

Case No. 12-50377

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PLANNED PARENTHOOD OF AUSTIN FAMILY PLANNING, INC., PLANNED PARENTHOOD ASSOCIATION OF HIDALGO COUNTY TEXAS, INC., PLANNED PARENTHOOD ASSOCIATION OF LUBBOCK, INC., PLANNED PARENTHOOD OF CAMERON AND WILLACY COUNTIES, FAMILY PLANNING ASSOCIATES OF SAN ANTONIO, PLANNED PARENTHOOD OF CENTRAL TEXAS, PLANNED PARENTHOOD GULF COAST, INC., PLANNED PARENTHOOD OF NORTH TEXAS INC., AND PLANNED PARENTHOOD OF WEST TEXAS, INC.,

Plaintiffs-Appellees

v.

THOMAS M. SUEHS, EXECUTIVE COMMISSIONER, TEXAS HEALTH AND HUMAN SERVICES COMMISSION, IN HIS OFFICIAL CAPACITY,

Defendant-Appellant.

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

BRIEF AMICI CURIAE OF THE AMERICAN CENTER FOR LAW AND JUSTICE, THE HOUSTON COALITION FOR LIFE, AND THE COMMITTEE TO STOP TAXPAYER FUNDING OF ABORTION, SUPPORTING DEFENDANT-APPELLANT AND REVERSAL

LAURA HERNANDEZ*

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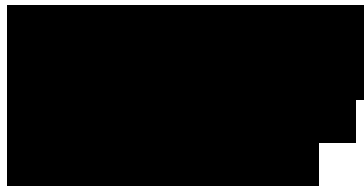


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CERTIFICATE OF INTERESTED PERSONS

Case No.: 12-50377

Short Caption: Planned Parenthood of Austin Family Planning, Inc., *et al.* v. Thomas M. Suehs, Executive Commissioner, Texas Health and Human Services Commission

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

American Center for Law and Justice, Amicus

CeCe Heil, Counsel for Amicus

Jay Alan Sekulow, Counsel for Amicus

Laura Hernandez, Counsel for Amicus

Stuart J. Roth, Counsel for Amicus

The Committee to Stop Taxpayer Funding of Abortion, Amicus

The Houston Coalition for Life, Amicus

In addition, the American Center for Law and Justice and the Houston Coalition for Life issue no stock.

/s/ Jay Alan Sekulow
Counsel for Amici

Date: May 18, 2012

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INTEREST OF AMICI¹

Amicus, the American Center for Law and Justice (ACLJ), is an organization dedicated to the defense of constitutional liberties secured by law and the sanctity of human life. ACLJ attorneys have argued before the Supreme Court of the United States concerning various constitutional issues. *See, e.g., Pleasant Grove v. Sumnum*, 555 U.S. 460 (2009); *McConnell v. FEC*, 540 U.S. 93 (2003); *Schenck v. Pro-Choice Network*, 519 U.S. 357 (1997); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993). The ACLJ has also participated as an *amicus* in a number of significant cases involving both free speech and abortion.

Amicus, the Houston Coalition for Life (HCL), owns and operates a mobile Crisis Pregnancy Center which provides free sonogram services to expectant mothers. The HCL organizes Stand & Pray events outside abortion facilities in Houston, Texas.

Amicus, the Committee to Stop Taxpayer Funding of Abortion, consists of over 39,000 Americans who support the authority of federal, state, and local

¹ Defendants-Appellants consented to the filing of this amicus brief but Plaintiffs-Appellees declined to consent. Amici therefore are moving for leave to submit this brief. No party's counsel in this case authored this brief in whole or in part. No party or party's counsel contributed any money intended to fund preparing or submitting this brief. No person, other than amici, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief.

governments to prevent the direct or indirect subsidizing of abortion through public funds.

Amici are concerned about the proper resolution of this case because they oppose any taxpayer subsidy to Planned Parenthood. Amici believe that the state has authority to exclude from the Women's Health Program participants who are openly and conspicuously linked with abortion rights advocacy and who therefore undermine the state's message promoting childbirth and disfavoring abortion.

SUMMARY OF ARGUMENT

Under the United States Supreme Court's government speech cases, including most recently *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), the Texas Health and Human Services Commission enjoys speaker autonomy to promote a message favoring childbirth over abortion, and to select speakers who are best suited to deliver health services in a manner consistent with that message. That same speaker autonomy permits the Commission to exclude from participation in the program grantees who risk garbling or distorting the Commission's message. The Plaintiffs here link the Women's Health Program in a conspicuous way to one of the nation's most prominent abortion rights advocates, and thereby undermine the Commission's intended message. Because Plaintiffs' identity and mission as Planned Parenthood affiliates are antithetical to the

Commission's pro-life message, the Commission's autonomy over its message includes the authority to exclude Plaintiffs from participation.

ARGUMENT

Although this case comes before this Court as an unconstitutional conditions case, it is more properly understood as a government speech case in which the government's right to select messengers to promote its message is at stake. *Pleasant Grove City*, 555 U.S. at 467. The First Amendment permits Texas to define the purpose and limits of the Women's Health Program and exclude Plaintiffs, who are so publicly identified with abortion advocacy that their participation in the program undermines the state's message promoting childbirth.

I. The Government Speech Doctrine Encompasses Speaker Autonomy To Select Speakers Who Best Promote The Government's Message And To Exclude Speakers Whose Identity And Mission Undermine That Message.

Rust v. Sullivan, 500 U.S. 173 (1991),² along with subsequent government subsidy cases established early guidelines for the government speech doctrine which is ultimately dispositive in this case. The *Rust* Court observed that "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." 500 U.S. at 194; *see also United States v. Am.*

² The Supreme Court has repeatedly highlighted the government speech component of *Rust*. *See, e.g., Bd. of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229, 235 (2000); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 546-48 (2001).

Library Ass’n, 539 U.S. 194, 203 (2003) (plurality opinion) (“Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives.”); *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1998) (“So long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities.”).

Included within the government’s right to “say what it wishes,” *Rosenberger v. Rector of Univ. of Virginia*, 515 U.S. 819, 833 (1995), and to “favor and disfavor points of view,” *Finley*, 524 U.S. at 598 (Scalia, J., concurring), is the right to select – within its own program – from a variety of groups who are best suited to promote the government’s message. *Pleasant Grove City*, 555 U.S. at 467. The Supreme Court has long recognized that the selective inclusion and exclusion of speech -- a process that itself defines an overarching message through the exercise of editorial control and judgment -- is a vital aspect of government speech, including where private speakers were the original sources of speech, but the government made the ultimate editorial judgment.

For example, the Court has noted the role of governmental discretion in “a university selecting a commencement speaker, a public institution selecting speakers for a lecture series, . . . a public school prescribing its curriculum,” and “a public broadcaster exercis[ing] editorial discretion in the selection and presentation of its programming,” *Arkansas Educ. TV Comm’n v. Forbes*, 523 U.S. 666, 674

(1998). Similar observations of this common-sense proposition appear in other cases. *See, e.g., Am. Library Ass’n*, 539 U.S. at 208 (plurality) (noting library’s “traditional role in identifying suitable and worthwhile material”); *Finley*, 524 U.S. at 585-86 (noting government agency’s role in selecting certain expressive works); *id.* at 611 (Souter, J., dissenting) (“[I]f the Secretary of Defense wishes to buy a portrait to decorate the Pentagon, he is free to prefer George Washington over George the Third.”) (footnote omitted).

Just as is true with private speakers, the government may exercise a high level of selectivity in choosing groups to disseminate its message, and this selectivity is not contingent on a clearly defined message. *Pleasant Grove City*, 555 U.S. at 471. *Cf. Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 573-74 (1995) (speaker autonomy encompasses the right not to associate with speakers who are identified with disfavored messages).

The Texas Health and Human Service Commission’s speaker autonomy concerns are far more compelling in this case because, unlike the plaintiffs in *Rust* who were otherwise anonymous health care providers, 500 U.S. at 181, the Plaintiffs here link the government’s program in a conspicuous way to one of the nation’s most prominent abortion providers and abortion rights advocates. In *Rust*, the Court explained that when the government establishes a National Endowment for Democracy to encourage other countries to adopt democratic principles, it need

not fund a corollary program promoting fascism. *Id.* at 194. If the government need not fund a program promoting fascism, it surely need not select the American Nazi Party as a grantee in the National Endowment for Democracy. If speaker autonomy means anything, it means that the government can legitimately determine that an entity promoting incompatible goals would not be a credible bearer of the government's message, and in fact would undermine the government's message. *See Rosenberger*, 515 U.S. at 833 (government can "ensure that [its] message is neither garbled nor distorted"). The risk that the government's message will be distorted or garbled is readily apparent when, as in this case, one of the would-be grantees' primary missions is to promote a message antithetical to that of the government program.

To illustrate the point further, suppose a state establishes a program to discourage drug use in the public schools. Under the principle of speaker autonomy, the state ought to be able to deny participation to the National Organization for Reform of Marijuana Laws (NORML) on the grounds that the organization's overarching commitment to marijuana legalization undermines its credibility as a spokesman in the government's program. Even if NORML agreed not to promote marijuana use within the government program, its separately funded promotion of marijuana use would substantially diminish its suitability as a grantee to deliver the government's message or carry out its program. In short, no

student would take the government's anti-drug use program seriously if NORML were a grantee in the government's program.

The Commission's right to provide women's health services with a pro-life message is indisputable. *See, e.g., Maher v. Roe*, 432 U.S. 464, 474 (1977) (there is "no limitation on the authority of a State to make a value judgment favoring childbirth over abortion"). "The State unquestionably has a 'strong and legitimate interest in encouraging normal childbirth,' . . . an interest honored over the centuries. . . ." *Id.* at 478; *see also Beal v. Doe*, 432 U.S. 438, 445-46 (1977) (state's interest in encouraging childbirth is "valid and important," "legitimate," "significant," and "unquestionably strong").

In the funding program at issue in this case, the Women's Health Program, the Commission has been clear that the program is to steer clear of abortion-related services as well as the promotion of abortion as a means of family planning.

The Commission shall ensure that money spent for purposes of the demonstration project for women's health care services under former Section 32.0248, Human Resources Code, or a similar successor program is not used to perform or promote elective abortions, or to contract with entities that perform or promote elective abortions or affiliate with entities that perform or promote elective abortions.

Tex. Hum. Res. Code § 32.024(c-1). The rule defines "affiliate" as

[a]n individual or entity that has a legal relationship with another entity, which relationship is created or governed by at least one written instrument that demonstrates:

(i) common ownership, management, or control;

- (ii) a franchise; or
- (iii) the granting or extension of a license or other agreement that authorizes the affiliate to use the other entity's brand name, trademark, service mark, or other registered identification mark.

The written instruments referenced [above] may include a certificate of formation, a franchise agreement, standards of affiliation, bylaws, or a license.

(to be codified at 1 Tex. Admin. Code §§ 354.1361-.1364). The rule defines “promotes” as “[a]dvocates or popularizes by, for example, advertising or publicity.” *Id.* These regulations do no more than legitimately seek to avoid any explicit or implicit endorsement of abortion by subsidy grantees because such endorsement of abortion related services undermines the state’s message preferring childbirth over abortion.

II. Plaintiffs’ Identification With A Nationally Prominent Advocate Of Abortion Rights Compromises Its Ability To Promote Texas’ Pro-Life Message In Delivering State-Subsidized Health Care Services.

Planned Parenthood’s prominence as a leading abortion rights advocate cannot be gainsaid. The organization was a party in most of the United States Supreme Court abortion cases. *See, e.g., Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Planned Parenthood Ass’n of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476 (1983); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006); *Gonzales v. Carhart*, 550 U.S. 124

(2007) (consolidated with *Gonzales v. Planned Parenthood*). Additionally, Planned Parenthood has been a party in hundreds of state and federal cases involving abortion rights.

The Plaintiffs are all affiliates or ancillary organizations of affiliates of Planned Parenthood Federation of America. The Plaintiffs all engage in advocacy and public education activities promoting abortion. *Planned Parenthood Assoc. of Hidalgo County Texas v. Suehs*, 2012 U.S. Dist. LEXIS 62289, *11 (W.D. Tex. April 30, 2012). In Texas alone this year, Planned Parenthood lobbyists spent between \$65,000 and \$135,000 in an effort to advance the organization's pro-abortion agenda.³ All but one Plaintiff are affiliated with an entity that provides abortions and that advertises that it provides those services. 2012 U.S. Dist. LEXIS 62289, *12. Although Plaintiffs and their affiliated abortion providers have different names, all use the registered service mark "Planned Parenthood" in providing medical services. *Id.* Thus, the plaintiffs offer state-funded health services under the banner of one of the leading abortion advocates in the nation. Because Planned Parenthood is widely associated with abortion rights advocacy, women served in Plaintiffs' facilities are implicitly given a pro-abortion message in much the same way that students receiving anti-drug use literature stamped with NORML's logo receive an implicit pro-marijuana message. The universal

³ http://webdev.ethics.state.tx.us/search/lobby_search.cfm.

association of Planned Parenthood with abortion rights advocacy garbles the state's message disfavoring abortion.⁴

The Commission's speaker autonomy permits it to exclude from the program grantees who are prominently identified with a message antithetical to the state's pro-life message. The First Amendment does not require the Commission to permit plaintiffs' participation in the program just because they provide women's health services. Plaintiffs have a First Amendment right to engage in abortion rights advocacy, but they do not have a First Amendment right to undermine Texas' message disfavoring abortion by publicly and conspicuously linking the Texas Women's Health Program with Planned Parenthood.

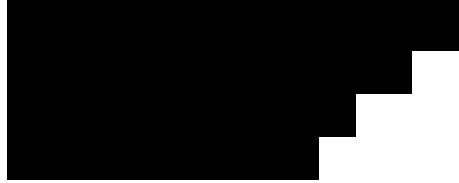
⁴ Or to switch analogies, sending school children to a casino for math tutoring would compromise a state message discouraging underage gambling.

CONCLUSION

Amici respectfully request this Court to vacate the preliminary injunction.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that the foregoing Amici Curiae Brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) in that, relying on the word count feature of the word-processing system used to prepare the brief, Microsoft Word 2007, the brief contains 2,200 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The undersigned counsel also certifies that the foregoing Amici Curiae Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) in that the brief has been prepared in a proportionally spaced 14-point Times New Roman typeface.

/s/ Jay Alan Sekulow
Counsel for Amici

CERTIFICATE OF SERVICE

I certify that on May 18, 2011, I caused the foregoing Amici Curiae Brief to be electronically filed with the Clerk of the Court by using the CM/ECF system. I certify that the following participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system:

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I further certify that the paper document is an exact copy of the electronic submission, and that the document has been scanned via Avast Online and is free of viruses.

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