

## **BLOWING *BLOTNER*: A MISSED OPPORTUNITY TO RATIONALIZE GEORGIA'S INFORMED CONSENT LAW**

Robert Gatter, J.D.\*

It is hard to defend an arbitrary rule of law, and that is exactly what is wrong with the decision of the Georgia Supreme Court in *Blotner v. Doreika*.<sup>1</sup> In that case, the court upheld a trial court's refusal to instruct the jury on a patient's informed consent claim against a chiropractor.<sup>2</sup> Specifically, the patient had alleged that his spine was injured as a result of the chiropractor's failure to disclose the material risks associated with a chiropractic adjustment.<sup>3</sup> In upholding the trial verdict, the Georgia Supreme Court ruled that health professionals in the state do not have a duty to disclose material treatment information to patients as part of the informed consent process, except where such a duty is expressly imposed by statute or regulation.<sup>4</sup>

Its ruling was based on a statute that describes the informed consent claim and imposes liability on any physician who fails to disclose specified risks related to any proposed surgery under

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\* Professor of Law and Co-Director of the Center for Health Law Studies, Saint Louis University School of Law.

<sup>1</sup> *Blotner v. Doreika*, 678 S.E.2d 80 (Ga. 2009).

<sup>2</sup> *Id.* at 83.

<sup>3</sup> *Doreika v. Blotner*, 666 S.E.2d 21, 23 (Ga. Ct. App. 2008). In upholding the trial court's ruling, the Georgia Supreme Court reversed the Georgia Court of Appeals opinion that had recognized a duty of disclosure in the case. *See Blotner*, 678 S.E.2d at 80.

<sup>4</sup> *See Blotner*, 678 S.E.2d at 82-83.

general anesthesia, spinal anesthesia, major regional anesthesia, an amniocentesis, or a diagnostic procedure using contrast media.<sup>5</sup> Because the court found the statute and its related regulations to be the exclusive source of state informed consent law, Georgians are left with a nonsensical disclosure regime. A patient's right to the disclosure of risk information turns not on the nature or degree of treatment risks, but rather on whether a patient's physician has proposed surgery, an amniocentesis, or the use of a contrast medium.<sup>6</sup> If a patient is considering whether to consent to any other procedure, she must ask for risk information before the law requires that a physician disclose it.<sup>7</sup> And, according to the *Blotner* court, there is nothing a state court can do about it.<sup>8</sup>

This essay argues that when such arbitrariness finds its way into legislation, it is the duty of the judiciary to identify it and, as much as possible, prevent it from harming those it affects. The Georgia Supreme Court failed to live up to this obligation in *Blotner*. As discussed below, the court missed the opportunity to interpret the statute as a safe harbor, giving presumptive immunity from liability to physicians in only certain informed consent cases. While it would not have completely cured the statute's irrationality, such a ruling would have at least limited its deleterious effects. Moreover, the doctrine of avoiding constitutional issues would have justified adopting a "safe harbor" interpretation described here because the construction ultimately given to the statute by the *Blotner* court is vulnerable to attack on equal protection grounds. All of this is explained in more detail below.

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<sup>5</sup> See GA. CODE ANN. § 31-9-6.1(a) (1991).

<sup>6</sup> See *id.*

<sup>7</sup> See *id.*

<sup>8</sup> Indeed, since *Blotner* was decided, an intermediate appellate court in Georgia upheld a trial court's refusal to submit instructions to the jury regarding informed consent for a dentist accused of failing to disclose the material risks of a wisdom tooth extraction to a patient. *Thompson v. Princell*, 696 S.E.2d 91, 93 (Ga. Ct. App. 2010). The court based its holding on the statutory language under which the duty to disclose is triggered only when a patient is undergoing surgery with "general anesthesia, spinal anesthesia, or major regional anesthesia," and no such anesthesia was provided to this patient. See *id.* at 94-95.

### A. THE *BLOTNER* RULING AND ITS IRRATIONAL RESULT

The Georgia Court of Appeals and Supreme Court opinions provide very little factual background. The plaintiff-patient received an adjustment from the defendant-chiropractor, which allegedly resulted in the plaintiff suffering a herniated disc or aggravating a pre-existing disc condition.<sup>9</sup> The plaintiff claimed that the defendant breached a duty to disclose the risk of such an injury prior to treatment as part of the informed consent process and, presumably, that the plaintiff would have refused the treatment had this risk been disclosed.<sup>10</sup> The jury returned a verdict for the defendant after the trial court—over the objection of the plaintiff—refused to instruct the jury as to any duty for the defendant to have disclosed risk information to the plaintiff.<sup>11</sup> The plaintiff appealed, and the intermediate court of appeals reversed the ruling and reinstated the claim, holding that, in addition to a limited statutory duty on physicians to disclose treatment risks, there is also a general common-law duty.<sup>12</sup> Finally, the Georgia Supreme Court, on a petition for review, reversed the Georgia Court of Appeals and reinstated the trial verdict for the defendant.<sup>13</sup>

At issue throughout was the meaning of a state informed consent statute that imposes a duty on physicians to disclose to patients certain risks of surgery, amniocentesis, and diagnostic procedures using injected radiologic contrast media.<sup>14</sup> It reads:

Except as otherwise provided in this Code, any person who undergoes any surgical procedure under general anesthesia, spinal anesthesia, or major regional anesthesia or any person who undergoes an amniocentesis diagnostic procedure or a diagnostic procedure which involves the intravenous or intraductal injection of a contrast material must consent to such procedure and shall be

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<sup>9</sup> *Doreika v. Blotner*, 666 S.E.2d 21, 23 (Ga. Ct. App. 2008).

<sup>10</sup> *See id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 23–24.

<sup>13</sup> *See Blotner*, 678 S.E.2d at 80–84.

<sup>14</sup> § 31-9-6.1 (1991).

informed in general terms of [the patient's diagnosis, prognosis without treatment, the nature of the proposed treatment, its material risks and alternatives, and its likelihood of success].<sup>15</sup>

While the statute does not name any other kinds of treatment that trigger a physician's duty to disclose risk information, neither does it expressly preclude imposing such a duty with respect to other treatments. Importantly, the statute also provides that a physician who has obtained a patient's signature on a writing that outlines the information that must be disclosed under the statute is entitled to a rebuttable presumption that the physician has obtained valid consent to treatment.<sup>16</sup>

The central question of the case was whether the statute is the exclusive source for a physician's duty to disclose treatment risks as part of the informed consent process, or whether—as the intermediate court of appeals had held—the statute exists in conjunction with a general common-law duty for physicians to act toward their patients with reasonable prudence, including when seeking consent for treatment.<sup>17</sup> The court held that the statute and related regulations are the exclusive source of a physician's duty of disclosure.<sup>18</sup> Moreover, it precluded courts from expanding the common-law duty to disclose risk information beyond its codified boundaries.<sup>19</sup> In effect, the Court's "exclusive source" interpretation

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<sup>15</sup> § 31-9-6.1(a).

<sup>16</sup> § 31-9-6.1(b)(2).

<sup>17</sup> *Blotner*, 678 S.E.2d at 80.

<sup>18</sup> *Id.* at 82. Specifically, the court wrote: "Contrary to the Court of Appeals' statement that [the statute] 'has no effect on the recognition of the common-law doctrine of informed consent,' the doctrine of informed consent for health procedures and treatment is defined in Georgia exclusively by statutes and regulations." *Id.* (emphasis added) (citation omitted).

<sup>19</sup> *Id.* The court's reasoning here was odd. It incorporated its holding from an earlier opinion that, because no common-law duty of risk disclosure existed in Georgia at the time the statute was adopted, the statute exists "in derogation of the common law rule against requiring physicians to disclose medical risks to their patients, [and so] it must be strictly construed and cannot be extended beyond its plain and explicit terms." *Blotner*, 678 S.E.2d at 81 (quoting *Albany Urology Clinic v. Cleveland*, 528 S.E.2d 777, 780 (Ga. 2000)). The preexisting common-law rule to which the court refers, however, was premised on an earlier version of the consent statute, which required only that a physician describe in general terms the nature of the proposed treatment prior to obtaining consent. *See Young v. Yarn*, 222 S.E.2d 113, 114 (Ga. Ct. App. 1975) (adopting the argument that the then-

preempts judicial action on the view that the state legislature has taken complete regulatory control of informed consent standards.

As a result of *Blotner*, patients in Georgia do not have a right to the disclosure of treatment information, except when such a right suddenly springs into existence if (and only if) a patient's physician proposes surgery, an amniocentesis, or a diagnostic procedure using a contrast medium.<sup>20</sup> There is no reasonable explanation for why the right to disclosure is associated with these procedures but not others. Certainly, the statutory procedures involve important risks about which patients should be made aware, but so too do countless other procedures left off of the statutory list. The risks of surgery, amniocentesis, or the injection of radiologic contrast media are not so great as to be categorically different from the risks of various prescription medications, chemotherapy, electro-convulsive therapy, a colonoscopy, a blood transfusion, radiation therapy, and a whole host of other treatments about which the statute is silent. Why must a patient proactively ask about the risk of an allergic reaction to an antibiotic when the law requires that she be automatically told about the same risk when asked to consent to the use of radiologic contrast medium? If a physician has a duty to disclose the risk of a bowel perforation associated with colorectal surgery, then why not also in the case of a colonoscopy? There are no rational answers to these questions. Consequently, *Blotner* leaves Georgians with an incoherent mechanism for triggering a doctor's duty of disclosure because it is based on a statute that arbitrarily distinguishes between cases in which a patient is provided with important risk information and cases in which a patient must ask for it.

The injustice of such arbitrary line drawing is easy to appreciate. First, a patient is poorly situated to ask for risk information as opposed to having it provided. Most patients have no training in medicine and, therefore, have little basis to know that they should be asking about risks or to know what risks to ask about. Additionally,

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controlling consent statute preempts any common-law claim for risk disclosure). Thus, there was a complete absence of common law on the subject of a duty to disclose treatment risks at the various times Georgia's legislature acted. As a result, the current statute is not in derogation of any common-law rule and so it need not be construed strictly.

<sup>20</sup> See § 31-9-6.1(a); *supra* text accompanying note 18.

the capacity of individuals to recognize the prudence of asking for treatment information and to formulate questions likely to elicit such information is necessarily compromised to some degree by the illness, injury, or concern that brought them to a health care provider in the first place.<sup>21</sup> Moreover, patients are generally deferential to a physician's authority and, therefore, reluctant to ask for information not offered by the physician.<sup>22</sup> Nonetheless, the statute, as interpreted by the *Blotner* court, leaves large categories of patients to their own devices.

Second, the arbitrary manner in which the statute distinguishes between cases in which a physician must disclose risk information and those in which a physician may remain silent will undoubtedly mislead patients. Consider, for example, a cancer patient whose attending physician recommends a combination of surgery to remove cancerous tissue, followed by a course of chemotherapy. In pursuing the patient's consent to the treatment plan, the attending physician must disclose the material risks of surgery and surgical anesthesia even if the patient does not ask for such information; yet she may remain silent about the risks of chemotherapy unless the patient asks about those risks.<sup>23</sup> Unless the patient happened to have read the court's opinion in *Blotner*, she would reasonably assume that the chemotherapy is virtually risk-free because her physician did not mention any risks during the very conversation in which the physician revealed the material risks of surgery. In this way, the statute, after *Blotner*, risks lulling Georgians into the belief that physicians will provide them with important treatment information when, in fact, the burden to discover that information is most often on patients.

To be clear, the central problem is *not* that Georgia's informed consent law recognizes a duty for physicians to disclose material treatment information to some patients but not others. Instead, the problem is the arbitrary manner in which the duty is triggered. The

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<sup>21</sup> See Mark A. Hall, *Law, Medicine, and Trust*, 55 STAN. L. REV. 465, 471-72 (2002).

<sup>22</sup> See, e.g., Laura Landro, *Finding a Way to Ask Doctors Tough Questions*, WALL ST. J., at D1 (March 4, 2009), available at [http://online.wsj.com/article/NA\\_WSJ\\_PUB:SB123612654272124081.html](http://online.wsj.com/article/NA_WSJ_PUB:SB123612654272124081.html).

<sup>23</sup> See *supra* note 20 and accompanying text.

legislature could have rationally distinguished between the most risky procedures, which would trigger a duty to disclose, and all other procedures, which would not. Alternatively, it could have imposed a duty to disclose information for all treatments, but limited the duty to disclose to only the most grave risks. While these standards may be objectionable on policy grounds, they at least impose rational legislative distinctions.

The arbitrary manner in which Georgia's informed consent statute triggers the doctor's duty to disclose risk information provides courts with the opportunity (and duty) to interpret the statute so as to avoid both the absurd results and the equal protection challenge that a literal reading would generate. As discussed in the next section, this is the opportunity that the Georgia Supreme Court missed.

## **B. THE MISSED OPPORTUNITY TO INTERPRET THE STATUTE AS A SAFE HARBOR**

It is possible to interpret Georgia's informed consent statute as creating a presumptive safe harbor for physicians against informed consent claims in certain cases. As noted above, the statute, in addition to articulating a duty to disclose certain information associated with particular kinds of procedures, provides for a presumption of valid consent whenever a physician to whom the statutory duty applies obtains the patient's signature on a writing that outlines the treatment information that must be disclosed under the statute.<sup>24</sup> Although this presumption is rebuttable, most likely by proving fraud,<sup>25</sup> it provides substantial protection for the physician against any informed consent claim authorized by the statute. In practical terms, it gives the physician a complete defense unless the patient can establish that the physician intentionally misrepresented

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<sup>24</sup> See § 31-9-6.1(b)(2) (1991).

<sup>25</sup> See *Young*, 222 S.E.2d at 114. This prediction is based on an earlier Georgia statute that provided for a presumption of valid consent whenever a patient's consent was recorded in a signed writing that described the treatment in general terms, and an interpretation of that statute meant that consent was conclusively presumed, absent fraud or misrepresentation. *Id.*

the writing or its contents.<sup>26</sup> This is substantially more difficult for the patient than proving the elements of a negligence-based claim.

This statutory presumption of valid consent provides a credible basis for interpreting the entire statute as a safe harbor. One principle of statutory construction demands that each statutory provision be interpreted in context with all other surrounding provisions of the statute.<sup>27</sup> Applying that principle here requires that a court consider the provisions that appear to circumscribe a physician's duty to disclose treatment information as part of a statute that provides presumptive immunity from liability for physicians who follow certain substantive and procedural steps. Read this way, the statute could be fairly construed as a legislative effort to encourage physicians to memorialize the informed consent process in writing in certain cases where disputes may be particularly likely to arise. This, in turn, provides a credible basis for courts to recognize a common-law duty to disclose treatment information beyond the apparent boundaries of the statute's language while still giving meaning to the statute.

Of course, the statute, when read as a whole, justifies other interpretations, including those that are much broader than the "safe harbor" interpretation. Most notably, the statute contains provisions that describe an informed consent cause of action in significant detail.<sup>28</sup> It addresses the elements of causation, clarifies that the claim arises from professional negligence, and identifies exceptions.<sup>29</sup> As a result, the statute, when read in its entirety and considered as a whole, could be interpreted as completely defining the informed consent cause of action. This would support the *Blotner* court's ruling that the statute is the exclusive source of an informed consent claim in Georgia,<sup>30</sup> which in turn would justify the further ruling that

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<sup>26</sup> See *id.*

<sup>27</sup> See *FDA v. Brown and Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'") (citation omitted).

<sup>28</sup> See §§ 31-9-6.1(d)-(e) (1991).

<sup>29</sup> See *id.*

<sup>30</sup> See *Blotner*, 678 S.E.2d at 82.



courts are precluded by the statute from recognizing a common-law duty beyond that permitted under the statute.<sup>31</sup>

So the question becomes: what, if any, legal justification exists to permit a court's adoption of the "safe harbor" interpretation of the statute over the "exclusive source" interpretation espoused in *Blotner*? One starting place is the principle of statutory construction that instructs courts to adopt an interpretation of a statute that avoids absurd results over any competing interpretation that does not.<sup>32</sup> As explained above, the "exclusive source" interpretation is plagued by absurd results because it defers completely to legislation that triggers the duty to disclose risk information in an arbitrary manner and without regard to the nature or degree of risk associated with treatments not mentioned in the statute. Meanwhile, the "safe harbor" interpretation largely cabins the statute's arbitrariness within the legislature's apparent intent to provide presumptive immunity to physicians who have performed the listed procedures after having memorialized in writing the required risk disclosures.

Yet, the principle of avoiding absurd interpretations of legislation gets us only so far because it must be used cautiously so as to respect legislative authority. Accordingly, courts may only adopt a construction of a statute that avoids absurd results if that construction is "consistent with the legislative purpose" behind the statute.<sup>33</sup> While the presumptive immunity provision in the statute is evidence that the "safe harbor" interpretation is consistent with the intent of the Georgia legislature, it does not explain as well as the "exclusive source" interpretation why the statute also provides a complete description of an informed consent claim. Thus, a court that reads the entire statute as a whole might find the "safe harbor" interpretation wanting because it does not easily account for all of the legislative purposes expressed in the statute. Additionally, what legislative history is available indicates that legislators deliberately

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<sup>31</sup> See *id.* at 80-83.

<sup>32</sup> See *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."). See also NORMAN J. SINGER & J.D. SHAMBLE SINGER, *SUTHERLAND ON STATUTORY CONSTRUCTION*, § 45.12, at 81 (6th ed. 2000).

<sup>33</sup> See *Griffin*, 458 U.S. at 575.

narrowed the kinds of procedures listed in the statute through a series of amendments so as to limit when the duty to disclose is triggered.<sup>34</sup> While this might weaken the “safe harbor” interpretation, it does not defeat it because this historical evidence indicates a legislative intent to significantly limit physician liability.

Ultimately, the rule authorizing courts to interpret statutes to avoid absurd results offers only moderate support for the “safe harbor” interpretation because the rule, by its nature, threatens the separation of powers. It authorizes courts to conclude “that the legislature could not have meant what it unmistakably said,” and, when courts interpret a statute from that perspective, there is an increased risk that they will exceed their powers and “displace legislative policy.”<sup>35</sup> Accordingly, courts may prefer to turn a blind eye toward the absurdities that result from a literal reading of a statute in the name of preserving the integrity of legislative and judicial roles. Indeed, this may explain an important motivation behind *Blotner*.<sup>36</sup>

While a court might be justifiably reluctant to adopt the “safe harbor” interpretation based only on the rule of avoiding interpretations that lead to absurd results, another rule of statutory construction provides additional justification. Courts are obligated to construe legislation so as to avoid constitutional problems.<sup>37</sup> Where two or more interpretations of a statute are viable, a court may not choose one that will render the statute unconstitutional if challenged.<sup>38</sup>

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<sup>34</sup> See S. Bawtinheimer, *Surgical and Medical Treatment: Provide for Informed Consent*, 5 GA. ST. U. L. REV. 426, 427-28 (1988) (describing some of the legislative history, including a battle between the state trial lawyers and state medical associations over the scope of the duty the statute would create).

<sup>35</sup> SINGER & SINGER, *supra* note 32, at 91.

<sup>36</sup> Interestingly, one justice of the Georgia Supreme Court wrote a separate concurring opinion in *Blotner* to emphasize, among other things, the necessity of the Court’s decision in order to honor the separation of powers. See *Blotner*, 678 S.E.2d at 83 (Carley J., concurring).

<sup>37</sup> See *Ellis v. Bhd. of Ry., Airline & S.S. Clerks, Freight Handlers, Express & Station Emps.*, 466 U.S. 435, 444 (1984) (recognizing the judicial duty to avoid constitutional issues by “first ascertain[ing] whether the statute can be reasonably construed to avoid the constitutional difficulty”). See also SINGER & SINGER, *supra* note 32, at 70.

<sup>38</sup> See SINGER & SINGER, *supra* note 32, at 70-71.

This principle of statutory construction could have been applied in *Blotner* because Georgia's informed consent statute is vulnerable to an equal protection challenge. The statute distinguishes between two classes of patients: those to whom a duty of disclosure is owed by their physicians and those to whom no such duty is owed.<sup>39</sup> Where a state actor does not treat all cases alike and instead draws distinctions among classes of individuals, equal protection jurisprudence requires, in most cases, that the state actor do so on rational grounds.<sup>40</sup> While classifications subject to only rational basis review often are upheld, a federal court would likely invalidate the classifications drawn in Georgia's informed consent statute as irrational for the very arbitrariness identified throughout this essay. There is simply no way to rationally explain why patients facing similar risks should be treated differently based on the statute's seemingly random selection of treatments that trigger a duty to disclose.

Of course, an equal protection claim requires a state actor,<sup>41</sup> and most informed consent claims involve private physicians. Yet it is not hard to imagine a future case arising from care by a physician employed by the Veterans Administration or by a state- or county-operated clinic. The element of state action would be satisfied in such a case, and an equal protection challenge could invalidate the statute. More likely, however, it would force a court to reinterpret the statute in keeping with the equal protection guarantee.

The *Blotner* court could have relied on the judicial obligation to construe statutes so as to avoid constitutional difficulties even though the constitutionality of the statute was not—and likely could not have been—challenged. The rule of construction authorizes courts to

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<sup>39</sup> See § 31-9-6.1 (1991).

<sup>40</sup> See *Pennell v. City of San Jose*, 485 U.S. 1, 14 (1988) (finding rent control ordinance must be upheld against an equal protection challenge so long as it is "rationally related to a legitimate state interest"). This assumes that the classification drawn is not of a suspect type, such as classifications based on race or ethnicity or a classification that concerns a fundamental constitutional right. Suspect classifications are subject to strict scrutiny. See *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

<sup>41</sup> U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."). See generally JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.1, at 568-70 (4th ed. 1991).

consider the constitutionality of a statute independently and interpret the statute to avoid any constitutional concerns discovered.<sup>42</sup>

Had the *Blotner* court acknowledged the statute's vulnerability to an equal protection challenge, it would have had no choice but to reject the "exclusive source" interpretation and find an alternative interpretation to save the statute from probable future constitutional nullification. The "safe harbor" interpretation is one—and perhaps the only—such alternative interpretation because it accounts for the medical procedures listed in the statute as ones that are more likely than others to result in informed consent claims, which the statute seeks to avoid by encouraging physicians—with a promise of presumptive immunity—to record the risk disclosure process in writing. Based on this construction, courts are free to enforce a duty for physicians to disclose material risk information regardless of the procedure at issue. Certainly this would not achieve the apparent intent of the Georgia legislature to insulate physicians from all liability for failing to disclose risk information when obtaining consent for procedures not listed in the statute. In fact, it would strike a different balance between the legislative goals of recognizing a claim for a physician's failure to disclose material risk information and of limiting the liability of physicians for such a claim. While this may mean that the "safe harbor" interpretation is somewhat strained, it is preferable to an interpretation that could render the statute unconstitutional. As one court put it, "a strained construction is not only permissible, but desirable, if it is the only construction that will save constitutionality."<sup>43</sup>

The *Blotner* court missed its opportunity to fix Georgia's informed consent law, but, in so doing, it sowed the seeds for the

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<sup>42</sup> See e.g., *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575-78 (1988) (rejecting NLRB's interpretation of a provision in the National Labor Relations Act based on the Court's independent determination that the NLRB's interpretation could be successfully challenged as violating the First Amendment guarantee of free speech).

<sup>43</sup> *Warren Sanitary Milk Co. v. Bd. of Review, Bureau of Unemployment Comp.*, 179 N.E.2d 385, 390 (Ct. Com. Pl. Ohio 1961). See also *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 629-30 (1993) ("In so construing the statute we make no pretense to have read the congressional mind to perfection. . . . In these circumstances it is enough that the choice to attain coherence by obviating constitutional problems is not 'plainly contrary to the intent of Congress.'").

next opportunity. For as long as the statute must be read to arbitrarily trigger the duty to disclose risk information, it remains vulnerable to an equal protection challenge. And when that opportunity arises, the Georgia Supreme Court had better seize it or a federal court will.