

Nos. 11-1111 and 11-1185

---

IN THE  
United States Court of Appeals  
FOR THE FOURTH CIRCUIT

GREATER BALTIMORE CENTER FOR PREGNANCY CONCERNS, INC.,  
*Plaintiff-Appellee,*

—v.—

MAYOR AND CITY COUNCIL OF BALTIMORE; STEPHANIE RAWLINGS-  
BLAKE, *in her official capacity as Mayor of Baltimore;* and OXIRIS BARBOT,  
M.D., *in her official capacity as Baltimore City Health Commissioner,*  
*Defendants-Appellants.*

*(caption continued on next page)*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND  
CASE NO. 1:10-cv-00760 MJG  
THE HONORABLE MARVIN J. GARBIS

---

**AMICI CURIAE BRIEF OF AMERICAN ASSOCIATION OF PRO-LIFE  
OBSTETRICIANS AND GYNCOLOGISTS, THE CATHOLIC MEDICAL  
ASSOCIATION AND THE CHRISTIAN MEDICAL & DENTAL ASSOCIATIONS  
IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE**

---

*OF COUNSEL:*

MATTHEW S. BOWMAN  
ALLIANCE DEFENSE FUND  
801 G. Street, N.W.,  
Suite 509  
Washington, DC. 20001  
Telephone: 202-393-8690  
Facsimile: 202-347-3622

SAMUEL B. CASEY,  
CAL BAR. No. 76022  
*Counsel of Record*  
DAVID B. WAXMAN,  
TX BAR No. 24070817  
JUBILEE CAMPAIGN-  
LAW OF LIFE PROJECT  
801 G. Street, N.W., Suite 521  
Washington, DC. 20001  
Telephone: 202-587-5652  
Facsimile: 703-349-7323  
*Attorneys for Amici Curiae*

*(caption cont.)*

-and-

ST. BRIGID'S ROMAN CATHOLIC CONGREGATION, INC.; and  
ARCHBISHOP EDWIN F. O'BRIEN, ARCHBISHOP OF  
BALTIMORE AND HIS SUCCESSORS IN OFFICE, A  
CORPORATION SOLE,

*Plaintiffs-Cross-Appellants,*

—v.—

MAYOR AND CITY COUNCIL OF BALTIMORE; STEPHANIE  
RAWLINGS-BLAKE,  
*in her official capacity as Mayor of Baltimore;* and OXIRIS BARBOT,  
M.D., *in her official capacity as Baltimore City Health Commissioner,*  
*Defendants-Cross-Appellees*

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	ii
CORPORATE DISCLOSURE STATEMENT.....	viii
INTEREST OF AMICI CURIAE.....	1
SUMMARY OF ARGUMENT .....	4
ARGUMENT .....	6
I.    STATE INFORMED CONSENT LAWS MANDATE OR RECOMMEND THAT BEFORE AN ABORTION WOMEN BE TOLD ABOUT THE RISKS OF BREAST CANCER, DIFFICULTIES IN FUTURE PREGNANCY AND POST-ABORTION PSYCHOLOGICAL PROBLEMS POTENTIALLY INVOLVED WITH INDUCED ABORTION.....	8
II.   IT IS MEDICALLY ADVISABLE TO FULLY INFORM WOMEN ABOUT WHAT IS KNOWN ABOUT THE RISKS OF BREAST CANCER, DIFFICULTIES IN FUTURE PREGNANCY AND POST-ABORTION PSYCHOLOGICAL PROBLEMS POTENTIALLY INVOLVED WITH INDUCED ABORTION.....	13
A. Risks of Difficulties in Subsequent Pregnancy are Linked to Induced Abortion.....	14
1. Preterm Birth.....	14
2. Placenta Previa.....	15
B. Breast Carcinoma is Linked to Induced Abortion.....	16
C. Serious Mental Health Problems are Linked to Induced Abortion.....	19
CONCLUSION .....	21

**TABLE OF AUTHORITIES**

**Page(s)**

**CASES**

Ackerley Communications of Massachusetts, Inc. v. City of Somerville,  
878 F.2d 513 (1st Cir. 1989).....7

Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,  
447 U.S. 557 (1980).....7

Eller Media Co. v. Montgomery County, 143 Md. App. 562, 795 A.2d 728  
(Md. App. 2002).....7

Gertz v. Robert Welch, Inc.,  
418 U.S. 323 (1974).....7

Gonzales v. Carhart,  
550 U.S. 124 (2007).....9

Planned Parenthood of Southeastern Pennsylvania v. Casey,  
505 U.S. 833 (1992).....9

Roe v. Wade,  
410 U.S. 113 (1973).....8

Vance v. Universal Amusement Co., Inc.,  
445 U.S. 308 (1980).....7

Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.,  
425 U.S. 748 (1976).....7

**STATUTES, CODES, AND ORDINANCES**

12 ALASKA ADMIN. CODE 40.070 (2010).....10,11

24 DEL. C. § 1794 (2010)..... 10,11

63 OKL. ST. § 1-738.1 THROUGH 1-738.5 (2010)..... 10

A.C.A. §§ 20-16-901 THROUGH 20-16-908 (2010)..... 10

ALASKA STAT. §§ 18.16.010, 18.16.060 (2010)..... 10,11

BALTIMORE, MD., HEALTH CODE §§ 3-501 THROUGH 3-506 (2010).....5

BALTIMORE, MD., CODE ART I, §§ 40-14, 41-14 (2010).....5

K.S.A. §§ 65-6704, 65-6708 THROUGH 65-6715 (2010)..... 10,11

LA. R.S. § 40:1299.35.6 (2010)..... 10,11

MCLS §§ 333.17014, 333.17015 (2010).....10

MISS. CODE ANN. §§ 41-41-33, 41-41-35 (2010)..... 10,11

MINN. STAT. §§ 145.4241 THROUGH 145.4244 (2010)..... 10,11

MINN. STAT. ANN. §§ 145.412(4)..... 10,11

N.D. CENT. CODE §§ 14-02.1-01, 14-02.1-02.2, 14-02.1-03, 14-02.1-03.2  
and 14-02.1-03.3 (2010)..... 10,11

NEB. REV. STAT. §§ 28-325 through 28-327, 28-327.01  
through 28-327.05 (2010)..... 10,11

NEV. REV. STAT. ANN. §§ 442.252, 442.253 (2010)..... 10,11

O.C.G.A. §§ 31-9A-1 THROUGH 31-9A-8 (2010).....10

PA. CONS. STAT. 18 §§ 3205, 3208 (2010).....10

R.S.MO. § 188.039 (2010).....10

S.C. CODE ANN. §§ 44-41-310 THROUGH 44-41-380 (2010).....10

S.D. CODIFIED LAWS §§ 34-23A-10.1 through 34-23A-10.3,  
and 34-23A-22 (2010)..... 10,11

TEX. HEALTH & SAFETY CODE § 171.011 THROUGH 171.018 (2010)..... 10,11

UTAH CODE ANN. §§ 76-7-305, 76-7-305.5 (2010).....10

VA. CODE ANN. § 18.2-76 (2010).....10

W. VA. CODE § 16-2I-1 THROUGH 16-2I-4 (2010).....10-12

WIS. STAT. ANN. § 253.10 (2010)..... 10-12

**JOINT APPENDIX.....1,6**

**APPELLANTS PRINCIPAL BRIEF [Document 26].....7**

**RESPONSE BRIEF OF APPELLEE AND PRINCIPAL BRIEF OF  
CROSS-APPELLANTS [Document 66].....4**

**OTHER AUTHORITIES**

Americans United for Life, *DEFENDING LIFE 2010: Informed Consent Laws: Protecting a Woman’s Right to Know*, at 75,79 (2010) *at*  
<http://www.aul.org/2011/03/the-defending-life-report>.....9

Alaska Health and Social Services, *MAKING A DECISION ABOUT YOUR PREGNANCY* at  
<http://www.hss.state.ak.us/DPH/WCFH/INFORMEDCONSENT/ABORTION>.....10,11

A. Gilchrist, P. Hannaford, P. Frank, C. Kay, “Termination of Pregnancy and Psychiatric Morbidity,” *BRIT. J. PSYCHIATRY*, 1995, 167: 243-248..... 19

A. Lanfranchi, “Normal Breast Physiology: The Reasons Hormonal Contraceptives and Induced Abortion Increased Breast-Cancer Risk,” *LINACRE QUARTERLY* 76(3)(August 2009) 239-249.....17

C. Ananth, J. Smulian, A. Vintzileos, “The Association of Placenta Previa with History of Cesarean Delivery and Abortion: A Meta-Analysis,” *AM. J. OBSTET. & GYNECOL.*, 1997, Vol. 177 (5): 1071-1078.....15,19

C. Morgan, M. Evans, J. Peters, C. Currie, “Suicides After Pregnancy,” (Letter), *BRIT. MED. J.*, 1997, 314-902.....19

D. Reardon, ABORTED WOMEN (1987).....9

D. Weed, B. Kramer, “Induced Abortion, Bias, and Breast Cancer: Why Epidemiology Hasn’t Reached Its Limit,” J. NAT’L CANCER INST., 1996, Vol. 88 (23):1698-1700.....19

Dolle, et al, (2009), “Risk Factors for Triple-Negative Breast Cancer in Women Under the Age of 45 Years,” CANCER EPIDEMIOL. BIOMARKERS PREV. 2009;18(4). April 2009.....17

Guttmacher Institute, “State Policies in Brief: Counseling and Waiting Periods for Abortion” (June 1, 2011) at [http://www.guttmacher.org/statecenter/spibs/spib\\_MWPA.pdf](http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf) ..... 6

Howe et al. (1989) “Early Abortion and Breast Cancer Risk Among Women Under Age 40,” INT’L. J. EPIDEMIOL. 18:300-4.....17

Janet R. Daling, Kathleen E. Malone, Lynda F. Voigt, Emily White, Noel S. Weiss, (1994) J. NAT’L CANCER INST. 86:1584-92l .....17

J. Brind, V. Chinchilli, W. Severs, J. Summy-Long, “Induced Abortion as an Independent Risk Factor for Breast Cancer: A Comprehensive Review and Meta-Analysis,” J. EPIDEMIOL. COMM’TY HEALTH, 1996, 50: 481-496.....19

J.Thorp, K.Hartmann, E.Shadigan, “The Long-Term Physical and Psychological Health Consequences of Induced Abortion: A Review of the Evidence, LINACRE QUARTERLY (February 2005) at <http://lq.cathmed.metapress.com/content/h14j7850j1033p83/fulltext.pdf>.....10,13-16,18-20

K. Michels, W. Willet, “Does Induced or Spontaneous Abortion Affect the Risk of Breast Cancer?,” EPIDEMIOLOGY, 1996, Vol. 7 (5) 521-528.85.....19

Kan. Dep’t of Health and Env’t, IF YOU ARE PREGNANT at [http://www.womansrighttoknow.org/download/WRTK\\_Handbook\\_7483\\_English.pdf](http://www.womansrighttoknow.org/download/WRTK_Handbook_7483_English.pdf) .....10,11

Kleder, Melissa & S. Malia Richmond Crum, NARAL Pro-Choice Maryland

Fund, “The Truth Revealed, Maryland Crisis Pregnancy Center Investigations” (Jan. 14, 2008) at <http://www.prochoicemaryland.org/assets/files/cpreportfinal.pdf>.....1,6

L. Bartholomew, D. Grimes, “The Alleged Association Between Induced Abortion and Risk of Breast Cancer: Biology or Bias?,” *OBSTET. & GYNECOL. SURV.*, 1998, Vol. 53 (11) 708-714.....19

L. Henriet, M. Kaminski, “Impact of Induced Abortions on Subsequent Pregnancy Outcome: The 1995 French National Perinatal Survey,” *BRIT. J. OBSTET. & GYNAECOL.*, Vol. 108: 1036-1042 (2001).....14

La. Dep’t of Health and Hospitals, *ABORTION MAKING A DECISION* at [http://new.dhh.louisiana.gov/assets/oph/AbortionMakingaDecision\\_2011.pdf](http://new.dhh.louisiana.gov/assets/oph/AbortionMakingaDecision_2011.pdf) .....10,11

M. Gissler, E. Hemminki, J. Lonnqvist, “Suicides After Pregnancy in Finland, 1987-94: Register Linkage Study,” *BRIT. MED. J.*, 1996, 313: 1431-1434.....19

M. McMahon, B. Cole, T. Lin et al., “Age at First Birth and Breast cancer Risk,” *BULL. WORLD HEALTH ORG.*, 1970, 43: 209-21.....19

Mark L. Rienzi, “The History and Constitutionality of Maryland’s Pregnancy Speech Regulations,” 26 *J. CONTEMP. HEALTH L. & POL’Y* 223 (2010).....7

Minn. Dep’t of Health Div. of Cmty. & Family Health: *IF YOU ARE PREGNANT: INFORMATION ON FETAL DEVELOPMENT, ABORTION AND ALTERNATIVES* at <http://www.health.state.mn.us/wrtk/handbook.html>... 10,11

N.D. Berkman, J.M. Thorp, K.E. Hartmann et al, “Management of Preterm Labor: Evidence Report/Technology Assessment No. 18 (prepared by Research Triangle Institute under Contract No. 290-97-0011)” AHRQ Publication No 01-E021. Rockville (MD) Agency for Healthcare Research and Quality, December 2000.....14

S.C. Dep’t of Health and Env’tl. Control, *INFORMATION OUTLINED IN THE S.C. WOMEN’S RIGHT TO KNOW ACT* at <http://www.scdhec.gov/health/mch/wcs/risks-of-abortion.htm>.....10



S.D. TASK FORCE TO STUDY ABORTION, submitted to the Governor and State Legislature (December 2005) at <http://www.dakotavoice.com/Docs/South%20Dakota%20Abortion%20Task%20Force%20Report.pdf>.....20

Tex. Dep’t of State Health Services, WOMAN’S RIGHT TO KNOW at <http://www.dshs.state.tx.us/wrtk/default.shtm>..... 10,11

United States House of Representatives Committee on Government Reform—Minority Staff, False and Misleading Health Information Provided by Federally Funded Pregnancy Resource Centers (prepared for Rep. Henry A. Waxman July 2006) at <http://www.chsourcebook.com/articles/waxman2.pdf>..... 1,6

W. Chie, C. Hsieh, P. Newcomb, M. Longnecker, R. Mittendorf, E. Greenberg, R.Clapp, K. Burke, L. Titus-Ernstoff, A. Trentham-Dietz, B. MacMahon, “Age at AnyFull-Term Pregnancy and Breast Cancer Risk,” AM. J. EPIDEMIOLOG., 2000, 151(7): 715-;22; 101.....18

W. Va. Dep’t of Health & Human Res., INFORMATION ON FETAL DEVELOPMENT, ABORTION, AND ADOPTION 10-11 (2003), at [http:// www.wvdhhr.org/wrtk/wrtkbooklet.pdf](http://www.wvdhhr.org/wrtk/wrtkbooklet.pdf)..... 10-12

W. Va. Dep’t of Health & Human Res., ABORTION METHODS & MEDICAL RISKS at [HTTP://WWW.WVDHHR.ORG/WRTK/ABORTIONINFORMATION.ASP](http://WWW.WVDHHR.ORG/WRTK/ABORTIONINFORMATION.ASP).....10-12

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Section 26.1 of the Federal Rules of Appellate Procedure ( F.R. A. P.) and Local Rule (L.R.) 26.1(b), *Amici Curiae* Association of Pro-Life Obstetricians and Gynecologists (AAPLOG), the Catholic Medical Association (CMA), and the Christian Medical & Dental Associations (CMDA) (collectively “*Amici*”) make the following disclosures:

- (a) *Amici* are not publicly held corporations or other publicly held entities or affiliates or parents of any corporation.
- (b) *Amici* do not issue stock. Therefore, no publicly owned corporation or other publicly held entity owns any stock issued by any *amici*.
- (c) *Amici* are professional associations, not trade associations. *Amici* are each duly incorporated not-forprofit associations exempt from federal taxation under Section 501(c) (3) of the Federal Income Tax Code.
- (d) *Amici* have no financial interest in the outcome of this litigation as defined in L.R. 26.1(b).

**INTERESTS OF *AMICI CURIAE*<sup>1</sup>**

The American Association of Pro-Life Obstetricians & Gynecologists (AAPLOG) is a national organization of over 2,000 obstetricians and gynecologists—including some who practice in Maryland—who reaffirm the unique value and dignity of individual human life in all stages of growth and development from conception onward. AAPLOG’s adopted mission statement includes the commitment “to educate abortion-vulnerable patients, the general public, pregnancy center counselors, and our medical colleagues regarding the medical and psychological complications associated with induced abortion, as evidenced in the scientific literature.” AAPLOG and its members believe that their expertise on the medical issues implicated in this case may assist the Court in understanding why the only scientific “evidence” cited in two politically motivated, non-peer-reviewed, “investigative” reports<sup>2</sup> published by abortion proponents supporting the enactment of the Ordinance below is far from as conclusive as claimed by Appellants, while, on the other hand, there are incontrovertible medical facts and generally accepted medical standards for

---

<sup>1</sup> As required by F.R.A.P. 29(a) for the filing this brief without a motion, all parties, through their counsel of record, have consented to the filing of this brief. Pursuant to F.R.A.P. 29(c)(5), counsel for Amici represent that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, including the Amici Curiae and their counsel, made any such monetary contribution.

<sup>2</sup> See generally JOINT APPENDIX (“JA”) pp.326-337 [the “NARAL Maryland Report (2008)”] and 417-430 [The “Waxman Minority Staff Report (2006)”].

informed consent providing scientific support for informing women of the increased risks of breast cancer, difficulties in subsequent pregnancies (e.g. preterm birth and placenta previa) and mental health problems that may occur under various circumstances following an induced abortion.

**The Catholic Medical Association (CMA)** has over 1,000 physician members and hundreds of allied health members nationwide including members who practice medicine in the State of Maryland. CMA members seek to uphold the principles of the Catholic faith in the science and practice of medicine—including the belief that human life begins at conception and that, because abortion is a violent act interrupting the natural process of pregnancy, women are harmed by abortion physically, emotionally, and spiritually. CMA members assist the Church in the work of communicating Catholic medical ethics to the medical profession and society at large. CMA has a particular interest in the question of whether induced abortion raises women’s risk of cancer, as CMA is committed to serving the health and human dignity of all patients, and hundreds of CMA member OB-GYN and Family Practitioners serve thousands of women patients. CMA adopted a resolution in 2003 calling for all women to be given information about the connection between abortion and breast cancer prior to receiving an abortion and for this disclosure to be required by state legislation. CMA’s peer-reviewed ethics journal, *The Linacre Quarterly*, has published several

articles on the connection between abortion and breast cancer in the last five years. There is no doubt that there is a connection between induced abortion and an increased risk of breast cancer. Informing women that there is a potential risk constitutes good medical care and is a part of meeting the most basic requirements of informed consent. CMA believes that its expertise on these questions can assist the Court to understand the factual fallacies in the assumption used by the Appellants in enacting the Ordinance that there is no scientific evidence indicating an increased risk of breast cancer following an induced abortion under various circumstances when, in fact, such evidence does exist.

**The Christian Medical & Dental Associations (CMDA)** was founded in 1931 and today represents over 16,000 members. Its membership consists primarily of practicing physicians, including physicians licensed to practice in Maryland, who represent the entire range of medical specialties, including obstetrics and gynecology. Among other functions, the CMDA Medical Ethics Commission coordinates member experts in the field of medical ethics who formulate positions on vital issues. These positions are subsequently voted upon for adoption, amendment, or rejection by approximately 70 elected representatives to CMDA's national convention. CMDA's members have an interest in this case because CMDA generally concurs with the legally required and medically ethical proposition that a woman should be fully informed before electing to induce an

abortion. Such information may properly include the disclosures required by state law and the peer-reviewed articles in medical journals providing scientific support for the increased risks of breast cancer, miscarriage, preterm delivery and mental health problems that may occur under various circumstances following an induced abortion. Since Appellants' enactment of the challenged Ordinance found unconstitutional by the court below is allegedly based, in part, on Appellants' claim that the free, non-commercial transmission of such truthful information by a pregnancy resource center is "misleading" and "deceptive," CMDA has an interest in advising this Court that Appellees are providing information that women have a right to know and with which Appellants simply disagree. For example, while it cannot be stated for certain that abortion causes breast cancer, the scientific literature generally agrees that induced abortion removes the benefit that pregnancy has on lowering a woman's risk of breast cancer. Therefore, as already mandated under some states' laws, CMDA concludes that currently available data provide enough concern that abortion may increase the risk of breast cancer that healthcare professionals have an ethical obligation to make this potential risk known to patients considering abortion.

### **SUMMARY OF ARGUMENT**<sup>3</sup>

---

<sup>3</sup> Amici accept as its statements of the case and facts, the statements set forth in the RESPONSE BRIEF OF APPELLEE AND PRINCIPAL BRIEF OF CROSS-APPELLANTS, filed herein on May 31, 2011[Document 66].

*Amici*, comprising three national groups of medical doctors, including doctors licensed to practice in Maryland and a large number of doctors engaged in obstetrics and gynecology (the field of medical practice implicated in this case), write in response to Appellants' argument that their enactment of the challenged Ordinance in this case, is justified in part by their opinion that it is deceptive and misleading for a non-medical, peer counselor to voluntarily inform women seeking such information about difficulties in subsequent pregnancy, the risks of breast cancer, and the psychological problems that may be associated with induced abortion.

Since the dissemination of such information is ethically warranted, and in some states legally required in whole or in part in support of the truly informed consent that a pregnant woman must give before she elects an induced abortion, *Amici* urge this Court to affirm the district court's decision below acknowledging the Appellees' First Amendment freedoms to provide such information. The fact that there is scientific disagreement and uncertainty about the sources, prevalence, and extent of these risks does not in *Amici's* judgment make the Appellees' disclosures of such risks deceptive or misleading, nor does it require this Court to take sides in assessing the magnitude of these risks in order to adjudicate Appellees' constitutional rights to communicate these risks, which are well-documented in the scientific literature.

## ARGUMENT

In its opening brief, Appellants argue that they enacted the challenged Baltimore City Ordinance 09-252 (“Ordinance”)<sup>4</sup> “responding to *evidence* that some<sup>[5]</sup> limited-service pregnancy centers (“Pregnancy Centers”) in Baltimore and throughout the country are engaging in deceptive practices that mislead consumers and endanger the public health of the City of Baltimore.” *See* Appellants’ Principal Brief (APB) at 19–20 (Document 26). In particular, for their so-called “evidence”, Appellants cite two non-peer reviewed “investigative reports” conducted and published by pro-abortion proponents: the 2006 “minority staff” Waxman Report<sup>6</sup> and the 2008 NARAL Pro-Choice-Maryland Report.<sup>7</sup> Taken together, these reports erroneously claim that pregnancy resource centers are providing “false and misleading” information about “a link between abortion and breast cancer”, the “effect of abortion on future [pregnancy]”, and the “mental health effects of

---

<sup>4</sup> BALT. CITY HEALTH CODE §§ 3-501 to 3-506 (2010) and BALT. CITY CODE ART. I, §§ 40-14, 41-14 (in December 2009. J.A. at 25-28.i)

<sup>5</sup> There is nothing in the record to indicate that Appellees themselves engage in the allegedly false speech discussed in the brief. This brief is not to defend any past or future speech made by Appellees, but to respond to claims made by those who supported the Ordinance to justify its passing.

<sup>6</sup> *See* Minority Staff of HR. Comm. On Government Reform Special Investigations Division, 109th Cong., Report on False and Misleading Health Information Provided by Federally Funded Pregnancy Resource Centers, prepared for Rep. Henry Waxman (2006), available at <http://www.chsourcebook.com/articles/waxman2.pdf> (hereinafter the “Waxman Minority Staff Report”) (JA. 417-30)

<sup>7</sup> A Report by the National Abortion Rights Action League (NARAL) Pro-Choice Maryland Fund, *The Truth Revealed: Maryland Crisis Pregnancy Center Investigation* (prepared by Melissa Kleder and S, Malia Richmond-Crum) (January 14, 2008 (hereinafter the “NARAL Maryland Report”)(JA 326-37)



abortion.” See APB at 8–9. Yet even the “other authorities” cited by Appellants in their own brief concede that many states’ informed consent laws require the disclosure of just such information prior to an abortion.<sup>8</sup>

There are at least five reasons to reject Appellants’ argument that the challenged Ordinance is necessary and justified as a response to the alleged “false and misleading” past speech of pregnancy centers.<sup>9</sup> Recognizing that Appellees’

---

<sup>8</sup> Appellants cite the abortion industry’s Guttmacher Institute publication, *State Policies in Brief: Counseling & Waiting Periods for Abortion* (June 1, 2011). ABP at iii and 21 n.6

<sup>9</sup> As noted by one legal commentator, the first three legal reasons Appellants may not constitutionally regulate pregnancy centers prospective speech based upon Appellants’ difference of opinion with the pregnancy centers past speech pertaining to the adverse health consequences of induced abortion may be summarized, as follows: (1) the government’s different interpretation of conflicting evidence is not proscribable, because “[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-341 (1974); (2) it is well established that the government cannot regulate present and future speech based on past legal speech. See, e.g., *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 310-11 (1980); *Ackerley Communications of Massachusetts, Inc. v. City of Somerville*, 878 F.2d 513, 520-21 (1st Cir. 1989); *Eller Media Co. v. Montgomery County*, 143 Md.App. 562, 601, 795 A.2d 728, 751 (Md. App. 2002) [deeming “well-founded” the claim that the First Amendment prohibits regulation of future speech based on past lawful speech]. Thus, just as the government cannot outlaw discussion of conflicting study results, it is also barred from regulating pregnancy counselors’ speech based on their past discussions of this information; and (3) governments cannot defend pregnancy speech regulations by defining them as “commercial speech.” Although regulations to ensure the accuracy of commercial speech can be permissible in certain circumstances, See, e.g., *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557 (1980), those circumstances do not apply here. As explained by the Court in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, the ability to regulate commercial speech extends only to “expression solely related to the economic interests of the speaker and its audience.” *Id.* at 561. Here, the pregnancy centers have no economic interests at all—they are non-profit centers that do not charge for their services. Moreover, the primary argument against these centers is that they have a political, social, and/or religious agenda to dissuade women from seeking abortion—in other words, the exact opposite of the “solely economic” speech to which the commercial speech analysis applies. Nor can the government deem the centers’ speech commercial simply because it is speech about a commercial enterprise, namely abortions provided for money. The Supreme Court expressly rejected this argument. See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-62 (1976) (“[T]he speech whose content deprives it

Response Brief more than adequately addressed the first three legal reasons, *Amici* focus their argument on the remaining *factual* reasons that (1) many state “informed consent” laws mandate or recommend that before an abortion women be told the risks of breast cancer, difficulties in future pregnancy, and post abortion psychological problems involved with induced abortion; and (2) peer-reviewed articles in medical journals provide scientific support for the three chief alleged “lies” told by the pregnancy centers—that abortion can cause subsequent pregnancy problems, that there is an association between abortion and breast cancer, and that abortion is linked to subsequent mental health problems. In short, *Amici* respectfully submit that what the Waxman and NARAL Reports falsely claim to be “lies” are ultimately different conclusions drawn from conflicting or incomplete scientific evidence.

**I. STATE INFORMED CONSENT LAWS MANDATE OR RECOMMEND THAT BEFORE AN ABORTION WOMEN BE TOLD ABOUT THE RISKS OF BREAST CANCER, DIFFICULTIES IN FUTURE PREGNANCY AND POST-ABORTION PSYCHOLOGICAL PROBLEMS POTENTIALLY INVOLVED WITH INDUCED ABORTION**

---

of protection cannot simply be speech on a commercial subject. No one would contend that our pharmacist may be prevented from being heard on the subject of whether, in general, pharmaceutical process should be regulated or their advertisement forbidden.”). Thus, for example, while the sale of cigarettes is undoubtedly a commercial enterprise and can be regulated as such, an anti-smoking campaign would not be. *Id*; see generally Mark L. Rienzi, “The History and Constitutionality of Maryland’s Pregnancy Speech Regulations,” 26 J. CONTEMP. HEALTH L. & POL’Y 223, 242-44 (2010) (hereafter “Rienzi”).

The unborn child is not the only casualty of abortion. Studies reveal that women can suffer physically, emotionally and psychologically following an abortion. Even the U.S. Supreme Court has recognized that severe depression and lack of esteem may follow. *Gonzalez v. Carhart*, 550 U.S. 124, 127 (2007). Thus, following *Roe v. Wade*, 410 U.S. 113 (1973), states began enacting informed consent laws, aiming to reduce “the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.” *Planned Parenthood v. Casey*, 505 U.S. 833, 882 (1992).<sup>10</sup> The Court has generally affirmed the constitutionality of these laws. *Gonzalez*, 550 U.S. at 127, *Casey*, 505 U.S. at 882. From a medical ethics perspective, “informed consent is a bioethical tool used in medical practice to protect an individual’s autonomy as he or she makes a healthcare decision.

---

<sup>10</sup> As stated in *Casey*, “[s]tates are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning”. *Id.* at 873. In response to the argument propounded by the abortion industry that women already have access to all the information they need about abortion, researchers have found 83% of women who seek abortion counseling have no prior knowledge about abortion procedure or fetal development. See generally, D. Reardon, *Aborted Women* 16-17, 101, 335 (1987). Based upon the common sense proposition that access to information is not the same as actually receiving information, most states have enacted “women’s right to know” laws reasoning that a woman’s health and her legal and ethical right to be fully informed prior to an abortion should not be jeopardized by merely “presuming” what a pregnant woman does or does not know. For a view of the different perspectives brought to fully informing women about the risks involved in induced abortion to compare Americans United for Life, *DEFENDING LIFE 2010: Informed Consent Laws: Protecting a Woman’s Right to Know*, at 75,79 (2010)( online at <http://www.aul.org/2011/03/the-defending-life-report/>) with Guttmacher Institute, *STATE POLICIES IN BRIEF: Counseling and Waiting Periods for Abortion* (June 1, 2011) (online at [http://www.guttmacher.org/statecenter/spibs/spib\\_MWPA.pdf](http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf)).

Clinicians are obliged by law to inform patients prior to a medical decision of the benefits and risks of the treatment being pondered.”<sup>11</sup>

Due to the serious nature of the possible consequences of induced abortion, many states have identified specific risks and consequences that must be disclosed to a patient before an abortion. These states’ legislatures believe that a woman is not fully informed and thus cannot legally consent to an abortion without knowledge of these risks. Some of these states additionally mandate that materials with this information be published in print and/or online.

A review of these state informed consent laws reveals that the dissemination of the sorts of information Appellants claim to be deceptive and misleading is often mandated or recommended. Nineteen states mandate that women be informed of the possible psychological consequences of having an abortion.<sup>12</sup> Twelve states

---

<sup>11</sup> J.Thorp, K.Hartmann, E.Shadigan, “The Long-Term Physical and Psychological Health Consequences of Induced Abortion: A Review of the Evidence,” LINACRE QUARTERLY ( F e b r u a r y 2 0 0 5 ) ( o n l i n e a t <http://lq.cathmed.metapress.com/content/h14j7850j1033p83/fulltext.pdf>.) (hereafter “Thorp, Hartmann et al.”) at 54.

<sup>12</sup> Alaska, Arkansas, Georgia, Kansas, Louisiana, Michigan, Minnesota, Missouri, Nebraska, Nevada, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Virginia, West Virginia, and Wisconsin all require disclosure of negative psychological problems as a risk of induced abortion for legal informed consent. See 12 ALASKA ADMIN. CODE 40.070 (2010); ALASKA STAT. §§ 18.16.010, 18.16.060 (2010); Alaska Health and Social Services, MAKING A D E C I S I O N A B O U T Y O U R P R E G N A N C Y a t <http://www.hss.state.ak.us/DPH/WCFH/INFORMEDCONSENT/ABORTION>; A.C.A. §§ 20-16-901 through 20-16-908 (2010); O.C.G.A. §§ 31-9A-1 through 31-9a-8 (2010); K.S.A. §§ 65-6704, 65-6708 through 65-6715 (2010); Kan. Dep’t of health and env’t, IF YOU ARE PREGNANT at [http://www.womansrighttoknow.org/download/WRTK\\_Handbook\\_7483\\_English.pdf](http://www.womansrighttoknow.org/download/WRTK_Handbook_7483_English.pdf); LA. R.S. § 40:1299.35.6 (2010); LA. DEP’T OF HEALTH AND HOSPITALS, ABORTION MAKING A DECISION AT

mandate warnings regarding the possible negative effects an abortion could have on future pregnancies.<sup>13</sup> Alaska<sup>14</sup>, Minnesota<sup>15</sup>, Mississippi<sup>16</sup>, Texas<sup>17</sup>, and West

---

[http://new.dhh.louisiana.gov/assets/oph/AbortionMakingaDecision\\_2011.pdf](http://new.dhh.louisiana.gov/assets/oph/AbortionMakingaDecision_2011.pdf); MCLS §§ 333.17014, 333.17015 (2010); MINN. STAT. §§ 145.4241 THROUGH 145.4244 (2010); MINN. STAT. ANN. §§ 145.412(4); Minn. Dep't of Health Div. of Cmty. & Family Health, IF YOU ARE PREGNANT: INFORMATION ON FETAL DEVELOPMENT, ABORTION AND ALTERNATIVES at <http://www.health.state.mn.us/wrtk/handbook.html>; R.S.MO. § 188.039 (2010); NEB. REV. STAT. §§ 28-325 through 28-327, 28-327.01 through 28-327.05 (2010); NEV. REV. STAT. ANN. §§ 442.252, 442.253 (2010); 63 OKL. ST. § 1-738.1 through 1-738.5 (2010); PA. CONS. STAT. 18 §§ 3205, 3208 (2010); S.C. CODE ANN. §§ 44-41-310 through 44-41-380 (2010); S.C. Dep't of Health and Env'tl. Control, INFORMATION OUTLINED IN THE S.C. WOMEN'S RIGHT TO KNOW ACT at <http://www.scdhec.gov/health/mch/wcs/risks-of-abortion.htm>; S.D. CODIFIED LAWS §§ 34-23A-10.1 through 34-23A-10.3, 34-23A-22 (2010); TEX. HEALTH & SAFETY CODE § 171.011 THROUGH 171.018 (2010); Tex. Dep't of State Health Services, WOMAN'S RIGHT TO KNOW at <http://www.dshs.state.tx.us/wrtk/default.shtm>; UTAH CODE ANN. §§ 76-7-305, 76-7-305.5 (2010); VA. CODE ANN. § 18.2-76 (2010); W. VA. CODE § 16-2I-1 through 16-2I-4 (2010); W. Va. Dep't of Health & Human Res., INFORMATION ON FETAL DEVELOPMENT, ABORTION, AND ADOPTION 10-11 (2003), at <http://www.wvdhhr.org/wrtk/wrtkbooklet.pdf>; W. Va. Dep't of Health & Human Res., ABORTION METHODS & MEDICAL RISKS at [Http://www.wvdhhr.org/wrtk/abortioninformation.asp](http://www.wvdhhr.org/wrtk/abortioninformation.asp); and WIS. STAT. ANN. § 253.10 (2010).

<sup>13</sup> Alaska, Delaware, Kansas, Louisiana, Minnesota, Mississippi, Nebraska, North Dakota, South Dakota, Texas, West Virginia, and Wisconsin all require disclosure of the possible risks an induced abortion may have regarding the patient's future pregnancies for legal informed consent. See 12 ALASKA ADMIN. CODE 40.070 (2010); ALASKA STAT. §§ 18.16.010, 18.16.060 (2010); ALASKA HEALTH AND SOCIAL SERVICES, MAKING A DECISION ABOUT YOUR PREGNANCY at <http://www.hss.state.ak.us/DPH/WCFH/INFORMEDCONSENT/ABORTION>; 24 DEL. C. § 1794 (2010); K.S.A. §§ 65-6704, 65-6708 through 65-6715 (2010); Kan. Dep't of health and env't, IF YOU ARE PREGNANT at [http://www.womansrighttoknow.org/download/WRTK\\_Handbook\\_7483\\_English.pdf](http://www.womansrighttoknow.org/download/WRTK_Handbook_7483_English.pdf); LA. R.S. § 40:1299.35.6 (2010); La. Dep't of Health and Hospitals, ABORTION MAKING A DECISION at [http://new.dhh.louisiana.gov/assets/oph/AbortionMakingaDecision\\_2011.pdf](http://new.dhh.louisiana.gov/assets/oph/AbortionMakingaDecision_2011.pdf); MINN. STAT. §§ 145.4241 THROUGH 145.4244 (2010); MINN. STAT. ANN. §§ 145.412(4); Minn. Dep't of Health Div. of Cmty. & Family Health, IF YOU ARE PREGNANT: INFORMATION ON FETAL DEVELOPMENT, ABORTION AND ALTERNATIVES at <http://www.health.state.mn.us/wrtk/handbook.html>; MISS. CODE ANN. §§ 41-41-33, 41-41-35 (2010); NEB. REV. STAT. §§ 28-325 through 28-327, 28-327.01 through 28-327.05 (2010); NEV. REV. STAT. ANN. §§ 442.252, 442.253 (2010); N.D. CENT. CODE §§ 14-02.1-01, 14-02.1-02.2, 14-02.1-03, 14-02.1-03.2 and 14-02.1-03.3 (2010); S.D. CODIFIED LAWS §§ 34-23A-10.1 through 34-23A-10.3, 34-23A-22 (2010); TEX. HEALTH & SAFETY CODE § 171.011 through 171.018 (2010); Tex. Dep't of State Health Services, WOMAN'S RIGHT TO KNOW at <http://www.dshs.state.tx.us/wrtk/default.shtm>; W. VA. CODE § 16-2I-1

Virginia<sup>18</sup> all require disclosure of a possible link between abortion and breast cancer.

The fact that the legislatures of several states have passed statutes requiring that women be informed of the risks of induced abortion, including possible psychological effects, effects on future pregnancies, and breast cancer, is evidence of the legitimacy of these risks. In these states, it is legally and ethically necessary for a doctor to inform a woman of these risks before she is able to consent to an induced abortion.

Given the laws of the several states mandating the disclosure of the very information that the NARAL Maryland and Waxman Minority Staff Reports allege to be “false and misleading”, *Amici* submit this Court may properly discount

---

THROUGH 16-2I-4 (2010); W. Va. Dep’t of Health & Human Res., INFORMATION ON FETAL DEVELOPMENT, ABORTION, AND ADOPTION 10-11 (2003), at <http://www.wvdhhr.org/wrtk/wrtkbooklet.pdf>; W. Va. Dep’t of Health & Human Res., ABORTION METHODS & MEDICAL RISKS at <HTTP://WWW.WVDHHR.ORG/WRTK/ABORTIONINFORMATION.ASP>; and WIS. STAT. ANN. § 253.10 (2010).

<sup>14</sup>See 12 ALASKA ADMIN. CODE 40.070 (2010); ALASKA STAT. §§ 18.16.010, 18.16.060 (2010); and Alaska Health and Social Services, MAKING A DECISION ABOUT YOUR PREGNANCY at <http://www.hss.state.ak.us/DPH/WCFH/INFORMEDCONSENT/ABORTION>.

<sup>15</sup> See MINN. STAT. §§ 145.4241 through 145.4244 (2010); MINN. STAT. ANN. §§ 145.412(4); and Minn. Dep’t of Health Div. of Cmty. & Family Health, IF YOU ARE PREGNANT: INFORMATION ON FETAL DEVELOPMENT, ABORTION AND ALTERNATIVES at <http://www.health.state.mn.us/wrtk/handbook.html>.

<sup>16</sup> See MISS. CODE ANN. §§ 41-41-33, 41-41-35 (2010).

<sup>17</sup>See TEX. HEALTH & SAFETY CODE § 171.011 THROUGH 171.018 (2010) and Tex. Dep’t of st. health services, WOMAN'S RIGHT TO KNOW at <http://www.dshs.state.tx.us/wrtk/default.shtm>.

<sup>18</sup> See W. VA. CODE § 16-2I-1 through 16-2I-4 (2010); W. Va. Dep’t of Health & Human Res., INFORMATION ON FETAL DEVELOPMENT, ABORTION, AND ADOPTION 10-11 (2003), at <http://www.wvdhhr.org/wrtk/wrtkbooklet.pdf>; and W. Va. Dep’t of Health & Human Res., ABORTION METHODS & MEDICAL RISKS at <Http://www.wvdhhr.org/wrtk/abortioninformation.asp>.

Appellants' reliance on these reports in support of its enactment of the challenged Ordinance. Baltimore cannot regulate as "lies" what other states assert as fact.

**II. IT IS MEDICALLY ADVISABLE TO FULLY INFORM WOMEN ABOUT WHAT IS KNOWN ABOUT THE RISKS OF BREAST CANCER, DIFFICULTIES IN FUTURE PREGNANCY AND POST-ABORTION PSYCHOLOGICAL PROBLEMS POTENTIALLY INVOLVED WITH INDUCED ABORTION**

Like the study of cigarette smoking and its health consequences in the 1950s and 60s, the long term health effects of induced abortion are admittedly difficult to study and are not yet completely understood. As Thorp, Hartmann et al. has noted when comparing the difficulties of studying the adverse health consequences of each:

While no individual clinician or patient could discern the harms of cigarette smoking and all studies had to be observational with their inherent biases, well-done epidemiologic research was able to document adverse consequences and ultimately inform public opinion and policy. Elective abortion must be studied in the same fashion with similar vigor, given the frequency with which women choose to terminate a pregnancy and the important and prevalent health conditions that some of the data gathered heretofore have linked to elective abortion, e.g., preterm birth and breast cancer. Women deserve to be fully and accurately informed about potential health effects of elective abortion, preferably in a health education context separate and distinct from the timeframe of actually being faced with making difficult decisions about whether to continue or end a pregnancy.<sup>19</sup>

Even more significantly, after reviewing more than 110 scientific reports and studies pertaining to the possible adverse long-term health effects of induced

---

<sup>19</sup> Thorp, Hartmann et al., supra note 11, at 52. This same study found less "evidence to support the claims that elective abortions increase the risk of subsequent sub-fertility, ectopic pregnancy, and spontaneous abortion."

abortion, these same researchers, well qualified to perform such epidemiological studies, found “the possibilities of links to preterm birth, placenta previa, breast carcinoma and serious mental health problems.” *Id.*

**A. Risks of Difficulties in Subsequent Pregnancy are Linked to Induced Abortion**

The two most important difficulties in subsequent pregnancy linked to induced abortion are preterm birth and placenta previa.

**1. Preterm Birth**

Abortion is a procedure most used by women at the outset of their reproductive life. The majority of women having an induced abortion are under 30 years old.<sup>20</sup> Preterm birth is common, affecting around 10% of deliveries in the western world, and is the leading cause of infant morbidity and mortality.<sup>21</sup> Despite substantial investigative effort, primary preventive measures to lower the rate of preterm births have proven futile, and rates have been steady or increased over the past two decades.<sup>22</sup> The population-based studies Thorpe, Hartmann & Shadigan reviewed caused them to report that “induced abortion increases the risk of preterm birth in subsequent pregnancies... [and] the increased risk of early childbirth

---

<sup>20</sup> L. Henriët, M. Kaminski, “Impact of Induced Abortions on Subsequent Pregnancy Outcome: The 1995 French National Perinatal Survey,” *BRIT. J. OBSTET. & GYNAECOL.*, 2001, Vol. 108: 1036-1042.

<sup>21</sup> N.D. Berkman, J.M. Thorp, K.E. Hartmann et al, “Management of Preterm Labor: Evidence Report/Technology Assessment No. 18 (prepared by Research Triangle Institute under Contract No. 290-97-0011).” AHRQ Publication No 01-E021. Rockville (MD) Agency for Healthcare Research and Quality, December 2000.

<sup>22</sup> *Id.*



associated with induced abortion occurs over and above the background risk of preterm birth (estimated to be 10%) inherent with any pregnancy.”<sup>23</sup> In light of these data, Thorpe, Hartmann et al. recommend “that women in general, including those considering abortion, need to be informed that surgical abortion procedures may increase the likelihood of subsequent preterm births and that the risk associated with the other methods is unknown. For those women who choose abortion, techniques that in theory protect the cervix from trauma, such as laminaria or pre-abortion cervical ripening, should be utilized.” *Id.*

## 2. Placenta Previa

Placenta previa affects 0.3 – 0.8% of pregnancies and is a leading cause of uterine bleeding in the third trimester and of medically indicated preterm birth. Pregnancies complicated by placenta previa result in high rates of preterm birth, low birth weight, and perinatal death.<sup>24</sup> According to Thorp, Hartmann et al., both “their observational studies and Ananth et al’s meta-analysis show a link between placenta previa and previous induced abortion.”<sup>25</sup> Placenta previa is rare enough and the impact of this change is so small that Thorp, Hartmann et al. “would not feel obliged to mention this to women contemplating their first abortion, [but their] advice might change if a woman had had a previous cesarean section, an

---

<sup>23</sup> Thorpe, Hartmann et al., *supra* note 11, at 52.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 53, citing C. Ananth, J. Smulian, A. Vintzileos, “*The Association of Placenta Previa with History of Cesarean Delivery and Abortion: A Meta-Analysis*,” *Am J Obstet Gynecol*, 1997, Vol. 177 (5): 1071-1078 (hereafter “Ananth et al.”)

independent risk factor for placenta previa; or if she were contemplating undergoing a second elective pregnancy termination.” *Id.* In other venues, like pregnancy resource centers, Thorp, Hartmann et al. suggest that “information about the existence and magnitude of risk may be appropriate for health education summaries of the reproductive correlates of elective abortion.” *Id.*

### **B. Breast Carcinoma is Linked to Induced Abortion**

*Amici* submit there is adequate evidence in the medical literature to indicate for informed consent purposes that induced abortion is associated with an increase in subsequent breast cancer. Reviewing the literature, *Amici* note there are two pregnancy related independent risk factors for breast cancer established in the medical literature. The first is the protective effect of an early first full term pregnancy. The landmark study establishing this protective effect (MacMahon, *et al.*, (1970) Bull. World Health Org. 43:209-221) is widely accepted in the medical world. Obviously, aborting a first pregnancy eliminates the protective effect against breast cancer for that woman, raising her individual risk for the subsequent development of breast cancer (loss of protection equals an increased risk for that person). To *Amici*’s knowledge, no article has seriously disputed this “protective effect vs. loss of protective effect.”

The second independent risk factor for breast cancer is induced abortion. As of 2009, at least 41 studies had been published in the worldwide medical literature

(including 16 American studies) reporting data on the risk of breast cancer among women with a history of induced abortion. Twentynine (70%) of these studies report increased risk. Thirteen of the 16 (81%) American studies report increased risk, 8 with statistical significance (at least 95% probability that the result is not due to chance) irrespective of age at first full-term pregnancy. The relative risk increase of the 41 studies combined is 30%.<sup>26</sup> As evidence that the potential breast cancer concern is a valid scientific question, *Amici* particularly note the following three studies all of which find an increased risk of breast cancer associated with induced abortion:

1. THE DALING STUDY: (Janet R. Daling, Kathleen E. Malone, Lynda F. Voigt, Emily White, Noel S. Weiss, (1994) JNCI 86:1584-921 ). The Daling study was specifically funded by the United States National Cancer Institute to investigate the abortion/breast cancer link.
2. THE HOWE STUDY: (Howe et al(1989) Early Abortion and Breast Cancer Risk Among Women Under Age 40; Int J Epidemiol 18:300-4.) This is the only study yet published on American women which relied solely on data from medical records entered at the time of the abortion (a prospective data base immune from potentially inaccurate interview material).
3. THE DOLLE STUDY: (Dolle, et al, (2009) Risk Factors for Triple-Negative Breast Cancer in Women Under the Age of 45 Years; Cancer Epidemiol Biomarkers Prev 2009;18(4). April 2009 The authors acknowledge both an association between induced abortion and subsequent

---

<sup>26</sup> For a citation to “those studies that show a statistically significant link between abortion and breast cancer” see A. Lanfranchi, “Normal Breast Physiology: The Reasons Hormonal Contraceptives and Induced Abortion Increased Breast-Cancer Risk,” LINACRE QUARTERLY (August 2009) 239, 246 n.1 (online at <http://lq.cathmed.metapress.com/content/56105r12215p60v2/fulltext.pdf>).

breast cancer, and that this is in line with findings of previous studies.

*Amici* acknowledge that medical literature also exists finding no association of induced abortion with an increased risk of subsequently developing breast cancer. Neither side of the question can be proven conclusively. Breast cancer risk is a matter of huge concern for women. In *Amici*'s view, adequate informed consent for the patient contemplating having an induced abortion requires that the patient be informed of the medical literature on both sides of the issue.

While concurring that “none of the reviewers seems to be comfortable with the scope and content of the current literature,” Thorp, Harttman et al. also support *Amici*'s conclusion (emphasis underscored):

Summarizing four review articles, one of which conducted a meta-analysis Two of the four reviewers found no association between induced abortion and breast cancer, while one found a “small to non-significant effect.” The sole meta-analysis by Brind et al. reported a summary odds ratio for breast cancer of 1.3 (95% CI 1.2, 1.4) in patients with a previous induced abortion. They concluded that induced abortion is an independent risk factor for breast carcinoma. ... Brind et al. have clearly demonstrated the need for such studies by showing that, despite the relatively low increase in risk they discovered, the high incidence of both breast cancer and induced abortion would ensure a substantial impact on women's health if their conclusions are correct. Weed and Kramer have thoughtfully considered the ways in which the conclusions one draws on this “thorny” issue are influenced by the moral values each reviewer brings to these complex data. Nonetheless, a statistically significant positive association between induced abortion and breast cancer cannot be easily dismissed, as Brind's is the only quantitative review.... Findings are mixed with reviewers and authors of original manuscripts drawing different conclusions. The one meta-analysis done to date points to a small but significant link between abortion and breast carcinoma. The current literature is insufficient to be informative for counseling. Nonetheless, the topic is worthy of well-designed and conducted

research and of careful meta-analyses using the hand search techniques employed by Ananth et al to explore sources of published data not focused on the direct link between abortion and breast cancer. In the interim should we, and how do we, inform the patients? We would argue that given the undisputed protective effect of a full-term delivery early in one's reproductive life on subsequent breast cancer development that a young woman facing an unwanted or crisis pregnancy can and should be informed of the loss of that protection which would derive from a decision to terminate her pregnancy and delay having a baby.<sup>27</sup>

### C. Serious Mental Health Problems are Linked to Induced Abortion

*Amici* agree that the effects of elective abortion on mental health are challenging to interpret for the reasons outlined by Thorp, Hartman et al. *supra* note 11 at 50–51. Nonetheless, large cohort studies linking abortion to the “hard” outcomes of either suicide, psychiatric admission, or deliberate self-harm exist and are concerning.<sup>28</sup> Consequently, Thorp, Hartman et al., following a review of

---

<sup>27</sup> Thorp, Hartmann et al., *supra* note 11, at 53-55, citing Ananth et al.; L. Bartholomew, D. Grimes, “The Alleged Association Between Induced Abortion and Risk of Breast Cancer: Biology or Bias?,” *OBSTET. & GYNECOL. SURV.*, 1998, Vol. 53 (11) 708-714.; J. Brind, V. Chinchilli, W. Severs, J. Summy-Long, “Induced Abortion as an Independent Risk Factor for Breast Cancer: A Comprehensive Review and Meta-Analysis,” *J. EPIDEMIOLOGY COMMUNITY HEALTH*, 1996, 50: 481-496; K. Michels, W. Willet, “Does Induced or Spontaneous Abortion Affect the Risk of Breast Cancer?,” *EPIDEMIOLOGY*, 1996, Vol. 7 (5) 521-528.85. D. Weed, B. Kramer, “Induced Abortion, Bias, and Breast Cancer: Why Epidemiology Hasn’t Reached Its Limit,” *J. NAT’L CANCER INST.*, 1996, Vol. 88 (23):1698-1700; W. Chie, C. Hsieh, P. Newcomb, M. Longnecker, R. Mittendorf, E. Greenberg, R. Clapp, K. Burke, L. Titus-Ernstoff, A. Trentham-Dietz, B. MacMahon, “Age at Any Full-Term Pregnancy and Breast Cancer Risk,” *AM. J. EPIDEMIOL.*, 2000, 151(7): 715-;22; 101. M. McMahon, B. Cole, T. Lin et al., “Age at First Birth and Breast cancer Risk,” *BULL. WORLD HEALTH ORG.*, 1970, 43: 209-21.

<sup>28</sup> M. Gissler, E. Hemminki, J. Lonnqvist, “Suicides After Pregnancy in Finland, 1987-94: Register Linkage Study,” *BRIT. MED. J.*, 1996, 313: 1431-1434; C. Morgan, M. Evans, J. Peters, C. Currie, “Suicides After Pregnancy,” (Letter) *BRIT. MED. J.*, 1997, 314-902; A. Gilchrist, P. Hannaford, P. Frank, C. Kay, “Termination of Pregnancy and Psychiatric Morbidity,” *BRIT. J. PSYCHIATRY*, 1995, 167: 243-248; *see also* SOUTH DAKOTA TASK FORCE TO STUDY ABORTION, submitted to the Governor and State Legislature (December 2005) (online at

these studies, conclude that the “observation of the association, regardless of the lack of causal linkage, suggests careful screening and follow-up for depression and anticipatory guidance/precautions for women who choose elective abortion.” *Id.* at 51. Thorp, Hartmann et al. bolster their conclusion with the following reflection upon the importance and purpose of informed consent prior to an induced abortion:

Informed consent is a bioethical tool used in medical practice to protect an individual’s autonomy as he or she makes a health care decision. Clinicians are obliged by law to inform patients prior to a medical decision of the benefits and risks of the treatment being pondered. The goal is not to confuse a patient nor direct her decision-making but to provide patients with the information that a reasonable person would want to know....we think abortion decision-making should include the protection of informed consent and women who wish to know the long-term physical and mental consequences of their decision should be informed.

*Id.* at 54–55.

---

<http://www.dakotavoices.com/Docs/South%20Dakota%20Abortion%20Task%20Force%20Report.pdf>) concluding:

The results of the four largest record based studies in the world have consistently revealed that women with a known history of abortion experience higher rates of mental health problems of various forms when compared to women without a known abortion history. (Coleman et al., 2002a; David et al., 1981; Ostbye et al., 2001; Reardon et al., 2003.) The two studies conducted in the U.S. (Coleman et al., 2002a; Reardon et al., 2003) used data from over 54,000 low-income women on state medical assistance in California. Women who had an abortion in 1989 with possible subsequent pregnancies had significantly higher rates of outpatient psychiatric diagnoses than women who gave birth. This difference was apparent when data for the full time period were examined (17% higher) and when only data from women with claims filed on their behalf within 90 days (63% higher), 180 days (42% higher), 1 year (30% higher), and 2 years (16% higher) of the pregnancy event were considered. Data using the same sample and focusing on inpatient claims revealed similar findings.

**CONCLUSION**

For each of the foregoing reasons, *Amici* respectfully submit that there is no reason in the medical literature or existing law for this Court to second-guess the correct decision of the court below that the First Amendment protects the right of pregnancy centers, through their peer-counselors free of charge, to fully inform women who voluntarily come to see them about the risks of difficulties in subsequent pregnancy, breast cancer, and the psychological problems that may be associated with induced abortion. The fact that Appellants disagree with this information, well-documented in the medical literature, does not make it false and deceptive, especially when various states so strongly hold the opposite view that they mandate the require as part of informed consent prior to an abortion. The decision of the district court ought to be affirmed.



Dated: June 7, 2011

*OF COUNSEL:*

MATTHEW S. BOWMAN,  
ALLIANCE DEFENSE FUND  
801 G. Street, N.W.,  
Suite 509  
Washington, DC. 20001  
Telephone: 202-393-8690  
Facsimile: 202-347-3622

/s/ \_\_\_\_\_  
SAMUEL B. CASEY,  
CAL BAR. NO. 76022  
*Counsel of Record*  
DAVID B. WAXMAN,  
TX BAR NO. 24070817  
JUBILEE CAMPAIGN-  
LAW OF LIFE PROJECT  
801 G. Street, N.W., Suite 521  
Washington, DC. 20001  
Telephone: 202-587-5652  
Facsimile: 703-349-7323  
*Attorneys for Amici Curiae*

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief contains 6,584 (no more than 7000) words, excluding the portions of the brief exempted by Federal Rule Appellate Procedure 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2001 in Times New Roman, 14 point font.



/s/

Samuel B. Casey  
One of Counsel for *Amici Curiae*



**CERTIFICATE OF SERVICE**

I hereby certify that, in addition to mailing eight (8) hard-copies copies to the Clerk of the Court pursuant to Local Rule 31(d), I caused the foregoing BRIEF *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE AND IN SUPPORT OF AFFIRMANCE to be served on counsel for Appellants and counsel for Appellee, listed below, via Electronic Mail generated by the Court's electronic filing system (CM/ECF) with a Notice of Docket Activity pursuant to Local Rule 25:



Suzanne Sangree  
Chief Solicitor  
City of Baltimore  
Law Department  
City Hall  
100 North Holliday Street, Room 109  
Baltimore, MD 21202  
(410) 396-3249

Stephanie Toti  
Dipti Singh  
Special Assistant City Solicitors  
Center for Reproductive Rights  
120 Wall Street, 14th Floor  
New York, NY 10005  
(917) 637-3600  
Attorneys for Defendants-Appellants

David W. Kinkopf  
Stephen G. Metzger  
Gallagher, Evelius & Jones, LLP  
218 N Charles Street # 400  
Baltimore, MD 21201-4033  
(410) 727-7702

Peter J. Basile  
Ferguson, Shetelich & Ballew, PA  
100 South Charles Street  
Baltimore, MD 21201  
(410) 837-2200  
Attorneys for Plaintiff-Appellee

Mark L. Rienzi  
Columbus School of Law  
Catholic University of America  
3600 John McCormack Rd NE  
Washington, D.C. 20064  
(202) 319-5140

I further certify that an electronic copy of the foregoing MOTION OF THE AMERICAN ASSOCIATION OF PROLIFE OBSTETRICIANS AND GYNECOLOGISTS ET AL. FOR LEAVE TO FILE BRIEF *AMICI CURIAE*, along with accompanying *amicus curiae* brief, was uploaded to the Court's electronic filing system:

CLERK OF COURT  
UNITED STATES COURT OF APPEALS, FOURTH CIRCUIT

on this 7th day of June 2011.

/s/ David B. Waxman  
David B. Waxman