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Sources for *Stuart v. Camnitz: Setting the Standard of Care for Abortion Providers in North Carolina*

# RECORD NO. 12-1052

In The

# United States Court Of Appeals

## For The Fourth Circuit

GRETCHEN S. STUART, MD, on behalf of herself and her patients seeking abortions; JAMES R. DINGFELDER, MD, on behalf of himself and his patients seeking abortions; DAVID A. GRIMES, MD, on behalf of himself and his patients seeking abortions; AMY BRYANT, MD, on behalf of herself and her patients seeking abortions; SERINA FLOYD, MD, on behalf of herself and her patients seeking abortions; DECKER & WATSON, INC., d/b/a Piedmont Carolina Medical Clinic; PLANNED PARENTHOOD OF CENTRAL NORTH CAROLINA; A WOMAN'S CHOICE OF RALEIGH, INC.; PLANNED PARENTHOOD HEALTH SYSTEMS, INC.; TAKEY CRIST, M.D., on behalf of himself and his patients seeking abortions; TAKEY CRIST, M.D., P.A., d/b/a Crist Clinic for Women,

*Plaintiffs – Appellees,*

v.

JANICE E. HUFF, MD, in her official capacity as President of the North Carolina Medical Board and her employees, agents and successors; ROY COOPER, in his official capacity as Attorney General of North Carolina and his employees, agents and successors; LANIER M. CANSLER, in his official capacity as Secretary of the North Carolina Department of Health and Human Services an his employees, agents and successors; JIM WOODALL, in his official capacity as District Attorney ("DA") for Prosecutorial District ("PD") 15B and his employees, agents and successors; TRACEY E. CLINE, in her official capacity as DA for PD14 and her employees, agents and successors; DOUG HENDERSON, in his official capacity as DA for PD 18 and his employees, agents and successors; BILLY WEST, in his official capacity as DA for pd 12 and his employees, agents and successors; C. COLON WILLOUGHBY, JR., in his official capacity as DA for PD 10 and his employees, agents and successors; BENJAMIN R. DAVID, in his official capacity as DA for PD 5 and his employees, agents and successors; JIM O'NEILL, in his official capacity as DA for PD 21 and his employees, agents and successors; ERNIE LEE, in his official capacity as DA for PD 4 and his employees, agents and successors,

*Defendants,*

and

JOHN M. THORP, JR., MD; GREGORY J. BRANNON, MD; MARTIN J. MCCAFFREY, MD; CHIMERE COLLINS; DALLENE HALLENBECK; TRACIE JOHNSON; LANITA WILKS; ASHEVILLE PREGNANCY SUPPORT SERVICES; PREGNANCY RESOURCE CENTER OF CHARLOTTE,

*Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
AT GREENSBORO

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**JOINT APPENDIX**
**Volume I of II**
**(Pages 1 - 282)**

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IN THE UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF NORTH CAROLINA

| | |
|---|---|
| GRETCHEN S. STUART, M.D.,et al., Plaintiffs, vs. JANICE E. HUFF, M.D., et al., , Defendants. | Case No. 1:11CV804<br>Greensboro, NC<br>October 17, 2011<br>10:01 a.m. |

TRANSCRIPT OF PRELIMINARY INJUNCTION HEARING

BEFORE THE HONORABLE CATHERINE C. EAGLES

UNITED STATES DISTRICT JUDGE

APPEARANCES:

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for purposes of your First Amendment argument for the actual speech that's required describing what's seen on the ultrasound screen and offering the patient the opportunity to listen to the fetal heartbeat and placing the screen so that the patient can see it? You know, those are three discrete acts. Are they all the same for purposes of your argument? How is placing the screen speech?

MS. ANDERSON: That's symbolic speech, Your Honor, and the Supreme Court has certainly recognized that speech includes symbolic speech -- wearing arm bands, for example, is the classic example, and that it's certainly -- speech is not limited to articulated words, much less words. So, for example, a billboard would be speech even if it only has images on it, it doesn't have any words on it. So both the putting -- forcing the physician to put that image in the woman's view and forcing the physician to speak and provide the selected description that the State requires of the image, those are both compelled speech and have the problems I just mentioned.

Requiring an offer, on the other hand, would be simply -- it would be more in line with providing information to the woman. It would not be compelling the content of the description. It would not be compelling the physician to -- again, do the symbolic speech of putting that in her view.

For example, the statute itself does have one offer in there. It has the offer of trying to make the heart tone audible if it's present, and we are not contesting that that -- if that were all that was in there, if that were the statute, if the statute were simply requiring that the physician tell the woman that if you want me to, I can try to see if the heartbeat is audible, do you want me to? We would not be challenging that. It's in there as part of the entirety, though, which again it's this package, Your Honor, which shows so clearly the ideological nature of what the State is requiring because it's requiring all of this without any regard again to the individual patient, to her circumstances, to her desires. It forces the physician to say particular things and to take particular symbolic steps that amount to symbolic speech and goes, again, far beyond anything that's been upheld by any court in this country.

THE COURT: Okay. Thank you.

MS. ANDERSON: Certainly, Your Honor.

As to vagueness, I want to turn first to Section 8290-20.82. As I mentioned, that is the section of the act that has some relationship to what was looked at by the Supreme Court in the Casey case. But what they managed to do is they've managed to confuse the requirements in a way that leaves the providers unsure of exactly how they can

**GENERAL ASSEMBLY OF NORTH CAROLINA**
**SESSION 2011**

**SESSION LAW 2011-405**
**HOUSE BILL 854**

AN ACT TO REQUIRE A TWENTY-FOUR-HOUR WAITING PERIOD AND THE INFORMED CONSENT OF A PREGNANT WOMAN BEFORE AN ABORTION MAY BE PERFORMED.

The General Assembly of North Carolina enacts:

**SECTION 1.** Chapter 90 of the General Statutes is amended by adding the following new Article to read:

"Article 1I.
"Woman's Right to Know Act.

"**§ 90-21.80. Short title.**

This act may be cited as the 'Woman's Right to Know Act.'

"**§ 90-21.81. Definitions.**

The following definitions apply in this Article:

(1) Abortion. – The use or prescription of any instrument, medicine, drug, or other substance or device intentionally to terminate the pregnancy of a woman known to be pregnant with an intention other than to do any of the following:
   a. Increase the probability of a live birth.
   b. Preserve the life or health of the child.
   c. Remove a dead, unborn child who died as the result of (i) natural causes in utero, (ii) accidental trauma, or (iii) a criminal assault on the pregnant woman or her unborn child which causes the premature termination of the pregnancy.

(2) Attempt to perform an abortion. – An act, or an omission of a statutorily required act, that, under the circumstances as the actor believes them to be, constitutes a substantial step in a course of conduct planned to culminate in the performance of an abortion in violation of this Article.

(3) Department. – The Department of Health and Human Services.

(4) Display a real-time view of the unborn child. – An ultrasound or any more scientifically advanced means of viewing the unborn child in real time.

(5) Medical emergency. – A condition which, in reasonable medical judgment, so complicates the medical condition of the pregnant woman as to necessitate the immediate abortion of her pregnancy to avert her death or for which a delay will create serious risk of substantial and irreversible physical impairment of a major bodily function, not including any psychological or emotional conditions. For purposes of this definition, no condition shall be deemed a medical emergency if based on a claim or diagnosis that the woman will engage in conduct which would result in her death or in substantial and irreversible physical impairment of a major bodily function.

(6) Physician. – An individual licensed to practice medicine in accordance with this Chapter.

(7) Probable gestational age. – What, in the judgment of the physician, will, with reasonable probability, be the gestational age of the unborn child at the time the abortion is planned to be performed.

(8) Qualified professional. – An individual who is a registered nurse, nurse practitioner, or physician assistant licensed in accordance with Article 1 of this Chapter, or a qualified technician acting within the scope of the

qualified technician's authority as provided by North Carolina law and under the supervision of a physician.

(9) Qualified technician. – A registered diagnostic medical sonographer who is certified in obstetrics and gynecology by the American Registry for Diagnostic Medical Sonography (ARDMS) or a nurse midwife or advanced practice nurse practitioner in obstetrics with certification in obstetrical ultrasonography.

(10) Stable Internet Web site. – A Web site that, to the extent reasonably practicable, is safeguarded from having its content altered other than by the Department.

(11) Woman. – A female human, whether or not she is an adult.

"**§ 90-21.82. Informed consent to abortion.**

No abortion shall be performed upon a woman in this State without her voluntary and informed consent. Except in the case of a medical emergency, consent to an abortion is voluntary and informed only if all of the following conditions are satisfied:

(1) At least 24 hours prior to the abortion, a physician or qualified professional has orally informed the woman, by telephone or in person, of all of the following:

a. The name of the physician who will perform the abortion.

b. The particular medical risks associated with the particular abortion procedure to be employed, including, when medically accurate, the risks of infection, hemorrhage, cervical tear or uterine perforation, danger to subsequent pregnancies, including the ability to carry a child to full term, and any adverse psychological effects associated with the abortion.

c. The probable gestational age of the unborn child at the time the abortion is to be performed.

d. The medical risks associated with carrying the child to term.

e. The display of a real-time view of the unborn child and heart tone monitoring that enable the pregnant woman to view her unborn child or listen to the heartbeat of the unborn child are available to the woman. The physician performing the abortion, qualified technician, or referring physician shall inform the woman that the printed materials and Web site described in G.S. 90-21.83 and G.S. 90-21.84 contain phone numbers and addresses for facilities that offer the services free of charge. If requested by the woman, the physician or qualified professional shall provide to the woman the list as compiled by the Department.

f. If the physician who is to perform the abortion has no liability insurance for malpractice in the performance or attempted performance of an abortion, that information shall be communicated.

g. The location of the hospital that offers obstetrical or gynecological care located within 30 miles of the location where the abortion is performed or induced and at which the physician performing or inducing the abortion has clinical privileges. If the physician who will perform the abortion has no local hospital admitting privileges, that information shall be communicated.

If the physician or qualified professional does not know the information required in sub-subdivisions a., f., or g. of this subdivision, the woman shall be advised that this information will be directly available from the physician who is to perform the abortion. However, the fact that the physician or qualified professional does not know the information required in sub-subdivisions a., f., or g. shall not restart the 24-hour period. The information required by this subdivision shall be provided in English and in each language that is the primary language of at least two percent (2%) of the State's population. The information may be provided orally either by telephone or in person, in which case the required information may be based on facts supplied by the woman to the physician and whatever other relevant information is reasonably available. The information required by this

subdivision may not be provided by a tape recording but shall be provided during a consultation in which the physician is able to ask questions of the patient and the patient is able to ask questions of the physician. If, in the medical judgment of the physician, a physical examination, tests, or the availability of other information to the physician subsequently indicates a revision of the information previously supplied to the patient, then that revised information may be communicated to the patient at any time before the performance of the abortion. Nothing in this section may be construed to preclude provision of required information in a language understood by the patient through a translator.

(2) The physician or qualified professional has informed the woman, either by telephone or in person, of each of the following at least 24 hours before the abortion:

a. That medical assistance benefits may be available for prenatal care, childbirth, and neonatal care.

b. That public assistance programs under Chapter 108A of the General Statutes may or may not be available as benefits under federal and State assistance programs.

c. That the father is liable to assist in the support of the child, even if the father has offered to pay for the abortion.

d. That the woman has other alternatives to abortion, including keeping the baby or placing the baby for adoption.

e. That the woman has the right to review the printed materials described in G.S. 90-21.83, that these materials are available on a State-sponsored Web site, and the address of the State-sponsored Web site. The physician or a qualified professional shall orally inform the woman that the materials have been provided by the Department and that they describe the unborn child and list agencies that offer alternatives to abortion. If the woman chooses to view the materials other than on the Web site, the materials shall either be given to her at least 24 hours before the abortion or be mailed to her at least 72 hours before the abortion by certified mail, restricted delivery to addressee.

f. That the woman is free to withhold or withdraw her consent to the abortion at any time before or during the abortion without affecting her right to future care or treatment and without the loss of any State or federally funded benefits to which she might otherwise be entitled.

The information required by this subdivision shall be provided in English and in each language that is the primary language of at least two percent (2%) of the State's population. The information required by this subdivision may be provided by a tape recording if provision is made to record or otherwise register specifically whether the woman does or does not choose to have the printed materials given or mailed to her. Nothing in this subdivision shall be construed to prohibit the physician or qualified professional from e-mailing a Web site link to the materials described in this subdivision or G.S. 90-21.83.

(3) The woman certifies in writing, before the abortion, that the information described in subdivisions (1) and (2) of this section has been furnished her and that she has been informed of her opportunity to review the information referred to in sub-subdivision (2)e. of this section. The original of this certification shall be maintained in the woman's medical records, and a copy shall be given to her.

(4) Before the performance of the abortion, the physician who will perform the abortion or the qualified technician must receive a copy of the written certification required by subdivision (3) of this section.

"**§ 90-21.83. Printed information required.**

(a) Within 90 days after this Article becomes effective, the Department shall publish in English and in each language that is the primary language of at least two percent (2%) of the State's population and shall cause to be available on the State Web site established under

G.S. 90-21.84, the following printed materials in a manner that ensures that the information is comprehensible to a person of ordinary intelligence:

(1) Geographically indexed materials designed to inform a woman of public and private agencies and services available to assist her through pregnancy, upon childbirth, and while the child is dependent, including adoption agencies. The information shall include a comprehensive list of the agencies available, a description of the services they offer, including which agencies offer, at no cost to the woman, imaging that enables the woman to view the unborn child or heart tone monitoring that enables the woman to listen to the heartbeat of the unborn child, and a description of the manner, including telephone numbers, in which they might be contacted. In the alternative, in the discretion of the Department, the printed materials may contain a toll-free, 24-hour-a-day telephone number that may be called to obtain, orally or by tape recorded message tailored to the zip code entered by the caller, a list of these agencies in the locality of the caller and of the services they offer.

(2) Materials designed to inform the woman of the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from the time a woman can be known to be pregnant until full term, including pictures or drawings representing the development of the unborn child at two-week gestational increments. The pictures shall contain the dimensions of the unborn child, information about brain and heart functions, the presence of external members and internal organs, and be realistic and appropriate for the stage of pregnancy depicted. The materials shall be objective, nonjudgmental, and designed to convey only accurate scientific information about the unborn child at the various gestational ages. The material shall contain objective information describing the methods of abortion procedures employed, the medical risks associated with each procedure, the possible adverse psychological effects of abortion, as well as the medical risks associated with carrying an unborn child to term.

(b) The materials referred to in subsection (a) of this section shall be printed in a typeface large enough to be clearly legible. The Web site provided for in G.S. 90-21.84 shall be maintained at a minimum resolution of 70 DPI (dots per inch). All pictures appearing on the Web site shall be a minimum of 200x300 pixels. All letters on the Web site shall be a minimum of 12-point font. All information and pictures shall be accessible with an industry-standard browser requiring no additional plug-ins.

(c) The materials required under this section shall be available at no cost from the Department upon request and in appropriate numbers to any physician, person, health facility, hospital, or qualified professional.

"**§ 90-21.84. Internet Web site.**

The Department shall develop and maintain a stable Internet Web site to provide the information described under G.S. 90-21.83. No information regarding who accesses the Web site shall be collected or maintained. The Department shall monitor the Web site on a regular basis to prevent and correct tampering.

"**§ 90-21.85. Display of real-time view requirement.**

(a) Notwithstanding G.S. 14-45.1, except in the case of a medical emergency, in order for the woman to make an informed decision, at least four hours before a woman having any part of an abortion performed or induced, and before the administration of any anesthesia or medication in preparation for the abortion on the woman, the physician who is to perform the abortion, or qualified technician working in conjunction with the physician, shall do each of the following:

(1) Perform an obstetric real-time view of the unborn child on the pregnant woman.

(2) Provide a simultaneous explanation of what the display is depicting, which shall include the presence, location, and dimensions of the unborn child within the uterus and the number of unborn children depicted. The individual performing the display shall offer the pregnant woman the opportunity to hear the fetal heart tone. The image and auscultation of fetal heart tone shall be of a quality consistent with the standard medical practice in the

community. If the image indicates that fetal demise has occurred, a woman shall be informed of that fact.

(3) Display the images so that the pregnant woman may view them.

(4) Provide a medical description of the images, which shall include the dimensions of the embryo or fetus and the presence of external members and internal organs, if present and viewable.

(5) Obtain a written certification from the woman, before the abortion, that the requirements of this section have been complied with, which shall indicate whether or not she availed herself of the opportunity to view the image.

(6) Retain a copy of the written certification prescribed by subdivision (a)(5) of this section. The certification shall be placed in the medical file of the woman and shall be kept by the abortion provider for a period of not less than seven years. If the woman is a minor, then the certification shall be placed in the medical file of the minor and kept for at least seven years or for five years after the minor reaches the age of majority, whichever is greater.

If the woman has had an obstetric display of a real-time image of the unborn child within 72 hours before the abortion is to be performed, the certification of the physician or qualified technician who performed the procedure in compliance with this subsection shall be included in the patient's records and the requirements under this subsection shall be deemed to have been met.

(b) Nothing in this section shall be construed to prevent a pregnant woman from averting her eyes from the displayed images or from refusing to hear the simultaneous explanation and medical description.

(c) In the event the person upon whom the abortion is to be performed is an unemancipated minor, as defined in G.S. 90-21.6(1), the information described in subdivisions (a)(2) and (a)(4) of this section shall be furnished and offered respectively to a person required to give parental consent under G.S. 90-21.7(a) and the unemancipated minor. The person required to give consent in accordance with G.S. 90-21.7(a), as appropriate, shall make the certification required by subdivision (a)(5) of this section. In the event the person upon whom the abortion is to be performed has been adjudicated mentally incompetent by a court of competent jurisdiction, the information shall be furnished and offered respectively to her spouse or a legal guardian if she is married or, if she is not married, to one parent or a legal guardian and the woman. The spouse, legal guardian, or parent, as appropriate, shall make the certification required by subdivision (a)(5) of this section. In the case of an abortion performed pursuant to a court order under G.S. 90-21.8(e) and (f), the information described in subdivisions (a)(2) and (a)(4) of this section shall be provided to the minor, and the certification required by subdivision (a)(5) of this section shall be made by the minor.

"**§ 90-21.86. Procedure in case of medical emergency.**

When a medical emergency compels the performance of an abortion, the physician shall inform the woman, before the abortion if possible, of the medical indications supporting the physician's judgment that an abortion is necessary to avert her death or that a 24-hour delay will create a serious risk of substantial and irreversible impairment of a major bodily function, not including psychological or emotional conditions. As soon as feasible, the physician shall document in writing the medical indications upon which the physician relied and shall cause the original of the writing to be maintained in the woman's medical records and a copy given to her.

"**§ 90-21.87. Informed consent for a minor.**

If the woman upon whom an abortion is to be performed is an unemancipated minor, the voluntary and informed written consent required under G.S. 90-21.82 shall be obtained from the minor and from the adult individual who gives consent pursuant to G.S. 90-21.7(a).

"**§ 90-21.88. Civil remedies.**

(a) Any person upon whom an abortion has been performed and any father of an unborn child that was the subject of an abortion may maintain an action for damages against the person who performed the abortion in knowing or reckless violation of this Article. Any person upon whom an abortion has been attempted may maintain an action for damages against the person who performed the abortion in willful violation of this Article.

(b) Injunctive relief against any person who has willfully violated this Article may be sought by and granted to (i) the woman upon whom an abortion was performed or attempted to be performed in violation of this Article, (ii) any person who is the spouse, parent, sibling, or

guardian of, or a current or former licensed health care provider of, the woman upon whom an abortion has been performed or attempted to be performed in violation of this Article, or (iii) the Attorney General. The injunction shall prevent the abortion provider from performing or inducing further abortions in this State in violation of this Article.

(c) If judgment is rendered in favor of the plaintiff in any action authorized under this section, the court shall also tax as part of the costs reasonable attorneys' fees in favor of the plaintiff against the defendant. If judgment is rendered in favor of the defendant and the court finds that the plaintiff's suit was frivolous or brought in bad faith, then the court shall tax as part of the costs reasonable attorneys' fees in favor of the defendant against the plaintiff.

"**§ 90-21.89. Protection of privacy in court proceedings.**

In every proceeding or action brought under this Article, the court shall rule whether the anonymity of any woman upon whom an abortion has been performed or attempted shall be preserved from public disclosure if she does not give her consent to the disclosure. The court, upon motion or sua sponte, shall make the ruling and, upon determining that her anonymity should be preserved, shall issue orders to the parties, witnesses, and counsel and shall direct the sealing of the record and exclusion of individuals from courtrooms or hearing rooms to the extent necessary to safeguard her identity from public disclosure. Each order issued pursuant to this section shall be accompanied by specific written findings explaining (i) why the anonymity of the woman should be preserved from public disclosure, (ii) why the order is essential to that end, (iii) how the order is narrowly tailored to serve that interest, and (iv) why no reasonable less restrictive alternative exists. In the absence of written consent of the woman upon whom an abortion has been performed or attempted, anyone who brings an action under G.S. 90-21.88 (a) or (b) shall do so under a pseudonym. This section may not be construed to conceal the identity of the plaintiff or of witnesses from the defendant.

"**§ 90-21.90. Assurance of informed consent.**

(a) All information required to be provided under G.S. 90-21.82 to a woman considering abortion shall be presented to the woman individually and, except for information that may be provided by telephone, in the physical presence of the woman and in a language the woman understands to ensure that the woman has adequate opportunity to ask questions and to ensure the woman is not the victim of a coerced abortion.

(b) Should a woman be unable to read the materials provided to the woman pursuant to this section, a physician or qualified professional shall read the materials to the woman in a language the woman understands before the abortion.

"**§ 90-21.91. Assurance that consent is freely given.**

If a physician acting pursuant to this Article has reason to believe that a woman is being coerced into having an abortion, the physician or qualified professional shall inform the woman that services are available for the woman and shall provide the woman with private access to a telephone and information about, but not limited to, each of the following services:

(1) Rape crisis centers.
(2) Shelters for victims of domestic violence.
(3) Restraining orders.
(4) Pregnancy care centers.

"**§ 90-21.92. Severability.**

If any one or more provision, section, subsection, sentence, clause, phrase, or word of this Article or the application thereof to any person or circumstance is found to be unconstitutional, the same is hereby declared to be severable, and the balance of this Article shall remain effective, notwithstanding such unconstitutionality. The General Assembly hereby declares that it would have passed this Article, and each provision, section, subsection, sentence, clause, phrase, or word thereof, irrespective of the fact that any one or more provision, section, subsection, sentence, clause, phrase, or word be declared unconstitutional."

**SECTION 2.** The Department of Health and Human Services shall use funds appropriated to it in implementing this act.

**SECTION 3.** This act becomes effective 90 days after it becomes law and applies to claims for relief arising on or after October 1, 2011.

In the General Assembly read three times and ratified this the 16th day of June, 2011.

s/ Walter H. Dalton
President of the Senate

s/ Thom Tillis
Speaker of the House of Representatives

VETO Beverly E. Perdue
Governor

Became law notwithstanding the objections of the Governor, 12:07 p.m. this 28th day of July, 2011.

s/ Sarah Clapp
Senate Principal Clerk

**GENERAL ASSEMBLY OF NORTH CAROLINA**
**SESSION 2015**

**SESSION LAW 2015-62**
**HOUSE BILL 465**

AN ACT TO ENACT THE WOMEN AND CHILDREN'S PROTECTION ACT OF 2015.

The General Assembly of North Carolina enacts:

**SECTION 1.(a)** G.S. 14-27.7A reads as rewritten:

"**§ 14-27.7A. Statutory rape or sexual offense of person who is ~~13, 14, or~~ 15 years ~~old.~~of age or younger.**

(a) A defendant is guilty of a Class B1 felony if the defendant engages in vaginal intercourse or a sexual act with another person who is ~~13, 14, or~~ 15 years ~~old~~ of age or younger and the defendant is at least six years older than the person, except when the defendant is lawfully married to the person.

(b) ~~A~~ Unless the conduct is covered under some other provision of law providing greater punishment, a defendant is guilty of a Class C felony if the defendant engages in vaginal intercourse or a sexual act with another person who is ~~13, 14, or~~ 15 years ~~old~~ of age or younger and the defendant is more than four but less than six years older than the person, except when the defendant is lawfully married to the person."

**SECTION 1.(b)** G.S. 14-208.6 reads as rewritten:

"**§ 14-208.6. Definitions.**

The following definitions apply in this Article:

...

(5) "Sexually violent offense" means a violation of G.S. 14-27.2 (first degree rape), G.S. 14-27.2A (rape of a child; adult offender), G.S. 14-27.3 (second degree rape), G.S. 14-27.4 (first degree sexual offense), G.S. 14-27.4A (sex offense with a child; adult offender), G.S. 14-27.5 (second degree sexual offense), G.S. 14-27.5A (sexual battery), former G.S. 14-27.6 (attempted rape or sexual offense), G.S. 14-27.7 (intercourse and sexual offense with certain victims), G.S. 14-27.7A(a) (statutory rape or sexual offense of person who is ~~13, 14, or 15 years old where~~ 15 years of age or younger and the defendant is at least six years older), G.S. 14-43.11 (human trafficking) if (i) the offense is committed against a minor who is less than 18 years of age or (ii) the offense is committed against any person with the intent that they be held in sexual servitude, G.S. 14-43.13 (subjecting or maintaining a person for sexual servitude), G.S. 14-178 (incest between near relatives), G.S. 14-190.6 (employing or permitting minor to assist in offenses against public morality and decency), G.S. 14-190.9(a1) (felonious indecent exposure), G.S. 14-190.16 (first degree sexual exploitation of a minor), G.S. 14-190.17 (second degree sexual exploitation of a minor), G.S. 14-190.17A (third degree sexual exploitation of a minor), G.S. 14-202.1 (taking indecent liberties with children), G.S. 14-202.3 (Solicitation of child by computer or certain other electronic devices to commit an unlawful sex act), G.S. 14-202.4(a) (taking indecent liberties with a student), G.S. 14-205.2(c) or (d) (patronizing a prostitute who is a minor or a mentally disabled person), G.S. 14-205.3(b) (promoting prostitution of a minor or a mentally disabled person), G.S. 14-318.4(a1) (parent or caretaker commit or permit act of prostitution with or by a juvenile), or G.S. 14-318.4(a2) (commission or allowing of sexual act upon a juvenile by parent or guardian). The term also includes the following: a solicitation or

section, the phrase "health care provider" shall have the same meaning as defined under G.S. 90-410(1).

(f) Nothing in this section shall require a hospital, other health care institution, or other health care provider to perform an abortion or to provide abortion services.

(g) For purposes of this section, "qualified physician" means (i) a physician who possesses, or is eligible to possess, board certification in obstetrics or gynecology, (ii) a physician who possesses sufficient training based on established medical standards in safe abortion care, abortion complications, and miscarriage management, or (iii) a physician who performs an abortion in a medical emergency as defined by G.S. 90-21.81(5)."

**SECTION 7.(b)** G.S. 90-21.82 reads as rewritten:

"**§ 90-21.82. Informed consent to abortion.**

No abortion shall be performed upon a woman in this State without her voluntary and informed consent. Except in the case of a medical emergency, consent to an abortion is voluntary and informed only if all of the following conditions are satisfied:

(1) At least ~~24 hours~~ 72 hours prior to the abortion, a physician or qualified professional has orally informed the woman, by telephone or in person, of all of the following:

...

If the physician or qualified professional does not know the information required in sub-subdivisions a., f., or g. of this subdivision, the woman shall be advised that this information will be directly available from the physician who is to perform the abortion. However, the fact that the physician or qualified professional does not know the information required in sub-subdivisions a., f., or g. shall not restart the ~~24-hour~~ 72-hour period. The information required by this subdivision shall be provided in English and in each language that is the primary language of at least two percent (2%) of the State's population. The information may be provided orally either by telephone or in person, in which case the required information may be based on facts supplied by the woman to the physician and whatever other relevant information is reasonably available. The information required by this subdivision may not be provided by a tape recording but shall be provided during a consultation in which the physician is able to ask questions of the patient and the patient is able to ask questions of the physician. If, in the medical judgment of the physician, a physical examination, tests, or the availability of other information to the physician subsequently indicates a revision of the information previously supplied to the patient, then that revised information may be communicated to the patient at any time before the performance of the abortion. Nothing in this section may be construed to preclude provision of required information in a language understood by the patient through a translator.

(2) The physician or qualified professional has informed the woman, either by telephone or in person, of each of the following at least ~~24 hours~~ 72 hours before the abortion:

a. That medical assistance benefits may be available for prenatal care, childbirth, and neonatal care.

b. That public assistance programs under Chapter 108A of the General Statutes may or may not be available as benefits under federal and State assistance programs.

c. That the father is liable to assist in the support of the child, even if the father has offered to pay for the abortion.

d. That the woman has other alternatives to abortion, including keeping the baby or placing the baby for adoption.

e. That the woman has the right to review the printed materials described in G.S. 90-21.83, that these materials are available on a State-sponsored Web site, and the address of the State-sponsored Web site. The physician or a qualified professional shall orally inform the woman that the materials have been provided by the Department and that they describe the unborn child and list agencies that offer alternatives to abortion. If the woman chooses to view the

materials other than on the Web site, the materials shall either be given to her at least ~~24 hours~~ 72 hours before the abortion or be mailed to her at least 72 hours before the abortion by certified mail, restricted delivery to addressee.

f. That the woman is free to withhold or withdraw her consent to the abortion at any time before or during the abortion without affecting her right to future care or treatment and without the loss of any State or federally funded benefits to which she might otherwise be entitled.

The information required by this subdivision shall be provided in English and in each language that is the primary language of at least two percent (2%) of the State's population. The information required by this subdivision may be provided by a tape recording if provision is made to record or otherwise register specifically whether the woman does or does not choose to have the printed materials given or mailed to her. Nothing in this subdivision shall be construed to prohibit the physician or qualified professional from e-mailing a Web site link to the materials described in this subdivision or G.S. 90-21.83.

...."

**SECTION 7.(c)** G.S. 90-21.86 reads as rewritten:

"**§ 90-21.86. Procedure in case of medical emergency.**

When a medical emergency compels the performance of an abortion, the physician shall inform the woman, before the abortion if possible, of the medical indications supporting the physician's judgment that an abortion is necessary to avert her death or that a ~~24-hour~~ 72-hour delay will create a serious risk of substantial and irreversible impairment of a major bodily function, not including psychological or emotional conditions. As soon as feasible, the physician shall document in writing the medical indications upon which the physician relied and shall cause the original of the writing to be maintained in the woman's medical records and a copy given to her."

**SECTION 7.(d)** G.S. 14-45.1(b1) and G.S. 14-45.1(c), as enacted by subsection (a) of this section, become effective January 1, 2016, and apply to abortions performed or attempted on or after that date. The remainder of subsections (a), (b), and (c) of this section become effective October 1, 2015, and apply to abortions performed or attempted on or after that date.

**SECTION 8.(a)** If any provision of this act or its application is held invalid, the invalidity does not affect other provisions or applications of this act that can be given effect without the invalid provisions or application, and to this end the provisions of this act are severable. If any provision of this act is temporarily or permanently restrained or enjoined by judicial order, this act shall be enforced as though such restrained or enjoined provisions had not been adopted, provided that whenever such temporary or permanent restraining order or injunction is stayed, dissolved, or otherwise ceases to have effect, such provisions shall have full force and effect.

**SECTION 8.(b)** Except as otherwise provided, this act is effective when it becomes law.

In the General Assembly read three times and ratified this the 4th day of June, 2015.

s/ Daniel J. Forest
President of the Senate

s/ Tim Moore
Speaker of the House of Representatives

s/ Pat McCrory
Governor

Approved 5:45 p.m. this 5th day of June, 2015

# Stuart v. Camnitz
**774 F.3d 238 (2014)**

**Gretchen S. STUART, MD, on behalf of herself and her patients seeking abortions; James R. Dingfelder, MD, on behalf of himself and his patients seeking abortions; David A. Grimes, MD, on behalf of himself and his patients seeking abortions; Amy Bryant, MD, on behalf of herself and her patients seeking abortions; Serina Floyd, MD, on behalf of herself and her patients seeking abortions; Decker & Watson, Inc., d/b/a Piedmont Carolina Medical Clinic; Planned Parenthood of Central North Carolina; A Woman's Choice of Raleigh, Inc.; Planned Parenthood Health Systems, Inc.; Takey Crist, on behalf of himself and his patients seeking abortions; Takey Crist, M.D., P.A., d/b/a Crist Clinic for Women, Plaintiffs-Appellees,**

**v.**

**Paul S. CAMNITZ, MD, in his official capacity as President of the North Carolina Medical Board and his employees, agents and successors; Roy Cooper, in his official capacity as Attorney General of North Carolina and his employees, agents and successors; Aldona Zofia Wos, in her official capacity as Secretary of the North Carolina Department of Health and Human Services and her employees, agents and successors; Jim Woodall, in his official capacity as District Attorney ("DA") for Prosecutorial District ("PD") 15B and his employees, agents and successors; Leon Stanback, in his official capacity as DA for PD 14 and his employees, agents and successors; District Attorney Douglas Henderson, in his official capacity as DA for PD 18 and his employees, agents and successors; Billy West, in his official capacity as DA for PD 12 and his employees, agents and successors; C. Colon Willoughby, Jr., in his official capacity as DA for PD 10 and his employees, agents and successors; Benjamin R. David, in his official capacity as DA for PD 5 and his employees, agents and successors; Ernie Lee, in his official capacity as DA for PD 4 and his employees, agents and successors; Jim O'Neill, in his official capacity as DA for PD 21 and his employees, agents and successors, Defendants-Appellants,**

**John Thorp, Intervenor/Defendant,**

**Francis J. Beckwith, MJS, PhD; Gerard V. Bradley; Teresa S. Collett; David K. Dewolf; Rick Duncan; Edward M. Gaffney; Stephen Gilles; Michael Stokes Paulsen; Ronald J. Rychlak; Richard Stith; Ruth Samuelson; Pat McElraft; Pat Hurley; Marilyn Avila; Susan Martin; Carolyn M. Justice; Rena W. Turner; Michele D. Presnell; Sarah Stevens; Jacqueline Michelle Schaffer; Debra Conrad; Mark Brody; Chris Whitmire; Allen McNeill; Donny Lambeth; George Cleveland; Linda Johnson; David Curtis; Joyce Krawiec; Shirley Randlemen; Dan Soucek; Norman Sanderson; Warren Daniel; Buck Newton; Kathy L. Harrington; Andrew Brock, Amici Supporting Appellant,**

**American College of Obstetricians and Gynecologists; American Medical Association; American Public Health Association, Amici Supporting Appellee.**

No. 14-1150.

**United States Court of Appeals, Fourth Circuit.**

Argued: October 29, 2014.
Decided: December 22, 2014.

241*241 ARGUED: John Foster Maddrey, North Carolina Department of Justice, Raleigh, North Carolina, for Appellants. Julie Rikelman, Center for Reproductive 242*242Rights, New York, New York, for Appellees. ON BRIEF: Roy Cooper, Attorney General, Gary R. Govert, Assistant Solicitor General, I. Faison Hicks, Special Deputy Attorney General, North Carolina Department of Justice, Raleigh, North Carolina, for Appellants. Christopher Brook, American Civil Liberties Union of North Carolina Legal Foundation, Raleigh, North Carolina; Andrew D. Beck, American Civil Liberties Union Foundation, New York, New York; Jennifer Sokoler, Center for Reproductive Rights, New York, New York; Walter Dellinger, Anton Metlitsky, Leah Godesky, O'Melveny & Myers LLP, Washington, D.C.; Diana O. Salgado, New York, New York, Helene T. Krasnoff, Planned Parenthood Fed. of America, Washington, D.C., for Appellees. Anna R. Franzonello, Mailee R. Smith, William L. Saunders, Denise M. Burke, Americans United for Life, Washington, D.C., for Amici Francis J. Beckwith, MJS, PhD, Gerard V. Bradley, Teresa S. Collett, David K. Dewolf, Rick Duncan, Edward M. Gaffney, Stephen Gilles, Michael Stokes Paulsen, Ronald J. Rychlak, and Richard Stith. Scott W. Gaylord, Jennings Professor, Thomas J. Molony, Associate Professor

of Law, Elon University School of Law, Greensboro, North Carolina, for Amici Ruth Samuelson, Pat McElraft, Pat Hurley, Marilyn Avila, Susan Martin, Carolyn M. Justice, Rena W. Turner, Michele D. Presnell, Sarah Stevens, Jacqueline Michelle Schaffer, Debra Conrad, Mark Brody, Chris Whitmire, Allen McNeill, Donny Lambeth, George Cleveland, Linda Johnson, David Curtis, Joyce Krawiec, Shirley Randlemen, Dan Soucek, Norman Sanderson, Warren Daniel, Buck Newton, Kathy L. Harrington, and Andrew Brock. Kimberly A. Parker, Alathea E. Porter, Thaila K. Sundaresan, Tiffany E. Payne, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, D.C., for Amici American College of Obstetricians and Gynecologists and American Medical Association. Shannon Rose Selden, Courtney M. Dankworth, Debevoise & Plimpton LLP, New York, New York, for Amicus American Public Health Association.

Before TRAXLER, Chief Judge, and WILKINSON and DUNCAN, Circuit Judges.

Affirmed by published opinion. Judge WILKINSON wrote the opinion, in which Chief Judge TRAXLER and Judge DUNCAN joined.

WILKINSON, Circuit Judge:

At issue here is a North Carolina statute that requires physicians to perform an ultrasound, display the sonogram, and describe the fetus to women seeking abortions. A physician must display and describe the image during the ultrasound, even if the woman actively "avert[s] her eyes" and "refus[es] to hear." N.C. Gen. Stat. § 90-21.85(b). This compelled speech, even though it is a regulation of the medical profession, is ideological in intent and in kind. The means used by North Carolina extend well beyond those states have customarily employed to effectuate their undeniable interests in ensuring informed consent and in protecting the sanctity of life in all its phases. We thus affirm the district court's holding that this compelled speech provision violates the First Amendment.

**I.**

In July 2011, the North Carolina General Assembly passed the Woman's Right to Know Act over a gubernatorial veto. The Act amended Chapter 90 of the North Carolina General Statutes, which governs medical and related professions, adding a new article regulating the steps that must precede an abortion.

243*243 Physicians and abortion providers filed suit after the Act's passage but before its effective date, asking the court to enjoin enforcement of the Act and declare it unconstitutional. In October 2011, the district court issued a preliminary injunction barring enforcement of one provision of the Act, the Display of Real-Time View Requirement ("the Requirement"), codified at N.C. Gen.Stat. § 90-21.85. J.A. 143-44. The court subsequently allowed the plaintiffs to amend their complaint. The Third Amended Complaint asserted that the Display of Real-Time View Requirement violated the physicians' First Amendment free speech rights and the physicians' and the patients' Fourteenth Amendment due process rights. J.A. 282.[1]

The Display of Real-Time View Requirement obligates doctors (or technicians) to perform an ultrasound on any woman seeking an abortion at least four but not more than seventy-two hours before the abortion is to take place. N.C. Gen.Stat. § 90-21.85(a)(1). The physician must display the sonogram so that the woman can see it,*id.* § 90-21.85(a)(3), and describe the fetus in detail, "includ[ing] the presence, location, and dimensions of the unborn child within the uterus and the number of unborn children depicted," *id.* § 90-21.85(a)(2), as well as "the presence of external members and internal organs, if present and viewable," *id.* § 90-21.85(a)(4). The physician also must offer to allow the woman to hear the fetal heart tone. *Id.* § 90-21.85(a)(2). The woman, however, may "avert[] her eyes from the displayed images" and "refus[e] to hear the simultaneous explanation and medical description" by presumably covering her eyes and ears. *Id.* § 90-21.85(b).

The Act provides an exception to these requirements only in cases of medical emergency. *Id.* § 90-21.86. Physicians who violate the Act are liable for damages and may be enjoined from providing further abortions that violate the Act in North Carolina. *Id.* § 90-21.88. Violation of the Act also may result in the loss of the doctor's medical license. *See*

*id.* § 90-14(a)(2) (The North Carolina Medical Board may impose disciplinary measures, including license revocation, upon a doctor who "[p]roduc[es] or attempt[s] to produce an abortion contrary to law.").

Not at issue in this appeal are several other informed consent provisions to which physicians, independently of the Display of Real-Time View Requirement, are subject. The first is the informed consent provision of the Act itself. *Id.* § 90-21.82. It requires that, at least twenty-four hours before an abortion is to be performed, a doctor or qualified professional explain to the woman seeking the abortion the risks of the procedure, the risks of carrying the child to term, "and any adverse psychological effects associated with the abortion." *Id.* § 90-21.82(1)(b), (d). The physician must also convey the "probable gestational age of the unborn child," *id.* § 9021.82(1)(c), that financial assistance for the pregnancy may be available, that the father of the child is obligated to pay child support, and that there are alternatives to abortion, *id.* § 90-21.82(2)(a)-(d). Furthermore, the doctor must inform the woman that she can view on a state-sponsored website materials published by the state which describe the fetus. The doctor 244*244 must also give or mail the woman physical copies of the materials if she wishes, and must "list agencies that offer alternatives to abortion." *Id.* § 90-21.82(2)(e).

Before this Act, physicians were still subject to North Carolina's general informed consent requirements when conducting abortions. *See id.* § 90-21.13(a); 10A N.C. Admin. Code 14E.0305(a); Appellees' Br. 6. Prior to its enactment, the physicians challenging the Act claim they were "inform[ing] each patient about the nature of the abortion procedure, its risks and benefits, and the alternatives available to the patient and their respective risks and benefits" and "counsel[ing] the patient to ensure that she was certain about her decision to have an abortion." Appellees' Br. 6.

Both parties moved for summary judgment. Applying heightened, intermediate scrutiny, *Stuart v. Loomis*, 992 F.Supp.2d 585, 600-01 (M.D.N.C.2014), the district court held that the Display of Real-Time View Requirement violated the physicians' First Amendment rights to free speech. *Id.* at 607-09. It thus granted the plaintiffs' motion for summary judgment and entered a permanent injunction. *Id.* at 610-11. The court declined to reach the merits of the due process claim, finding it moot in light of the court's ruling on the First Amendment claim. *Id.* at 611.[2]

We review a grant of summary judgment *de novo*. *S. Appalachian Mountain Stewards v. A & G Coal Corp.*, 758 F.3d 560, 562 (4th Cir.2014). In so doing, we view the facts in the light most favorable to the state. *Moore-King v. Cnty. of Chesterfield, Va.*, 708 F.3d 560, 566 (4th Cir.2013).

**II.**

**A.**

"Congress shall make no law ... abridging the freedom of speech." U.S. Const. amend. I. This concept sounds simple, but proves more complicated on closer inspection. Laws that impinge upon speech receive different levels of judicial scrutiny depending on the type of regulation and the justifications and purposes underlying it. On the one hand, regulations that discriminate against speech based on its content "are presumptively invalid," *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), and courts usually "apply the most exacting scrutiny," *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994); *see also United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 814, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000). On the other hand, "area[s] traditionally subject to government regulation," such as commercial speech and professional conduct, typically receive a lower level of review. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562-63, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) (regulation of commercial speech); *see also Keller v. State Bar of Cal.*, 496 U.S. 1, 13-16, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990) (regulation of legal profession).

We thus must first examine the type of regulation at issue to determine the requisite level of scrutiny to apply. *Turner*, 512 U.S. at 637, 114 S.Ct. 2445 (explaining that "because not every interference with speech triggers the same degree of scrutiny under the First Amendment, we must decide at the outset the 245*245 level of scrutiny applicable"). As we do, we are mindful of "the First Amendment's command that government regulation of speech

must be measured in minimums, not maximums."*Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 790, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988).

The physicians urge us to find that the regulation must receive strict scrutiny because it is content-based and ideological. *See* Appellees' Br. 36-40. The state counters that the Requirement must be treated as a regulation of the medical profession in the context of abortion and thus subject only to rational basis review.*See* Appellants' Br. 7-15, 20-28. The district court chose a different path. Recognizing that the Requirement both compelled speech and regulated the medical profession, the court applied neither strict scrutiny nor rational basis review, but rather the intermediate scrutiny standard normally used for certain commercial speech regulations. *See Stuart v. Loomis*, 992 F.Supp.2d 585, 598-601 (M.D.N.C.2014). For the reasons outlined below, we agree with the district court that the Requirement is a content-based regulation of a medical professional's speech which must satisfy at least intermediate scrutiny to survive.

**B.**

The Display of Real-Time View Requirement regulates both speech and conduct. The physician must convey the descriptions mandated by the statute in his or her own voice. The sonogram display is also intimately connected with the describing requirement. The two are thus best viewed as a single whole. In deciding whether an activity "possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether `[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'" *Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 410-11, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974)). The state's avowed intent and the anticipated effect of all aspects of the Requirement are to discourage abortion or at the very least cause the woman to reconsider her decision. *See* Appellants' Br. 29-32. The clear import of displaying the sonogram in this context — while the woman who has requested an abortion is partially disrobed on an examination table — is to use the visual imagery of the fetus to dissuade the patient from continuing with the planned procedure. If the state's intent is to convey a distinct message, the message does not lose its expressive character because it happens to be delivered by a private party. Whether one agrees or disagrees with the state's approach here cannot be the question. In this context, the display of the sonogram is plainly an expressive act entitled to First Amendment protection. *See, e.g., John Doe No. 1 v. Reed*, 561 U.S. 186, 194-95, 130 S.Ct. 2811, 177 L.Ed.2d 493 (2010) (recognizing First Amendment protections for signing a referendum petition); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02, 72 S.Ct. 777, 96 L.Ed. 1098 (1952) (commercial film).

The First Amendment not only protects against prohibitions of speech, but also against regulations that compel speech. "Since all speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) (citations omitted) (internal quotation marks omitted); *see also Wooley v.* 246*246 *Maynard*, 430 U.S. 705, 714, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) ("[T]he First Amendment ... includes both the right to speak freely and the right to refrain from speaking at all."). A regulation compelling speech is by its very nature content-based, because it requires the speaker to change the content of his speech or even to say something where he would otherwise be silent.*Riley*, 487 U.S. at 795, 108 S.Ct. 2667 ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech."); *Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 189 (4th Cir.2013) (en banc) (same). Compelled speech is particularly suspect because it can directly affect listeners as well as speakers. Listeners may have difficulty discerning that the message is the state's, not the speaker's, especially where the "speaker [is] intimately connected with the communication advanced." *Hurley*, 515 U.S. at 576, 115 S.Ct. 2338.

The Requirement is quintessential compelled speech. It forces physicians to say things they otherwise would not say. Moreover, the statement compelled here is ideological; it conveys a particular opinion. The state freely admits that the purpose and anticipated effect of the Display of Real-Time View Requirement is to convince women seeking abortions to change their minds or reassess their decisions. *See*Appellants' Br. 2932.

It may be true, as the Fifth Circuit has noted, that "the required disclosures... are the epitome of truthful, non-misleading information." *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 577-78 (5th Cir.2012). But an individual's "right to tailor [his] speech" or to not speak at all "applies ... equally to statements of fact the speaker would rather avoid." *Hurley*, 515 U.S. at 573, 115 S.Ct. 2338; *see also Sorrell v. IMS Health Inc.*, ___ U.S. ___, 131 S.Ct. 2653, 2667, 180 L.Ed.2d 544 (2011); *Turner*, 512 U.S. at 645, 114 S.Ct. 2445; *Riley*, 487 U.S. at 797-98, 108 S.Ct. 2667. While it is true that the words the state puts into the doctor's mouth are factual, that does not divorce the speech from its moral or ideological implications. "[C]ontext matters." *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.*, 721 F.3d 264, 286 (4th Cir.2013) (en banc). Of course we need not go so far as to say that every required description of a typical fetus is in every context ideological. But this Display of Real-Time View Requirement explicitly promotes a pro-life message by demanding the provision of facts that all fall on one side of the abortion debate — and does so shortly before the time of decision when the intended recipient is most vulnerable.

The state protests that the Requirement does not dictate a specific script and that the doctor is free to supplement the information with his own opinion about abortion. Reply Br. 1416. That is true; the state does not demand that the doctor use particular words. But that does not mean that the Requirement is "not designed to favor or disadvantage speech of any particular content." *Turner*, 512 U.S. at 652, 114 S.Ct. 2445. In fact, the clear and conceded purpose of the Requirement is to support the state's pro-life position. That the doctor may supplement the compelled speech with his own perspective does not cure the coercion — the government's message still must be delivered (though not necessarily received).

Content-based regulations of speech typically receive strict scrutiny. *Id.* at 642, 114 S.Ct. 2445. The state, however, maintains that the Requirement is merely a regulation of the practice of medicine that need only satisfy rational 247*247 basis review. We turn now to that contention.[3]

C.

The state's power to prescribe rules and regulations for professions, including medicine, has an extensive history. *See Dent v. West Virginia*, 129 U.S. 114, 122, 9 S.Ct. 231, 32 L.Ed. 623 (1889) ("[I]t has been the practice of different states, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely."). Licensing and regulation by the state "provide clients with the confidence they require to put their health or their livelihood in the hands of those who utilize knowledge and methods with which the clients ordinarily have little or no familiarity." *King v. Gov. of N.J.*, 767 F.3d 216, 232 (3d Cir.2014). The state may establish licensing qualifications, *Dent*, 129 U.S. at 122, 9 S.Ct. 231, oblige the payment of dues to a professional organization for purposes such as "disciplining members" and "proposing ethical codes," *Keller*, 496 U.S. at 16, 110 S.Ct. 2228, and even set standards for the conduct of professional activities, *Barsky v. Bd. of Regents of Univ. of State of N.Y.*, 347 U.S. 442, 449-50, 74 S.Ct. 650, 98 L.Ed. 829 (1954). In the medical context, the state may require the provision of information sufficient for patients to give their informed consent to medical procedures, *see Canterbury v. Spence*, 464 F.2d 772, 781 (D.C.Cir.1972), and patients may seek damages when doctors fail to follow statutory and professionally recognized norms, *see, e.g.*, N.C. Gen.Stat. § 90-21.88. Simply put, "[t]he power of government to regulate the professions is not lost whenever the practice of a profession entails speech." *Lowe v. SEC*, 472 U.S. 181, 228, 105 S.Ct. 2557, 86 L.Ed.2d 130 (1985) (White, J., concurring in the judgment).

But that does not mean that individuals simply abandon their First Amendment rights when they commence practicing a profession. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (plurality opinion)("[T]he physician's First Amendment rights not to speak *are* implicated." (emphasis added)); *Lowe*, 472 U.S. at 229-30, 105 S.Ct. 2557 (White, J., concurring in the judgment) ("But the principle that the government may restrict entry into professions and vocations through licensing schemes has never been extended to encompass the licensing of speech *per se* or of the press."). To the contrary, "speech is speech, and it must be analyzed as such for purposes of the First Amendment." *King*, 767 F.3d at 229. There are "many dimensions" to professionals' speech. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 634, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995). And "[t]here are circumstances in which we will accord speech by attorneys on public issues and matters of legal representation the strongest protection our Constitution has to offer." *Id.* With all forms of compelled speech,

we must look to the context of the regulation to determine when the state's regulatory authority has extended too far. *Riley*, 487 U.S. at 796, 108 S.Ct. 2667.

248*248 When the First Amendment rights of a professional are at stake, the stringency of review thus slides "along a continuum" from "public dialogue" on one end to "regulation of professional *conduct*" on the other. *Pickup v. Brown*, 740 F.3d 1208, 1227, 1229 (9th Cir.2013) (emphasis in original). Other circuits have recently relied on the distinction between professional speech and professional conduct when deciding on the appropriate level of scrutiny to apply to regulations of the medical profession. *See King*, 767 F.3d at 224-29, 233-37; *Wollschlaeger v. Gov. of Fla.*, 760 F.3d 1195, 1217-25 (11th Cir. 2014).

The Display of Real-Time View Requirement resides somewhere in the middle on that sliding scale. It is a regulation of medical treatment insofar as it directs doctors to do certain things in the context of treating a patient. In that sense, the government can lay claim to its stronger interest in the regulation of professional conduct. But that is hardly the end of the matter. The government's regulatory interest is less potent in the context of a self-regulating profession like medicine. *Moore-King v. Cnty. of Chesterfield, Va.*, 708 F.3d 560, 570 (4th Cir. 2013). Moreover, the Requirement is a clearly content-based regulation of speech; it requires doctors to "say" as well as "do." As the district court found, the confluence of these factors points toward borrowing a heightened intermediate scrutiny standard used in certain commercial speech cases. *Stuart*, 992 F.Supp.2d at 600. Thus, we need not conclusively determine whether strict scrutiny ever applies in similar situations, because in this case "the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied." *Sorrell*, 131 S.Ct. at 2667.

**D.**

Insofar as our decision on the applicable standard of review differs from the positions taken by the Fifth and Eighth Circuits in cases examining the constitutionality of abortion regulations under the First Amendment, we respectfully disagree. Both courts relied heavily on a single paragraph in *Casey:*

All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, see*Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977), but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, cf. *Whalen v. Roe*, 429 U.S. 589, 603, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.

505 U.S. at 884, 112 S.Ct. 2791; *see also Lakey*, 667 F.3d at 574-76; *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 686 F.3d 889, 893 (8th Cir.2012) (en banc) ("*Rounds II*"); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 733-35 (8th Cir.2008) (en banc) ("*Rounds I*"). That is the sum of the First Amendment analysis in *Casey*.

In considering an ultrasound display-and-describe requirement similar to the one at issue here, the Fifth Circuit interpreted *Casey* as employing "the antithesis of strict scrutiny." *Lakey*, 667 F.3d at 575. It further noted that in *Gonzales v. Carhart*, the Supreme Court "upheld a state's `significant role ... in regulating the medical profession.'" *Lakey*, 667 F.3d at 575-76 (quoting *Gonzales v. Carhart*, 550 U.S. 124, 157, 127 S.Ct. 1610, 167 249*249 L.Ed.2d 480 (2007)). Therefore, the *Lakey* court reasoned, provisions such as the one at issue here — that is, laws that "require truthful, nonmisleading, and relevant disclosures," *id.* at 576 — "do not fall under the rubric of compelling `ideological' speech that triggers First Amendment strict scrutiny," *id.* The Eighth Circuit similarly drew from *Casey* and *Gonzales* the rule that the First Amendment permits the state to "use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion." *Rounds I*, 530 F.3d at 734-35; *see also Rounds II*, 686 F.3d at 893.

With respect, our sister circuits read too much into *Casey* and *Gonzales*. The single paragraph in *Casey* does not assert that physicians forfeit their First Amendment rights in the procedures surrounding abortions, nor does it

announce the proper level of scrutiny to be applied to abortion regulations that compel speech to the extraordinary extent present here. The plurality opinion stated that the medical profession is "subject to reasonable licensing and regulation by the State" and that physicians' speech is "part of the practice of medicine." Casey, 505 U.S. at 884, 112 S.Ct. 2791. But the plurality did not hold sweepingly that all regulation of speech in the medical context merely receives rational basis review. Rather, having noted the physicians' First Amendment rights and the state's countervailing interest in regulating the medical profession, the plurality simply stated that it saw "no constitutional infirmity in the requirement that the physician provide the information mandated by the State *here*." *Id.* (emphasis added). That particularized finding hardly announces a guiding standard of scrutiny for use in every subsequent compelled speech case involving abortion.

Furthermore, the Fifth and Eighth Circuits' reliance on *Gonzales* seems inapposite.*Gonzales* was not a First Amendment case; the plaintiffs there did not bring free speech claims. *See* Carhart v. Ashcroft, 331 F.Supp.2d 805, 814 (D.Neb. 2004);*Planned Parenthood Fed'n of Am. v. Ashcroft*, 320 F.Supp.2d 957, 967 (N.D.Cal.2004). Thus *Gonzales* does not elucidate the First Amendment standard applied in *Casey*. *Gonzales* provides valuable insight into the relationship between the state and the medical profession and the role the state may play in ensuring that women are properly informed before making what is indisputably a profound choice with permanent and potentially harmful impacts. *See infra* Part III. But it says nothing about the level of scrutiny courts should apply when reviewing a claim that a regulation compelling speech in the abortion context violates physicians' First Amendment free speech rights. The fact that a regulation does not impose an undue burden on a woman under the due process clause does not answer the question of whether it imposes an impermissible burden on the physician under the First Amendment. A heightened intermediate level of scrutiny is thus consistent with Supreme Court precedent and appropriately recognizes the intersection here of regulation of speech and regulation of the medical profession in the context of an abortion procedure.[4]

250*250 **III.**

Under an intermediate standard of scrutiny, the state bears the burden of demonstrating "at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest." *Sorrell v. IMS Health Inc.*, ___ U.S. ___, 131 S.Ct. 2653, 2667-68, 180 L.Ed.2d 544 (2011). This formulation seeks to "ensure not only that the State's interests are proportional to the resulting burdens placed on speech but also that the law does not seek to suppress a disfavored message." *Id.* at 2668. The court can and should take into account the effect of the regulation on the intended recipient of the compelled speech, especially where she is a captive listener. *See Hill v. Colorado*, 530 U.S. 703, 716-18, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976); *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.*, 721 F.3d 264, 286 (4th Cir.2013) (en banc); *cf. Lee v. Weisman*, 505 U.S. 577, 598, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992).

The protection of fetal life, along with the companion interests of protecting the pregnant woman's psychological health and ensuring that "so grave a choice is well informed," *Gonzales*, 550 U.S. at 159, 127 S.Ct. 1610, is undeniably an important state interest. The Supreme Court has repeatedly affirmed the state's "important and legitimate interest" in preserving, promoting, and protecting fetal life. *Roe v. Wade*,410 U.S. 113, 162, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (quoted in *Casey*, 505 U.S. at 871, 112 S.Ct. 2791); *see also Gonzales*, 550 U.S. at 145, 127 S.Ct. 1610. We shall presume for the purpose of this appeal that this statute protects fetal life by increasing the likelihood that a woman will not follow through on the decision to have an abortion. Nonetheless, the means used to promote a substantial state interest must be drawn so as to directly advance the interest without impeding too greatly on individual liberty interests or competing state concerns. *Sorrell*, 131 S.Ct. at 2667-68. The means employed here are far-reaching — almost unprecedentedly so — in a number of respects and far outstrip the provision at issue in *Casey*. *See Casey*, 505 U.S. at 881, 112 S.Ct. 2791. This statutory provision interferes with the physician's right to free speech beyond the extent permitted for reasonable regulation of the medical profession, while simultaneously threatening harm to the patient's psychological health, interfering with the physician's professional judgment, and compromising the doctor-patient relationship. We must therefore find the Display of Real-Time View Requirement unconstitutional.

**A.**

Before addressing the provision's constitutional infirmities, it is well worth identifying briefly the various state interests at stake in this case. As we noted above, the Supreme Court has forcefully reiterated that the state's interest in protecting fetal life is important and profound. This interest derives from the state's general interest in protecting and promoting respect for life, and has been recognized in abortion decisions without number. *See, e.g.*, *Gonzales*, 550 U.S. at 158, 127 S.Ct. 1610; *Casey*, 505 U.S. at 871, 112 S.Ct. 2791; *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 165-66 (4th Cir.2000). We do not question the substantial state interest at work here.

As part of its general interest in promoting the health of its citizens, the state also has an interest in promoting the psychological health of women seeking abortions. Appellants' Br. 17. The state may seek to 251*251 protect women both from the psychological harm of "com[ing] to regret their choice," *Gonzales*, 550 U.S. at 159, 127 S.Ct. 1610, as well as the psychological harm from the process of obtaining an abortion itself. The Supreme Court has also recognized a state interest in maintaining "the integrity and ethics of the medical profession," which includes promoting a healthy doctor-patient relationship, *Washington v. Glucksberg*, 521 U.S. 702, 731, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997); *see also Gonzales*, 550 U.S. at 157, 127 S.Ct. 1610, and respecting physicians' professional judgment, *see Casey*, 505 U.S. at 884, 112 S.Ct. 2791.

However, that important state interests are implicated in the abortion context is only the starting point for our analysis. Though physicians and other professionals may be subject to regulations by the state that restrict their First Amendment freedoms when acting in the course of their professions, professionals do not leave their speech rights at the office door. *See Lowe v. SEC*, 472 U.S. 181, 229-30, 105 S.Ct. 2557, 86 L.Ed.2d 130 (1985) (White, J., concurring in the judgment). Any state regulation that limits the free speech rights of professionals must pass the requisite constitutional test. The Display of Real-Time View Requirement must directly advance an important state interest in a manner that is drawn to that interest and proportional to the burden placed on the speech. *See Sorrell*, 131 S.Ct. at 2667-68.

**B.**

North Carolina contends that the Display of Real-Time View Requirement is merely "reasonable ... regulation by the State" of the medical profession that does not violate the physicians' First Amendment rights any more than informed consent requirements do. Appellants' Br. 22-25 (quoting *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 575 (5th Cir.2012) (quoting *Casey*, 505 U.S. at 882, 112 S.Ct. 2791)). The requirements the provision imposes on physicians, however, resemble neither traditional informed consent nor the variation found in the Pennsylvania statute at issue in *Casey*. The North Carolina statute goes much further, imposing additional burdens on the physicians' free speech and risking the compromise of other important state interests.

Traditional informed consent requirements derive from the principle of patient autonomy in medical treatment. Grounded in self-determination, obtaining informed consent prior to medical treatment is meant to ensure that each patient has "the information she needs to meaningfully consent to medical procedures." Am. Coll. of Obstetricians & Gynecologists & the Am. Med. Ass'n ("ACOG & AMA") Br. 5; *see also* AMA, Op. 8.08 — Informed Consent (2006). As the term suggests, informed consent consists of two essential elements: comprehension and free consent. ACOG & AMA Br. 7; ACOG, Comm. Op. No. 439 — Informed Consent, at 2 (2012). Comprehension requires that the physician convey adequate information about the diagnosis, the prognosis, alternative treatment options (including no treatment), and the risks and likely results of each option. ACOG & AMA Br. 7; ACOG, Comm. Op. No. 439, at 3, 5; *see also* J.A. 359 (declaration of Dr. Anne Drapkin Lyerly); *Canterbury v. Spence*, 464 F.2d 772, 780-81 (D.C.Cir.1972). Physicians determine the "adequate" information for each patient based on what a reasonable physician would convey, what a reasonable patient would want to know, and what the individual patient would subjectively wish to know given the patient's individualized needs and treatment circumstances. 252*252 ACOG, Comm. Op. No. 439, at 5. Free consent, as it suggests, requires that the patient be able to exercise her autonomy free from coercion. *Id.* at 3, 5. It may even include at times the choice *not* to receive certain pertinent information and to rely instead on the judgment of the doctor. *Id.* at 7; ACOG & AMA Br. 8. The physician's role in this process is to inform and assist the patient without imposing his or her own personal will and values on the patient. J.A. 359-60 (declaration of Dr. Anne Drapkin Lyerly); ACOG, Comm. Op. No. 439, at 3. The informed consent process typically involves a conversation between the patient, fully clothed, and the physician in an office or similar room before the

procedure begins. ACOG & AMA Br. 8, 23; ACOG, Comm. Op. No. 439, at 4. Once the patient has received the information she needs, she signs a consent form, and treatment may proceed. *See, e.g.,* N.C. Gen.Stat. § 90-21.13(b).

The Pennsylvania statute challenged in *Casey* prescribes a modified form of informed consent for abortions. To provide informed consent, the statute first requires the physician to orally inform the woman of the nature of the abortion procedure, the "risks and alternatives to the procedure... that a reasonable patient would consider material to the decision" whether to have an abortion, the risks of carrying the child to term, and the "probable gestational age of the unborn child" when the abortion is to be performed. 18 Pa. Cons. Stat. § 3205(a)(1). The physician must give this information at least twenty-four hours prior to the abortion. *Id.* Aside from the gestational age of the fetus, this information is the same type that would be required under traditional informed consent for any medical procedure.

The statute continues on, however, to require that the physician must inform the woman, at least twenty-four hours in advance, that the state prints materials that describe the unborn child, and a copy must be provided to her if she wants it. 18 Pa. Cons.Stat. § 3205(a)(2)-(3). Finally, the statute requires the physician to provide some additional information about financial and other assistance that may be available from the state and the father. 18 Pa. Cons.Stat. § 3205(a)(2). These provisions deviate only modestly from traditional informed consent. They also closely resemble the informed consent provisions of North Carolina's Woman's Right to Know Act that are not under challenge in this appeal. N.C. Gen.Stat. § 90-21.82(1)-(2). The challenged Display of Real-Time View Requirement, N.C. Gen.Stat. § 90-21.85, however, reaches beyond the modified form of informed consent that the Court approved in *Casey.* In so doing, it imposes a virtually unprecedented burden on the right of professional speech that operates to the detriment of both speaker and listener.

**C.**

The burdens trace in part from deviations from the traditions of informed consent. The most serious deviation from standard practice is requiring the physician to display an image and provide an explanation and medical description to a woman who has through ear and eye covering rendered herself temporarily deaf and blind. This is starkly compelled speech that impedes on the physician's First Amendment rights with no counterbalancing promotion of state interests. The woman does not receive the information, so it cannot inform her decision. In fact, "[t]he state's own expert witness agrees that the delivery of the state's message in these circumstances does not provide any information to the patient and does not aid voluntary and informed consent." 253*253 *Stuart v. Loomis,* 992 F.Supp.2d 585, 602 (M.D.N.C.2014). And while having to choose between blindfolding and earmuffing herself or watching and listening to unwanted information may in some remote way influence a woman in favor of carrying the child to term, forced speech to unwilling or incapacitated listeners does not bear the constitutionally necessary connection to the protection of fetal life. Moreover, far from promoting the psychological health of women, this requirement risks the infliction of psychological harm on the woman who chooses not to receive this information. She must endure the embarrassing spectacle of averting her eyes and covering her ears while her physician — a person to whom she should be encouraged to listen — recites information to her. We can perceive no benefit to state interests from walling off patients and physicians in a manner antithetical to the very communication that lies at the heart of the informed consent process.

The constitutional burden on the physicians' expressive rights is not lifted by having a willing listener. The information the physician had to convey orally in *Casey* was no more than a slight modification of traditional informed consent disclosures. The information conveyed here in the examining room more closely resembles the materials that in *Casey* were provided by the state in a pamphlet. *Casey,* 505 U.S. at 881, 112 S.Ct. 2791. A physician in Pennsylvania need only inform the patient that such information is available and, if requested, provide her with a copy of the state-issued pamphlet. 18 Pa. Cons.Stat. § 3205(a)(2)(i) & (a)(3). Informing a patient that there are state-issued materials available is not ideological, because the viewpoint conveyed by the pamphlet is clearly the state's — not the physician's. It is no wonder then that the *Casey* court found no First Amendment infirmities in that requirement. By contrast, the North Carolina statute compels the physician to speak and display the very information on a volatile subject that the state would like to convey. *See* N.C. Gen.Stat. § 90-21.85(a)(2)-(4). The coercive effects of the speech are magnified when the physician is compelled to deliver the state's preferred message in his or her own voice. This Requirement treads far more heavily on the physicians' free speech rights than the state pamphlet provisions at issue in *Casey.*

Though the information conveyed may be strictly factual, the context surrounding the delivery of it promotes the viewpoint the state wishes to encourage. As a matter of policy, the state may certainly express a preference for childbirth over abortion, *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 511, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989), and use its agents and written materials to convey that message. However the state cannot commandeer the doctor-patient relationship to compel a physician to express its preference to the patient. As the district court noted, "[b]y requiring providers to deliver this information to a woman who takes steps not to hear it or would be harmed by hearing it, the state has ... moved from `encouraging' to lecturing, using health care providers as its mouthpiece." *Stuart*, 992 F.Supp.2d at 609. Transforming the physician into the mouthpiece of the state undermines the trust that is necessary for facilitating healthy doctor-patient relationships and, through them, successful treatment outcomes. *See* Am. Pub. Health Ass'n ("APHA") Br. 9-10. The patient seeks in a physician a medical professional with the capacity for independent medical judgment that professional status implies. The rupture of trust comes with replacing what the doctor's medical judgment would counsel in a communication with what the state wishes told. It subverts the patient's 254*254expectations when the physician is compelled to deliver a state message bearing little connection to the search for professional services that led the patient to the doctor's door.

Furthermore, by failing to include a therapeutic privilege exception, the Display of Real-Time View Requirement interferes with the physician's professional judgment and ethical obligations. The absence of a therapeutic exception means that the state has sought not only to control the content of the physician's speech, but to dictate its timing. Under the Requirement, the physician must display and describe the fetus simultaneously with the ultrasound procedure, and he must do this at least four and not more than seventy-two hours prior to the abortion procedure. *See* N.C. Gen.Stat. § 90-21.85(a). Therapeutic privilege, however, permits physicians to decline or at least wait to convey relevant information as part of informed consent because in their professional judgment delivering the information to the patient at a particular time would result in serious psychological or physical harm. ACOG, Comm. Op. 439, at 7. It is an important privilege, albeit a limited one to be used sparingly. *See id.* It protects the health of particularly vulnerable or fragile patients, and permits the physician to uphold his ethical obligations of benevolence.

The *Casey* court found it relevant that the Pennsylvania statute contained a therapeutic exception so that it "does not prevent the physician from exercising his or her medical judgment." 505 U.S. at 883-84, 112 S.Ct. 2791. North Carolina by contrast requires the physician to "[d]isplay the images" and "[p]rovide a simultaneous explanation of what the display is depicting" along with "a medical description of the images," with no exception. N.C. Gen.Stat. § 90-21.85(a)(2)-(4). The lack of a provision similar to Pennsylvania's in North Carolina's statute runs contrary to the state's interest in "protecting the integrity and ethics of the medical profession," *Gonzales*, 550 U.S. at 157, 127 S.Ct. 1610, and more generally to its interest in the psychological and physical well-being of the affected women. Particularly for women who have been victims of sexual assaults or whose fetuses are nonviable or have severe, life-threatening developmental abnormalities, having to watch a sonogram and listen to a description of the fetus could prove psychologically devastating. *See* J.A. 332-33 (declaration of Dr. Gretchen S. Stuart); Appellees' Br. 12-13; APHA Br. 8-9. Requiring the physician to provide the information regardless of the psychological or emotional well-being of the patient, *see* N.C. Gen.Stat. §§ 90-21.85 & 90-21.86, can hardly be considered closely drawn to those state interests the provision is supposed to promote.

In sum, though the State would have us view this provision as simply a reasonable regulation of the medical profession, these requirements look nothing like traditional informed consent, or even the versions provided for in *Casey* and in N.C. Gen. Stat. § 90-21.82. As such, they impose an extraordinary burden on expressive rights. The three elements discussed so far — requiring the physician to speak to a patient who is not listening, rendering the physician the mouthpiece of the state's message, and omitting a therapeutic privilege to protect the health of the patient — markedly depart from standard medical practice.

**D.**

Other aspects of the Requirement are equally unusual. As described above, informed consent frequently consists of a fully-clothed conversation between the patient and physician, often in the physician's office. It is driven by the "patient's particular needs and circumstances," J.A. 388 255*255 (declaration of Dr. Amy Weil), so that the patient receives the information he or she wants in a setting that promotes an informed and thoughtful choice.

This provision, however, finds the patient half-naked or disrobed on her back on an examination table, with an ultrasound probe either on her belly or inserted into her vagina. Appellees' Br. 13; APHA Br. 8. Informed consent has not generally been thought to require a patient to view images from his or her own body, ACOG & AMA Br. 7, much less in a setting in which personal judgment may be altered or impaired. Yet this provision requires that she do so or "avert[] her eyes." N.C. Gen.Stat. § 90-21.85(a)(3), (b). Rather than engaging in a conversation calculated to inform, the physician must continue talking regardless of whether the patient is listening. *See Stuart*, 992 F.Supp.2d at 590 & 602 n. 34. The information is provided irrespective of the needs or wants of the patient, in direct contravention of medical ethics and the principle of patient autonomy. "[F]orcing this experience on a patient over her objections" in this manner interferes with the decision of a patient not to receive information that could make an indescribably difficult decision even more traumatic and could "actually cause harm to the patient." J.A. 330 (declaration of Dr. Gretchen S. Stuart). And it is intended to convey not the risks and benefits of the medical procedure to the patient's own health, but rather the full weight of the state's moral condemnation. Though the state is plainly free to express such a preference for childbirth to women, it is not the function of informed consent to require a physician to deliver the state's preference in a setting this fraught with stress and anxiety.

There are few absolutes in the difficult area of professional regulation and professional expression. But there do exist constraints on the permissible interference with the doctor-patient relationship; there are limits on state attempts to compel physicians to deliver its message, especially when that message runs counter to the physician's professional judgment and the patient's autonomous decision about what information she wants. Though states may surely enact legislation to ensure that a woman's choice is informed and thoughtful when she elects to have an abortion, states cannot so compromise physicians' free speech rights, professional judgment, patient autonomy, and other important state interests in the process. The means here exceed what is proper to promote the undeniably profound and important purpose of protecting fetal life. *See, e.g., Sorrell*, 131 S.Ct. at 2667-68, 2670 (holding that Vermont statute unconstitutionally burdened speech because "[w]hile Vermont's stated policy goals may be proper, § 4631(d) does not advance them in a permissible way" under intermediate scrutiny).

**IV.**

"The right to speak and the right to refrain from speaking are complementary components of the broader concept of `individual freedom of mind.'" *Wooley v. Maynard*, 430 U.S. 705, 714, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943)). Regulations which compel ideological speech "pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994). Abortion may well be a special case because of the undeniable gravity of all that is involved, 256*256 but it cannot be so special a case that all other professional rights and medical norms go out the window. While the state itself may promote through various means childbirth over abortion, it may not coerce doctors into voicing that message on behalf of the state in the particular manner and setting attempted here. The district court did not err in concluding that § 90-21.85 of the North Carolina General Statutes violates the First Amendment and in enjoining the enforcement of that provision. Its judgment is in all respects affirmed.

*AFFIRMED.*

[1] The Third Amended Complaint also challenged both the Display of Real-Time View Requirement and the Informed Consent to Abortion provision, N.C. Gen.Stat. § 90-21.82, as unconstitutionally vague. J.A. 281. The parties and the district court agreed on savings constructions so that the Act was not void for vagueness, and the plaintiffs did not appeal that ruling. *Stuart v. Loomis*, 992 F.Supp.2d 585, 611 (M.D.N.C.2014) (district court opinion).

[2] After the district court's order granting the preliminary injunction, several individuals and pregnancy counseling centers moved to intervene as defendants. The district court denied the motion, *Stuart v. Huff*, 2011 WL 6740400 (M.D.N.C. Dec.22, 2011), and this court affirmed, *Stuart v. Huff*, 706 F.3d 345 (4th Cir.2013).

[3] Plaintiffs seem to suggest that the Display of Real-Time View Requirement constitutes viewpoint discrimination and that we should strike the provision down on that basis. *See* Appellees' Br. 2, 54. Because we find that the Requirement fails even intermediate scrutiny, *infra* Part III, it is unnecessary for us to definitively determine whether the compelled speech here requires strict scrutiny. *SeeGreater Balt.*, 721 F.3d at 288 (cautioning against "precipitately concluding that the [provision] is an exercise of viewpoint discrimination").

[4] The state's *amici* insist that the decision we reach today will permit future litigants to use the First Amendment "as a `trump card' in a multitude of challenges to abortion regulations, allowing abortion proponents to provoke a `back-door,' strict scrutiny approach" that will override *Casey's* undue burden standard. Law Professors' Br. 27. We think this concern is overdrawn. The great majority of abortion regulations do not compel anyone's speech, and the great majority of litigants do not raise First Amendment concerns.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

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| GRETCHEN S. STUART, M.D., et al., | ) | |
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| Plaintiffs, | ) | |
| | ) | CIVIL ACTION |
| v. | ) | |
| | ) | Case No. _____ |
| JANICE E. HUFF, M.D., et al., | ) | |
| | ) | |
| Defendants. | ) | |
| | ) | |
| | ) | |

**DECLARATION OF JAMES R. DINGFELDER, M.D., IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

JAMES R. DINGFELDER, M.D., declares and states the following:

1. I am a physician licensed to practice medicine in the State of North Carolina and a plaintiff in this action. I am currently the owner of Eastowne OB/GYN and Infertility ("Eastowne"), located in Chapel Hill, North Carolina. I have consulting privileges at Duke University Medical Center, as well as admitting privileges in general obstetrics and gynecology at Durham Regional Hospital. I am also Assistant Consulting Professor of OB-GYN at Duke University School of Medicine. I submit this declaration in support of Plaintiffs' motion for a temporary restraining order and preliminary injunction.

2. I attended Wesleyan University and was graduated from Thiel College, as well as Jefferson Medical College, and I have a residency and fellowship in obstetrics

and gynecology from Case-Western Reserve University following service as a Medical Officer in the United States Air Force. I am a Fellow of the American College of Surgeons, a Fellow of the American College of Obstetrics and Gynecology, and a Founding Member of the Society of Reproductive Surgeons.

3. I have been practicing medicine for more than 46 years. Over the course of my years of practice, I have provided a full range of OB/GYN care. I have delivered thousands of babies over the course of my career.

4. I have also been providing abortion services for approximately four decades. I currently provide surgical and medical abortions at Eastowne.

5. I have also taught medical students and residents and published numerous articles in the area of reproductive health.

6. I have read the "Woman's Right to Know Act." I am very concerned that it forces me to act in a manner that is contrary both to my patients' best interests and to medical ethics. In particular, requiring me, while performing an ultrasound on a patient, to describe the images in detail regardless of whether she wants this is antithetical to good medical practice, will damage my relationship with my patients, and will inflict stress and emotional harm on my patients. In addition, parts of the Act are so vague that I am unsure what will fulfill some of its requirements.

Abortions in North Carolina and in My Practice

7. Legal abortion is a very safe medical procedure; it is one of the safest procedures in contemporary medical practice. Major complications from abortion are

through her decision with her more extensively, we offer to refer her to a counselor, and/or we suggest that she take more time to think through her decision and come back if and when she decides that she does, indeed, want to end her pregnancy.

The Act

12. As required by North Carolina law, all of my abortion patients already receive an ultrasound before the procedure. These ultrasounds are used to determine the presence and location of an intrauterine pregnancy, the gestational age of the pregnancy, and whether the patient is carrying multiples. These ultrasounds typically take less than 5 minutes to complete.

13. For pregnancies up to approximately 8 gestational weeks, a vaginal ultrasound is sometimes used because it may provide a clearer picture at those very early stages of pregnancy. During a vaginal ultrasound, a patient must put her legs into the stirrups and a vaginal probe is inserted into her vagina.

14. From approximately 8 gestational weeks onward, an abdominal probe is typically used because it is sufficient for determining the location and length of the pregnancy.

15. We ask every woman if she wants to see a print-out of the ultrasound. It is up to the patient.

16. At Eastowne, these ultrasounds are performed by physicians or registered nurses or medical assistants who have been trained in ultrasound and have, over time, extensive hands-on, supervised experience.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

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| GRETCHEN S. STUART, M.D., et al., | ) | |
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| Plaintiffs, | ) | |
| | ) | |
| v. | ) | CIVIL ACTION |
| | ) | |
| JANICE E. HUFF, M.D., et al., | ) | Case No. _____ |
| | ) | |
| Defendants. | ) | |
| | ) | |
| | ) | |

**DECLARATION OF GRETCHEN S. STUART, M.D., M.P.H. & T.M., IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION/TEMPORARY RESTRAINING ORDER**

GRETCHEN S. STUART, M.D., M.P.H. & T.M., declares and states the following:

1. I am one of the named plaintiffs in this case. I submit this declaration in support of Plaintiffs' motion for a preliminary injunction and/or temporary restraining order.

2. I am a physician licensed to practice medicine in North Carolina and also in Texas and California. I am board-certified in obstetrics and gynecology. In 1994, I graduated from both the School of Medicine and the School of Public Health and Tropical Medicine at Tulane University, with, respectively, an M.D. and an M.P.H. & T.M. I completed my residency in obstetrics and gynecology in 1998, at Parkland Memorial Hospital at the University of Texas Southwestern Medical Center, Dallas.

between performing the ultrasound and inserting the dilators is typically about thirty minutes or less.

10. For my abortion patients, I perform an ultrasound to determine the gestational age of the fetus and to confirm the pregnancy and its location. It is my practice to first perform an abdominal ultrasound, which involves putting an ultrasound probe over her abdomen while she lies still on the examining table. If I am not able to confirm that there is an intrauterine pregnancy using the abdominal probe, I will perform a vaginal ultrasound, which involves inserting a probe into the woman's vagina while she lies still on the examining table with her feet in stirrups. Patients differ, but typically when the gestational age is 8 weeks lmp or less, I need to use the vaginal probe.

11. It is my practice to offer my patients the opportunity to view the ultrasound. A relatively small number, probably about 20%, choose to look at the image. I have never had a patient who asked me to describe the image, nor have I ever had a patient who decided not to have an abortion after viewing the image.

HB 854

12. I have read HB 854 and have many concerns about how it will affect women seeking abortions in North Carolina, my provision of abortion services to my patients, and my obligations as a physician.

13. If HB 854 goes into effect, I understand that I will be at risk of disciplinary penalties by the State Medical Board if I do not comply with all of its requirements,

expense, additional time off work and/or extra childcare. These harms will fall disproportionately on low income women. Also, additional expense may cause some women to delay getting an abortion because they need to gather more funds to cover the extra time off work, or childcare, or an overnight stay. Although abortion is a very safe procedure, with increased gestational age the medical risks increase, so these women face possible increased medical risks as a result of HB 854's requirements.

25. As I understand HB 854, I will need to comply with the extra ultrasound requirements even for patients who come to me with a detailed ultrasound report that they have discussed with another physician. In my practice, I frequently provide abortion services to women who have been referred to me after they already have seen at least one physician and have had an ultrasound performed. Some of my patients have had more than one ultrasound performed before they see me, depending on how far along they were in their pregnancy. Many of these patients have been diagnosed with a serious or even fatal fetal anomaly or with a medical condition that puts the woman's own health at risk if she continues the pregnancy and – after receiving that information about her fetus or about her health – the woman has decided to seek an abortion. In those situations, I receive a full, detailed ultrasound report for the patient. Yet even in those situations, it appears that I will need to comply with the extra ultrasound requirements of HB 854 before I can initiate the abortion. The patient does not need for me to repeat the information that she has already received about her fetus. Complying with the extra ultrasound requirements in these situations cannot possibly serve any valid purpose.

No. 14-1172

IN THE

# Supreme Court of the United States

CHERYL WALKER-MCGILL, IN HER OFFICIAL CAPACITY AS PRESIDENT OF THE NORTH CAROLINA MEDICAL BOARD, ET AL.,

*Petitioners,*

v.

GRETCHEN S. STUART, ET AL.,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

## BRIEF IN OPPOSITION


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### A. Factual Background

1. Respondents are North Carolina physicians and healthcare providers who treat patients seeking abortions in a variety of settings, including major hospitals like the University of North Carolina. Pet. App. 38a; C.A. App. 786.[1] Prior to the Act, respondents' informed-consent practice was comparable to that of doctors in other areas of medicine. Pre-existing North Carolina law already required a physician to obtain informed consent from each patient, including abortion patients. N.C. Gen. Stat. § 90-21.13(a)(2); *see also* 10A N.C. Admin. Code 14E.0305(a).

Consistent with this law and their ethical obligations, respondents and/or their staff informed each patient about the nature of the abortion procedure, its risks and benefits, and the alternatives available to the patient and their respective risks and benefits; they likewise counseled the patient to ensure that she was certain about her decision to have an abortion. *See* C.A. App. 326-27, 409-10, 427-28. Moreover, even before the Act, respondents' general practice was to *offer* patients the option to view the ultrasound and ask questions. *See* Pet. App. 49a.[2]

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[1] "C.A. App." refers to the joint appendix filed with the Fourth Circuit.

[2] A North Carolina regulation that pre-dates the Act requires an ultrasound prior to an abortion. *See* 10A N.C. Admin. Code 14E.0305(d). Respondents in any event perform ultrasounds on patients seeking an abortion for diagnostic purposes to confirm the pregnancy, determine its location, and to establish the gestational age of the embryo or fetus. *See* C.A.

2. In their medical practice, respondents followed two principles that the traditional law of informed consent has always recognized and, as the undisputed facts before the district court confirmed, current medical practice continues to recognize: patient autonomy and therapeutic privilege, i.e., the principle that disclosure is not required when it "poses such a threat of detriment to the patient as to become unfeasible or contraindicated from a medical point of view." *Canterbury v. Spence*, 464 F.2d 772, 789 (D.C. Cir. 1972); *see* Pet. App. 24a, 29a-30a.

Accordingly, consistent with their ethical obligations and traditional medical practice, even though respondents generally chose to offer their patients the opportunity to view ultrasound images, they respected the decisions of those patients who elected not to view the images. Pet. App. 47a-50a; C.A. App. 449-51, 481. And, in rare circumstances, consistent with best medical practices, respondents would not offer to display and describe ultrasound images to patients who, in their medical judgment, were at significant risk of suffering psychological harm as a result of the offer itself. Pet. App. 47a-48a & n.12, 49a-50a.

**B. The Act**

The Act includes two components relevant to this case.

1. First, the Act includes an "informed consent" provision much like the provision upheld in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion). Section

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App. 327, 410-11, 428.

**NO. 14-1150**

# United States Court of Appeals

*for the*

# Fourth Circuit

GRETCHEN S. STUART, MD, on behalf of herself and her patients seeking abortions; JAMES R. DINGFELDER, MD, on behalf of himself and his patients seeking abortions; DAVID A. GRIMES, MD, on behalf of himself and his patients seeking abortions; AMY BRYANT, MD, on behalf of herself and her patients seeking abortions; SERINA FLOYD, MD, on behalf of herself and her patients seeking abortions; DECKER & WATSON, INC., d/b/a Piedmont

*(For Continuation of Caption See Inside Cover)*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA AT GREENSBORO
AT CASE NO. 1:11-CV-00804-CCE-LPA
CATHERINE C. EAGLES, U.S. DISTRICT COURT JUDGE

## BRIEF FOR PLAINTIFFS-APPELLEES

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Amendment principles, that is because they are—there is no abortion exception to the First Amendment, and the Supreme Court has never suggested, let alone held, that the state can compel physician speech, no matter the type of speech compelled or the regulatory context. In *Casey*, the Supreme Court upheld against a First Amendment challenge a law requiring, *inter alia*, a physician to *offer* to a patient *state-published* materials concerning fetal development, and even then only if the physician believed that doing so would not harm the patient. Neither that case nor any other Supreme Court precedent immunizes from First Amendment scrutiny a state's attempt to compel a physician to speak the state's message in his or her own voice, even when the patient does not want to hear it, even when the patient physically avoids seeing or hearing the compelled message, and even when following the speech mandate would harm the patient and thus force the physician to violate ethical obligations.

The State also relies on precedents from this and other courts concerning "professional speech," but those cases refute the State's contention that the First Amendment does not apply to speech mandates related to "the practice of medicine." Instead, those cases make clear that mandates like the one at issue here are subject to heightened First Amendment scrutiny. And when subjected to such scrutiny, this speech mandate does not stand a chance: it does not legitimately further any substantial state interest, and, even more obviously, it is far broader

The Physicians' practice also generally involved asking patients if they wanted to view ultrasound images, showing the images to patients who wanted to see them, and answering questions about the ultrasound. *See Stuart*, 2014 WL 186310, at *5; *see also* JA 327-28, 411, 429-30, 791. Thus, *offering* patients the option to view an ultrasound was part of the Physicians' practice even before the Act.[1]

In obtaining informed consent, however, the Physicians followed two traditional principles of medical practice: patient waiver and therapeutic privilege. Thus, consistent with their ethical obligations, the Physicians respected the decisions of those patients who elected not to view the ultrasound images. *See Stuart*, 2014 WL 186310 at *4 (noting that under traditional informed consent principles, physicians should ordinarily respect patient's decision not to consider some information); Comm. on Ethics, Am. Coll. Of Obstetricians & Gynecologists, *Comm. Op. # 439: Informed Consent* 7 (2009, reaffirmed 2012) (patient's decision not to receive information is "itself an exercise of choice, and its acceptance can be part of respect for patient's autonomy" and "[i]mplicit in the

[1] The Physicians perform ultrasounds on patients seeking an abortion for diagnostic purposes to confirm the pregnancy, determine its location, and to establish the gestational age of the embryo or fetus. *See* JA 327, 410-11, 428.

An ultrasound is also required by regulation: the same pre-existing North Carolina regulation that requires abortion patients to complete a written consent form also requires an ultrasound to be performed on any patient who is scheduled for an abortion procedure. *See* 10A N.C. Admin. Code 14E.0305(d).

ethical concept of informed consent is the goal of maximizing a patient's freedoms"); JA 449-51, 481. And, in rare circumstances, consistent with best medical practices, the Physicians would not offer to display and describe ultrasound images to patients who, in their medical judgment, were at significant risk of suffering psychological harm as a result of the offer itself. *See Stuart*, 2014 WL 186310, at *4; *id.* at *4 n.12 (summarizing case law and noting that "[i]n other contexts, North Carolina law recognizes the necessity of withholding certain kinds of information from a patient").

**B. The Act**

This appeal concerns only one section of the Act: the Requirement. Nevertheless, the State begins its discussion of the Act by focusing on Section 90-21.82, *see* State's Br. 2-3, which is not at issue here.

Notably, unlike the Requirement, Section 90-21.82 is the only section in the Act actually entitled "Informed consent to abortion." N.C.G.S. § 90-21.82. It requires that no abortion be performed without a woman's voluntary and informed consent and that at least 24 hours before the procedure, a physician or qualified professional must inform the woman, *inter alia*, of the particular medical risks associated with the abortion procedure to be employed, the probable gestational age of the embryo or fetus, that medical assistance benefits may be available for prenatal care and childcare, that she has the right to review printed materials

created by the state that provide information about embryonic and fetal development, *and* that she can view an ultrasound of the embryo or fetus and listen to any heartbeat, *if she so chooses*. *Id.* §§ 1(b), (c), (e), 2(a), (e). All of this section, including the *offer* to the woman to view ultrasound images and listen to any heartbeat, has been in force since the Act's effective date in 2011, was not challenged based on its substance by Plaintiffs,[2] and is not at issue in this appeal.

The Requirement, however, is altogether different. It mandates that the physician or qualified technician conduct an ultrasound that gives "an obstetric real-time view of the unborn child" at least four hours before the woman can have an abortion. N.C.G.S. §§ 90-21.85(a). During this ultrasound procedure, the woman must lie supine on an examination table either (i) naked from the waist down, covered only by a drape or (ii) with her clothing pulled down to expose the lower portion of her abdomen. *See Stuart*, 2014 WL 186310, at *3; JA 327, 411, 428-29, 787. Depending on the stage of pregnancy, the provider performs the ultrasound either by inserting an ultrasound probe into the woman's vagina or by placing the ultrasound probe on her abdomen. *Stuart*, 2014 WL 186310, at *3; JA 327, 411, 428-29.

[2] Part of this section was the subject of a vagueness challenge by the Physicians, but the District Court resolved this challenge through a savings construction, and the Physicians have not appealed from that ruling. *See infra* at n. 7.

339, 388-89, 454-55. Part of this discretion includes the ability "to choose in what way they obtain their informed consent from their patients," as the State's own expert conceded. JA 482, 490. But the Requirement gives providers no discretion on how to provide information to patients, when to do so, and what to say.

In sum, while the State pretends that the Requirement is simply an informed consent provision, there is a reason a *different* portion of the Act is entitled "informed consent to abortion": the Requirement is inconsistent with principles of informed consent and "undermines well-established professional norms in the medical field, without empirical justification." *Stuart*, 2014 WL 186310, at *16. The Requirement does not merely require physicians to offer their patients the ability to view an ultrasound and hear its description; it mandates physicians to speak and display the state's message even over a patient's objection, regardless of any harm to her, and even if she actively refuses to see and hear. As the District Court concluded based on uncontroverted evidence, "informed consent is not improved and no medical purpose is served" when a physician displays and describes the ultrasound images to a patient who has taken steps to avoid seeing the images or hearing the description. *Id.* at *3; JA 798-99.[5]

[5] When the State's expert, Dr. Watson A. Bowes, was asked how the Requirement improves informed consent when a physician continues speaking to a patient who has turned her head or covered her ears, he conceded that "[i]t doesn't." JA 489. The State could not refute this admission but attempted to claim

Requirement is a speech mandate that should be subjected to heightened scrutiny, which it cannot meet.

The State does not dispute that government speech mandates—even those compelling only "factual" speech—are ordinarily subject to heightened First Amendment scrutiny. Rather, it argues that the Court should discard ordinary First Amendment principles in this case because the Supreme Court's decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), adopted a special rule under which the Requirement is subject only to rational basis review. In particular, the State presses the erroneous reading of *Casey* adopted by the Fifth Circuit in *Texas Medical Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012), under which a state may compel speech regulating abortion so long as the challenged law is rational and does not impose an undue burden on a woman's due process right to abortion. The State also presses an even broader rule it purports to derive from *Casey*, under which any government speech mandate is subject only to rationality review so long as it regulates the "practice of medicine."

*Casey* supports neither rule. It involved a Pennsylvania informed consent statute entirely unlike the Requirement. Most relevant to the First Amendment challenge in that case, the Pennsylvania statute merely required physicians to *offer* to their patients the opportunity to view state-published pamphlets concerning fetal development (i.e., the *state's* own speech). Moreover, the statute allowed

physicians to waive compliance with this requirement if they believed it would harm their patients. *Casey* rejected both the patients' due process challenge and the physicians' First Amendment challenge to this statute, but its analysis makes clear that its First Amendment holding was limited to the particular law at issue there. Thus, *Casey* stands only for the proposition that a state law requiring a physician to offer to a patient the opportunity to view the state's speech (subject to physician override if it would harm the patient) is subject to rational basis review under the First Amendment.

Indeed, *Casey* merely confirms the fundamental principle that the level of First Amendment scrutiny turns on the nature and context of the speech mandate at issue. And the informed consent provision upheld in *Casey* is nothing like the Requirement.

Although the State insists that the Requirement is just an informed consent law, the Requirement actually violates basic principles of informed consent because it fails to allow for patient waiver or the exercise of therapeutic privilege by the physician, both of which were permitted under the statute in *Casey*. Indeed, the absurd nature of the Requirement completely undermines the State's argument that the provision is nothing more than an informed consent law. As the State conceded below, a woman can wear "blinders" on her eyes to prevent her from seeing and "earphones" to prevent her from hearing while the physician displays

on trained counselors. *Id.*[9] Thus, the *Casey* plurality reasonably could have concluded that this portion of § 3205 had "only an indirect effect on protected speech," and heightened scrutiny was not required. *Riley*, 487 U.S. at 789 n.5.

Crucially, the only part of § 3205 that the physicians challenged in substance under the First Amendment was the requirement that they tell their patients about "the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth." *Casey*, 505 U.S. at 881. This portion of the *Casey* statute, however, only required physicians to *offer* to patients the state's *own* speech, in state-created pamphlets, and only when the offer itself would not harm the patient. *See supra*.

The *Casey* plurality evaluated the due process claim against Section 3205 first. It held that "the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus" was not an "undue burden" on a woman's abortion right. *Casey*, 505 U.S. at 882. The plurality similarly held that "requiring that the woman be informed of the availability of information relating to fetal

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[9] *See also Casey*, 505 U.S. at 881 ("Petitioners challenge the statute's definition of informed consent because it includes the provision of specific information by the doctor and the mandatory 24-hour waiting period.'); *id.* at 884 (stating that plurality was reconsidering holding in *City of Akron v. Akron Ctr. for Reproductive Health, Inc.*, 462 U.S. 416, 448 (1983), that "the State may not require that a physician, as opposed to a qualified assistant, provide information relevant to a woman's informed consent").

development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to ensure an informed choice." *Id.* at 883.

The plurality then separately considered the physicians' First Amendment claim. It stated: "[a]ll that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State." *Id.* at 884. "To be sure," the plurality explained, "the physician's First Amendment rights not to speak are implicated," *id.* (citing *Wooley v. Maynard*, 430 U.S. 705 (1977)), "but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State," *id.* (citing *Whalen v. Roe*, 429 U.S. 589, 603 (1977)). The plurality then upheld the provision without heightened review, stating only: "We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State *here*." *Id.* (emphasis added).

As the "here" in the just-quoted sentence reflects, *Casey*'s First Amendment holding is quite limited. The plurality in *Casey* declined to apply heightened scrutiny to an informed consent provision when (i) one part of the provision arguably had only an "indirect effect" on speech, (ii) the part of the provision that directly affected physician speech only required physicians to *offer* their patients state-created pamphlets containing the *state's* speech, and (iii) the provision in its entirety did not apply if the physician concluded that compliance would harm the

part of their informed consent process, and thus only incidentally affected the physicians' speech. With respect to speech that was *not* part of the standard, preexisting process of obtaining informed consent (*e.g.*, the state materials on fetal development), *Casey*'s holding was extremely narrow. To the extent the plurality approved of allowing the state to provide its ideological message to patients, it did so only through the physician's *offer* of the state's *own speech*—with information in the state's publication—and even then only in circumstances when the physician concluded that the offer itself would not harm the patient.

The *Casey* plurality did not hold that the physician could be required, in his or her own voice, to adopt and communicate the state's message about the embryo or fetus, as the Requirement here mandates. "What the state can say itself is very different from what the state can compel individuals to say." *Stuart*, 834 F. Supp. 2d at 430 n.6 (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995)).

Further, nothing in the Pennsylvania statute at issue in *Casey* required physicians to communicate the state's anti-abortion message while the patient was lying vulnerable and exposed in the midst of a medical procedure, and even if the patient was closing her eyes and covering her ears. For all of these reasons, the District Court correctly concluded that the Requirement is "a much more significant intrusion than the *Casey* statute's relatively passive requirements"

2321, 2327 (2013) (discussing "basic First Amendment principle that freedom of speech prohibits the government from telling people what they must say" (internal quotation marks omitted)).

"[M]andating speech that a speaker would not otherwise make necessarily alters the content of the speech," and thus imposes "a content-based regulation of speech." *Riley*, 487 U.S. at 795. Content-based regulations of speech are presumed invalid, and the government bears the burden of showing their constitutionality. *See, e.g., United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012).

The "general rule" that the "speaker has the right to tailor the speech[] applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." *Hurley*, 515 U.S. at 573. Thus, rules mandating speech are generally subject to exacting First Amendment scrutiny, regardless of whether they compel ideological or factual statements. *See, e.g., id.*; *Riley*, 487 U.S. at 798; *see also Centro Tepeyac*, 722 F.3d at 189-90, 192; *Hersh*, 553 F.3d at 764, 766; *Axson-Flynn*, 356 F.3d at 1284 n.4.

Under a straightforward application of the foregoing principles, the speech mandated by the Requirement is subject to heightened scrutiny. The State does not dispute that the Physicians would not comply with the Requirement's speech mandate voluntarily. JA 786. Although the Physicians offer their patients the opportunity to view ultrasound images, only a government mandate could force

*Stuart*, 2014 WL 186310, at *12. And if the State really cared about informed consent, it would not mandate speech even in circumstances in which its "own expert witness agrees that the delivery of the state's message . . . does not provide any information" or "aid voluntary and informed consent." *Id.*

Finally, as to its asserted interest in preventing "rushed or coerced" abortions, the Requirement is a solution in search of problem. An asserted state interest must be "real, not merely conjectural," *Turner*, 512 U.S. at 664, and yet, as the District Court concluded, "[t]here is no evidence before the Court" that women are being coerced into having abortions, "even in small measure." *Stuart*, 2014 WL 186310, at *15. Indeed, "[a]ll of Plaintiffs' evidence is to the contrary." *Id.* And "[e]ven assuming provider-coerced abortion is a real and not theoretical harm, the state has not shown that the speech-and-display provision is directed at alleviating this harm." *Id.*

Even if the Requirement legitimately advanced the State's interest in informed and deliberate consent, it is not remotely tailored to furthering that interest. For one thing, other portions of the Act to which the Physicians do not object *already* require the Physicians to *offer* their patients the opportunity to view ultrasound images and receive state-published materials concerning fetal development and the risks of abortion, and mandate a 24-hour waiting period (as in *Casey*). *See supra* at pp. 8-9. The State says, without an iota of support in the

pregnant women to opt for childbirth over abortion." State Br. 29. As explained earlier, that is simply a refreshing acknowledgment that the Requirement by design commandeers the Physicians to communicate in their own voices not only the state's preferred content, but also its viewpoint, which the First Amendment simply prohibits. *See supra* at Part II.A. Again, the government can push a viewpoint through its *own* speech, which is why there was no First Amendment problem with the requirement in *Casey* that doctors make available *state-published* brochures about embryonic and fetal development to their patients. But "the Supreme Court has never held that the government may use a professional's voice to do the same." *Stuart*, 2014 WL 186310, at *16. To the contrary, the Court has held that "where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Wooley*, 430 U.S. at 716.

In any event, even if the State could legitimately conscript the Physicians to carry its anti-abortion message, its effort here still fails the tailoring test for the same reasons discussed above: the State makes no effort to explain (i) why existing law (which in large part parrots the law at issue in *Casey*, and which requires an *offer* to view ultrasound images rather than forcing the experience upon women irrespective of their objections) is not sufficiently protective of its interest in persuading women to carry to term; (ii) why that interest could not be advanced