impair a woman's right to bear her child. *Cf. Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) ("Marriage and procreation are fundamental to the very existence and survival of the race"). *Planned Parenthood v. Rounds*, 653 F.3d 662, 669 (8th Cir. 2011) (statement that a pregnant woman "is legally and constitutionally protected against being forced to have an abortion" is "truthful" and "relevant").

As discussed below, *Casey* explicitly approved a government purpose "to create a structural mechanism by which the State . . . may express profound respect for the life of the unborn," 505 U.S. at 877. The measures South Dakota has taken here are certainly "reasonable," given the appalling record of coerced abortions and PPMNS's failure to provide adequate safeguards.

Furthermore, the state need not be indifferent to the choice between abortion and childbearing. While current Supreme Court case law does not permit states to outlaw abortion, those cases "impl[y] no limitation on the authority of a State to make a value judgment favoring childbirth over abortion," *Maher v. Roe*, 432 U.S. 464, 474 (1977), including in the informed consent context, *Casey*, 505 U.S. at 883. In other words, the state is not required to treat the pursuit of abortion as good or even indifferent. "The Constitution does not forbid a State or city, pursuant to democratic

processes, from expressing a preference for normal childbirth." *Casey*, 505 U.S. at 872.

Thus, given "the unique nature of the abortion decision," *Bellotti v. Baird*, 443 U.S. 622, 642 (1979) (plurality), states have an exceedingly strong interest in assuring that abortion not be undertaken under circumstances of undue influence, pressure, or coercion. A woman who aborts when she does not want to, when she is being pressured or coerced, or when, had she had adequate information about alternatives, would not have wanted to abort, suffers the catastrophic and irrevocable loss of her freedom, her own child, and a lifelong relationship with that child, potentially leading to unimaginable suffering over an act she cannot undo. *Supra* pp. 12-13.

II. THE STATE HAD MORE THAN ENOUGH EVIDENCE TO CONCLUDE THAT PPMNS WAS NOT ADEQUATELY PROTECTING WOMEN FROM COERCION.

The record in this case, discussed at great length above, shows that abortion providers, specifically PPMNS (the only provider in South Dakota), are completely unreliable – willfully so – in screening pregnant women for coercion. The state could rightly conclude that the priority of PPMNS in particular, and the Planned Parenthood chain in general, is to maximize the volume of abortions done, and thus to maximize the abortion providers' bottom line revenue, even if that comes at the expense of women pushed into abortions they do not want. Indeed, the record in this case shows

PPMNS and other abortion providers, as a routine matter, disregarding signs of ambivalence or coercion, downplaying or undercutting any factual considerations that might lead a woman not to choose abortion, and even helping push women into abortions they do not want. The state could therefore reasonably conclude that it simply could not rely upon PPMNS to protect women from coerced abortions.

III. REQUIRING INDEPENDENT THIRD-PARTY COUNSELING WAS LIKELY A CONSTITUTIONALLY PERMISSIBLE RESPONSE TO THE PROBLEM OF ILL-INFORMED AND COERCED ABORTIONS.

Facing the tragedy, even outrage, of women being railroaded into abortions they do not want and may bitterly regret for the rest of their lives, the state had a duty to take remedial measures. One response could have been for the state to shut the offending providers down altogether. Since PPMNS is the sole abortion provider in South Dakota, that would have the *de facto* effect of shutting down abortion in the state. South Dakota, however, has taken a far less restrictive, more narrowly tailored approach, namely, outsourcing part of the consent process. The state therefore requires women considering abortion to meet with independent, highly regulated third-party counselors as a precondition to giving final consent for abortion.

The district court, in undertaking its "undue burden" analysis under *Casey*, completely bracketed out of consideration all those women who are uncertain or

being pressured to abort: "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." SAPX 92, R. Doc. 39, at 18; SAPX 3119-20, R. Doc. 374, at 20-21. But as the record discussed above overwhelmingly demonstrates, there are many, many women going into abortion facilities who are uncertain about or even opposed to having an abortion. The third-party counseling requirement applies to, and was adopted precisely for the sake of, such women; for the district court to define them out of the equation is grievous error.

Having defined out of consideration the very women the law was designed to help, the district court focused exclusively upon women who are resolute about having abortions and who will remain so when informed of resources and alternatives. *But see supra* p. 7 (any such women are few and far between). For such hypothetical women, the district court opined, the third-party counseling is humiliating and degrading. SAPX 93, R. Doc. 39, at 19; SAPX 3120-21, R. Doc. 374, at 21-22. But the district court's opinion runs counter to the record in this case, which establishes that the relevant pregnancy centers are tightly regulated, and are forbidden from judging, much less humiliating, the women they counsel. *Supra* pp.35-38. Moreover, the district court did not even begin to justify its apparent conclusion that for 100% of those (few) women who are determined to get an

abortion, the counseling requirement would rise to the level of a "substantial" obstacle, and not just a lesser nuisance. Ultimately, the district court's "large fraction" analysis therefore rests on speculation, not evidence, and represents reversible error. *PP v. Jegley*, 864 F.3d at 958-60 (vacating injunction where district court erred in its "undue burden" analysis).

The district court postulated that "[e]ven if . . . the counseling session is ideologically neutral and the counselor . . . expresses zero signs of disapproval," the pregnancy centers themselves are opposed to abortion, and therefore a woman will "fear" being ridiculed or judged. SAPX 3122, R. Doc. 374, at 23. But third-party counseling has long been an instrument of the law– for those in need of addiction treatment, family counseling, adoption screening, etc. Such counseling remedies proceed on the assumption that professional counselors are conscious of a client's fear of being blamed or judged for their circumstances or choices and that counselors allay those fears and eschew condemnation. Condemnation, after all, would be counterproductive to the goals of helping the person in question. While it has been observed that abortion jurisprudence is rife with "ad hoc nullification" of many larger legal principles, this practice should not result in a special legal presumption that pro-life counseling agencies are less compassionate or competent than other

counselors who act at the direction of the law. *Thornburgh v. American College of Obstets. & Gynecs.*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting).

The district court also speculated about the fear of women having private information revealed to the public, SAPX 94-95, R. Doc. 39, at 20-21; SAPX 3123-24, R. Doc. 374, at 24-25, but the record also refutes that concern, *supra* p. 37. The district court acknowledged steps the South Dakota legislature has taken that have improved privacy protections, SAPX 3123-24, R. Doc. 374, at 24-25, but found fault with the *theoretical possibility* of "negligent or unintentional disclosures," SAPX 3124, R. Doc. 374, at 25. The district court cited no authority, however, for the proposition that privacy protections must be the strictest imaginable in order to pass constitutional muster. "Undue burden" analysis is not strict scrutiny. Indeed, given the stakes for women being pushed into unwanted abortions, it would seem a bizarre inversion of priorities to say that hypothetical concerns about unintentional disclosures bar a state from using third-party counseling to protect women being forced to abort babies they want.

What remains is that the third-party counseling requirement may well be, for those firmly set on getting an abortion, an inconvenience, a nuisance, or a delay that the resolute abortion-seeker does not want. But "not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right." *Casey*, 505

U.S. at 873. "The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." *Id*. at 874.

The district court's perspective is deficient for additional reasons. First, the state *cannot know in advance* which women are facing pressure to abort against their will or better judgment. Nor can the state – or PPMNS – know in advance which women who seem fully committed to going through with the abortion have private reservations or will reconsider when counseled outside of the context of a facility that essentially sells abortions as its business. For women who are undecided, ambivalent, or – worse – having their arms twisted to "take care of" a pregnancy that *someone else* does not want, the visit to an independent third-party counselor may be a lifesaver.

Second and more fundamentally, the district court's depiction of the case fails to consider the women's rights on the *other* side of the equation, women who may well represent the majority (or close to it) of abortion clients. "A district court abuses its discretion when it fails to consider a relevant factor that should have been given significant weight," *PP v. Jegley*, 864 F.3d at 957. To use the *Casey* terminology, there is assuredly a burden – a very grave burden – on women coerced into abortion, a burden which the district court effectively ignored. *Casey* explicitly stated that

there is no "substantial obstacle," and thus no "undue burden," entailed in informed consent measures that "express a preference for childbirth over abortion" and "might cause the woman to choose childbirth over abortion." 505 U.S. at 883. All the more so here. A pregnant woman has a right *not* to be forced to abort a baby she wants. *Supra* pp. 43, 46. As the record in this case starkly illustrates, it is simply false to assume that every woman who walks in the door of an abortion facility has made up her mind to abort – or even wants to abort. No analysis of the situation, for constitutional purposes, will be adequate if it focuses only on those for whom the third-party counseling will ultimately make little or no difference. The judicial assessment has to take into consideration as well those women for whom third-party counseling is precisely the lifeline they and their prenatal offspring need to get out from under someone else's thumb.

In short, the proper approach is to assess the balance of harms, not just on the question of injunctive relief *vel non*, but on the merits question of the likelihood of success of the constitutional challenge at issue here. In that balance, the scales are lopsided in favor of the third-party counseling requirement. On one side is any inconvenience to those who consider third-party counseling, after the fact, not to have been beneficial. On the other side is the profound and irremediable injustice and harm done to those women who undergo coerced abortions that the women do not

want and who thereby suffer the loss of their children's lives. Thus, even assuming PPMNS has standing here, despite its obvious conflict of interest, to argue the rights of its patients – the very persons this patient protection law was designed to protect against PPMNS's malfeasance – the balance of harms weighs decidedly – overwhelmingly – in favor of South Dakota's measure.

IV. REQUIRING INDEPENDENT THIRD-PARTY COUNSELING DOES NOT LIKELY FACIALLY VIOLATE THE FIRST AMENDMENT.

The district court erred by concluding that the third-party counseling requirement likely runs afoul of the First Amendment. As explained *supra* p. 43-44. 47-48, the Supreme Court permits a state to "tak[e] steps to ensure that this choice is thoughtful and informed," to "enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to term," to "create a structural mechanism by which the state . . . may express profound respect for the life of the unborn," and to "enact regulations to further the health or safety of a woman seeking an abortion," so long as such measures are "reasonably related" to the state's goals. *Casey*, 505 U.S. at 872, 877, 878. South Dakota's counseling requirement was enacted for these very purposes, and the *Casey* Court gave no indication such measures would create First Amendment problems.

There is powerful and abundant evidence that women are being pressured into abortions they do not want, and that PPMNS not only does not adequately screen to prevent such coercion, but intentionally overlooks evidence of coercion and even facilitates abortions on women who do not want abortions. *E.g., supra* pp. 27-28. The state therefore requires the modest step of bringing an independent, tightly regulated third party counselor into the process. SDCL § 34-23A-59.1 (identifying class of licensed professionals qualified to perform pre-abortion counseling). Since "consent" given under duress is no consent at all, the state seeks to make sure a woman under such pressure has a genuine method of escaping being railroaded into an abortion she does not want. The third-party counseling requirement, in short, is a key part of the informed *consent* requirement.

The district court invoked *Wooley v. Maynard*, 430 U.S. 705 (1977), *Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988), and other compelled speech cases as warranting strict scrutiny review here. SAPX 81, R. Doc. 39, at 7. This was error. Those cases invalidated state compulsion to display an ideological message (*Wooley*) or to utter a factual statement against interest in a noncommercial advocacy context (*Riley*). By contrast, a woman participating in a counseling session to screen for coercion is not being compelled to endorse any state message or self-sabotage her advocacy of some viewpoint. Under no circumstances is she forced "to speak a

particular message" she opposes. *Nat'l Inst. of Family & Life Advocates [NIFLA] v. Becerra*, 138 S. Ct. 2361, 2371 (2018). *See also Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005) (describing a "true 'compelled-speech'" case as one "in which an individual is obliged personally to express a message he disagrees with, imposed by the government"). The speech involved in this case, incidental to ensuring that informed consent is obtained, "is a far cry from the compelled speech in . . . *Wooley*." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006). Indeed, the *Riley* Court specifically noted the importance of the overall context involved. "Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon." 487 U.S. at 796. Such consideration of context is crucial for distinguishing between such *permissible* "compelled speech" as filing a tax return, filling out a financial aid application, or – as here – speaking in an informed consent exchange, and *impermissible* government coopting of private persons as government mouthpieces.

Here, the context is informed consent. As the *NIFLA* Court explained, there is a world of difference between, on the one hand, a state imposing mandatory disclosures that are *not* incidental to the performance of a medical procedure, 138 S. Ct. at 2373 ("the notice does not facilitate informed consent to a medical procedure.

In fact, it is not tied to a procedure at all"), and, on the other, requirements that are part and parcel of the informed consent process, which need only be reasonable, *id*. While abortion serves nonmedical purposes, SAPX 2307, R. Doc. 269, ¶3 (HARTMANN), it remains a medical procedure, and hence regulation of informed consent in that context remains subject to a less demanding standard of First Amendment review "as part of the practice of medicine, subject to reasonable licensing and regulation by the State." *Casey*, 505 U.S. at 884. Nor is this a case in which someone is required to undergo indoctrination supporting a contested ideology. *Compare Altman v. Minn. Dep't of Corr.*, 251 F.3d 1199, 1201 (8th Cir. 2001) (reinstating challenges to "state-sponsored indoctrination" of employees on controversial issue); *Campbell v. Cauthron*, 623 F.2d 503, 509 (8th Cir. 1980) (ordering prison to prevent "forced religious indoctrination" of inmates); *Phommasoukha v. Gonzales*, 408 F.3d 1011, 1015 (8th Cir. 2005) (Laotian "subjected to 'indoctrination meetings'" by Communists); *ACLU of Fla. v. Miami Dade County Sch. Bd.*, 557 F.3d 1177 (11th Cir. 2009) (in Cuban educational system, "revolutionary ideology and discipline are reinforced"). The South Dakota statute expressly limits what the third-party counselors can say, absent invitation from the pregnant woman. SDCL § 34-23A-59(2), SAPX 189, R. Doc. 191-1, at 9 (barring discussion of religion and of risks of abortion). It is not "political" or "ideological"

to prevent coercion or to advise pregnant women of available resources and alternatives in an effort to resolve a situation in which abortion seems to be the only way out. *See id.* (SDCL § 34-23A-59(1)) (pregnancy centers permitted to address coercion and alternative resources).

Notably, PPMNS challenges the third-party counseling requirement on its face. The pertinent Complaint (with one exception) finds fault with the statute *as written*. *See* SAPX 165, 170-76, R. Doc. 191, at ¶¶ 1, 14, 16, 23, 31, 36, 38, 40, 44, 46 (5th Am'd Cplt.). The exception – the only part of the complaint against the third-party counseling requirement that sounds in factual allegations – is the claim that many pregnancy centers are religiously based, SAPX 174-74, R. Doc. 191, at. ¶¶32, 42, but the district court did not address PPMNS's claim under the Establishment Clause, SAPX 81, R. Doc. 39, at 7 n.4 ("the court only addresses the undue burden and the patient free speech claim"). The preliminary injunction therefore rests upon a facial challenge – the notion that a state is categorically barred from requiring third-party counseling to protect against coercion. *Accord* SAPX 89, R. Doc. 39, at 15 (district court concluding PPMNS likely to succeed under "decisions involving facial free speech challenges"); SAPX 91, R. Doc. 39, at 17 (citing case on facial constitutionality). However, a district court "abuse[s] its discretion [when] it fail[s] to consider whether Planned Parenthood satisfied the requirements necessary to

sustain a facial challenge to an abortion regulation." *PP v. Jegley*, 864 F.3d at 958 – or worse, as here, erroneously concludes that those requirements have been met.

By its very nature, informed consent entails verbal give and take. SAPX 786, R Doc. 246, at ¶47 (RIDDER). That is not a First Amendment compelled speech problem. *Tex. Med. Providers v. Lakey*, 667 F.3d 570, 578 (5th Cir. 2012) (upholding requirement that woman seeking abortion "certify in writing her understanding" of several informed consent matters). If it were, the state could not require informed consent at all. But that is not the law. Indeed, the Supreme Court has held, precisely in the abortion context, that informed consent requirements are permissible "as part of the practice of medicine, subject to reasonable licensing and regulation by the State." *Casey*, 505 U.S. at 884.[10]

The district court declared that the outcome must be different here because *the woman* is compelled to interact. SAPX 3113-14, R. Doc. 374, at 14-15. But the

[10]As demonstrated in this brief, the third-party counseling requirement passes muster regardless of the level of scrutiny applied. While "reasonable basis" review is proper under *Casey*, "there is no dispute" that there is a "compelling interest in protecting a woman from being forced against her well to have an abortion and in informing a woman of truthful, relevant, and non-misleading information about abortion, alternatives to abortion, and pregnancy assistance." SAPX 86, R. Doc. 39, at 12. *Accord* SAPX 3116, R. Doc. 374, at 17. And, as explained at length in the text, the utter failure of PPMNS adequately to screen for these compelling concerns – and, to the contrary, to downright aid in the coercion of women into unwanted abortions, *supra* pp. 27-28, shows that recourse to third-party counseling is a narrowly tailored solution.

Supreme Court has already rejected that argument. "Our prior decisions establish that as with any medical procedure, the State may *require a woman* to give her written informed consent to an abortion." *Casey*, 505 U.S. at 881 (emphasis added; citing *Planned Parenthood v. Danforth*, 428 U.S. at 67). In fact, it would be farcical to insist on ensuring informed consent when only the other party speaks. It is the woman, after all, who gives the consent.

That the statute requires a woman to speak with a third party does not alter this conclusion when, as here, PPMNS "abuses the privileges of exercising proper medical judgment," *Roe*, 410 U.S. at 166, necessitating resort to outside, independent counselors. The Supreme Court itself has stated that its rulings do not create "a right to be insulated from all others" in making a decision about abortion. *Casey*, 505 U.S. at 877. To hold a third-party counseling requirement *per se* unconstitutional is to abandon such women to those who view her as simply a step toward meeting a quota, *supra* pp. 6, 24.

The district court found fault with the personal nature of inquiries about women being pressured to abort against their will. SAPX 3115, R. Doc. 374, at 16 ("personal issues that a woman may be asked to discuss"); SAPX 3116, R. Doc. 374 at 17 ("deeply personal issues"). But forced or pressured abortions, like domestic

abuse, of their nature can arise from deeply personal situations. That context does not render the state powerless to protect the women who are victims of intimate abuse.

South Dakota's counseling statute is simply an exercise of its "broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others." *Casey*, 505 U.S. at 885 (joint opinion). Given the record of egregious failure of abortion businesses themselves, particularly PPMNS and the Planned Parenthood chain, effectively (or even halfheartedly) to screen against coercion, the state had more than enough reason to look to third party counseling as an essential remedy.

V. THE BALANCE OF HARMS OVERWHELMINGLY FAVORS DISSOLUTION OF THE INJUNCTION.

Finally, and importantly, the harms to be balanced in the present case weigh quite heavily in favor of lifting the preliminary injunction. One aspect of PPMNS's "injury" from the third-party counseling requirement is downright illegitimate: PPMNS suffers the loss of business whenever a woman being pushed into an abortion she does not want ends up not aborting. But PPMNS has no legitimate right to do abortions on women who are coerced into them. The only other "injury" PPMNS identifies is annoyance and inconvenience to those women who turn out ultimately

to be dead set on aborting. There may not even be very many such women, if any. *Supra* p. 7. On the other side of the scale, by contrast, is the immeasurable tragedy, guilt, and sorrow of those women pressured into an abortion that they did not want, not to mention the needless deaths of the children whom those women wanted to keep. (The district court simply ignored this side of the balance of harms. SAPX 3128, R. Doc. 374, at 29.) Every day that the preliminary injunction remains in place is a day in which another woman may be railroaded into an abortion she does not want. That was the case with B.H. and L.M. Both were forced to have abortions they did not want *after* the third-party counseling law was enacted. *Supra* pp. 30, 34. They did not get the third-party help they desperately needed because the district court had enjoined the law. SAPX 319, R. Doc. 206, at ¶33 (B.H.); SAPX 2648, R. Doc. 302, at ¶6 (L.M.).

To identify the nature of the "harms" being balanced is to answer the question of the proper balance of harms, as well as the public interest to be served by vacating the injunction. The preliminary injunction as to third-party counseling should be dissolved. The order of the district court must be reversed.

CONCLUSION

This Court should reverse the district court and remand with instructions to dissolve the preliminary injunction.

Respectfully submitted,

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December 3, 2021