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CLEAR DEPICTIONS PROMOTE CLEAR DECISIONS: DRAFTING ABORTION SPEECH-AND-DISPLAY STATUTES THAT PASS FIRST AND FOURTEENTH AMENDMENT MUSTER

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INTRODUCTION

Pro-life and pro-choice camps continue to fight an abortion rights battle in the legal arena—with both sides determined not to give any ground. This tug-of-war over the broader abortion debate can make it difficult to examine narrower legal questions that implicate abortion on their own merits as a matter of law and public policy. The abortion struggle generates heat but little light. Consider the issue of “speech-and-display” statutes, which can promote informed consent by requiring physicians to take, display, and describe an ultrasound to patients seeking an abortion before conducting an abortion procedure. The drama of the broader abortion debate has distracted from the central law and public policy issues surrounding these statutes. Ultimately, speech-and-display statutes, if drafted properly, are constitutional under the First and Fourteenth Amendments and can be used to promote women’s health; a sound public policy everyone should be able to agree upon.

Speech-and-display statutes raise two constitutional issues:

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(1) whether speech-and-display statutes violate a woman's personal autonomy by creating an undue burden on abortion and (2) whether requiring a physician to describe an ultrasound to a patient seeking an abortion violates a physician's First Amendment right by compelling speech. Only two circuits have grappled with these issues and both have ruled in favor of the statutes; however, the Middle District of North Carolina and the Oklahoma Supreme Court have struck down speech-and-display statutes, which showcases the burgeoning divide over the issue.

While these constitutional concerns are real, states can draft speech-and-display statutes in a manner that does not violate patients' or physicians' constitutional rights and also minimize the risks that courts will erroneously invalidate the statutes. A model statute should require a physician to take a non-invasive, abdominal ultrasound and require a physician to speak and display information that is objective, truthful, and medically relevant to a patient's abortion decision. This Article's principal purpose is to guide legislatures in passing constitutional speech-and-display statutes. To that end, the Article outlines the basic elements of a model statute, explains why the statute is constitutional, and provides the full text of a model statute in the Appendix.

The most detrimental component to speech-and-display statutes is the way they are framed by politicians. Pro-life politics arguably promote these statutes as a means of discouraging abortions. Whatever one thinks of that goal, it has a polarizing and unnecessary effect on public debate and on the drafting of the statutes. The principal goal of speech-and-display statutes should be to empower women by providing them with the necessary and pertinent information to truly make an autonomous decision regarding their reproductive health. While many participants in the abortion debate have a capacious understanding of the abortion procedure, a layperson cannot be expected to share that knowledge, and a state owes an obligation to its citizens to protect them by empowering them with this

knowledge.

Part One of this Article surveys the legal landscape of abortion and speech-and-display law. Part Two highlights components of a model speech-and-display statute that will pass First and Fourteenth Amendment muster and promote good public policy. (The full text of the model statute is placed in the Appendix and a summary is provided in the text.) Part Three explains why a properly drafted speech-and-display statute does not create an undue burden on a patient seeking an abortion: the model statute does not have the purpose or effect of placing a substantial obstacle in the path of a patient seeking an abortion but instead promotes a woman's mental health and respect for the life of the unborn. This part further shows that speech-and-display statutes provide only information that is medically necessary to support informed consent. Part Four shows that a properly drafted speech-and-display statute does not violate the First Amendment because it merely compels physicians to convey information that is non-ideological, truthful, and medically relevant. Part Four also explains why speech-and-display statutes need to pass only rational basis review. In the alternative, Part Four also advances an argument for an intermediate level of scrutiny for compelled disclosures of medically relevant information, which the author calls "deferential balancing," and explains why the model statute can pass that standard of review. Lastly, Part Four makes a case that speech-and-display statutes may even pass a strict level of scrutiny, if that test were thought to apply.

BACKGROUND

ABORTION-RELATED PRECEDENTS

Roe v. Wade

In *Roe*, the Court held that state criminal abortion laws that do not regard the stage of the pregnancy and only create an exception for life-saving medical procedures violate the

Fourteenth Amendment Due Process Clause right to privacy.¹ In addition, the Court held that a woman has the right to terminate her pregnancy before viability.² Throughout the opinion, the Court referred to the fetus as a "potential life."³ The personal privacy right to an abortion decision is not unqualified, though, as a "[s]tate may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life."⁴

Planned Parenthood of Southeastern Pennsylvania v. Casey

In *Casey*, the first key issue was whether requiring a physician to inform a patient seeking an abortion of specific health risks constituted compelled speech in violation of the First Amendment.⁵ The Pennsylvania statute required that a physician inform a pregnant patient of the "probable gestational age of the unborn child" at least 24 hours prior to performing the abortion.⁶ The Supreme Court held that it is not unconstitutional to require a physician to inform a patient seeking an abortion of the "nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus," as long as the information a physician is required to provide is "truthful" and "non-[misleading]."⁷ The Court included the age of the fetus as truthful and non-misleading information that the State could require a physician to provide because the information is important to a patient's abortion decision and may attribute to her overall mental health.⁸

1. *Roe v. Wade*, 410 U.S. 113, 164 (1973).

2. *Id.* at 163-64.

3. *See generally id.*

4. *Id.* at 154.

5. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 885 (1992).

6. *Id.* at 881 (requiring also that a physician inform a patient at least 24 hours prior to performing the abortion of the "nature of the procedure" and "the health risks of the abortion and of childbirth.").

7. *Id.* at 882.

8. *Id.* (reasoning that if a patient is not fully informed of the procedure and its ramifications, she may later discover information that would have played a role in

Another key issue in *Casey* was whether broadening the informed consent requirement of a physician to a patient is constitutional even if the information a physician is required to supply has “no direct relation to [the patient’s] health.”⁹ The Pennsylvania statute required that a physician inform a patient about the availability of printed information published by the State pertaining to fetal development, child support, and alternatives to an abortion. It also required a patient seeking an abortion to certify “in writing that she has been informed of the availability of these printed materials and has been provided them if she chooses to view them.”¹⁰

The Court held that this is constitutional, as the State may “further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion.”¹¹ The Court reasoned that requiring a physician to inform a patient of the information published by the State not only did not violate the Constitution because protecting the life of the unborn is a legitimate state interest, but it also does not place an undue burden on the patient seeking an abortion.¹²

The Court in *Lakey* reaffirmed the Court in *Casey* by holding that requiring a physician to provide informed consent which includes truthful, non-misleading information is “part of the state’s reasonable regulation of medical practice and [does] not fall under the rubric of compelling ‘ideological’ speech that triggers First Amendment strict scrutiny.”¹³ Because this type of

her decision as to whether to receive the abortion and that information may be detrimental to her mental health).

9. *Id.* at 882-83 (specifically referring to information that only pertains to a fetus rather than a woman seeking an abortion, as informed consent typically protects a patient only).

10. *Id.* at 881.

11. *Id.* at 883.

12. *Id.*

13. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576 (5th Cir. 2012); The United States Supreme Court, in *Gonzales v. Carhart*, deemed the State’s role in the regulating the medical profession “significant.” *Id.* (citing *Gonzales v. Carhart*, 550 U.S. 124, 127 (2007)).

speech does not trigger strict scrutiny, it receives a lower level of scrutiny and is upheld because it furthers the legitimate state interest of protecting fetal life.¹⁴

Lastly, *Casey* affirmed the principle holding in *Roe v. Wade* that a woman has the “right to terminate her pregnancy before viability,” but it replaced the trimester framework with an undue burden standard.¹⁵ An undue burden is “a state regulation [that] has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”¹⁶ The Court furthered the undue burden standard by stating:

A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman’s free choice, not hinder it. And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman’s choice cannot be considered a permissible means of serving its legitimate ends.¹⁷

COMPELLED SPEECH PRECEDENTS

Wooley v. Maynard

The First Amendment right not to speak was examined in *Wooley v. Maynard*, when the Court addressed whether it was constitutional to require the citizens of New Hampshire to display compelled speech¹⁸ on the license plates of all non-

14. *Tex. Med. Providers Performing Abortion Servs.*, 667 F.3d 570; The *Casey* decision was reaffirmed in *Gonzales v. Carhart*, in which the United States Supreme Court upheld the Partial-Birth Abortion Ban Act of 2003 because “[t]he government may use its voice and regulatory authority to show its profound respect for the life within the woman.” *Id.* (citing *Gonzales*, 550 U.S. at 128, 157).

15. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876-77, 879 (1992).

16. *Id.* at 877.

17. *Id.*

18. The compelled speech was the state motto, “Live Free or Die,” and it was offensive to certain followers of the Jehovah’s Witnesses church. *Wooley v. Maynard*, 430 U.S. 705, 707 (1977).

commercial vehicles even though it was offensive to their moral convictions.¹⁹ Police arrested George Maynard for violating a New Hampshire misdemeanor statute because he obscured the state motto on his license plate.²⁰ The Court held that requiring citizens to display a state motto consisting of ideological speech was unconstitutional.²¹

In reaching its holding, the Court stated that an individual has the right to not speak at all.²² Maynard's interest in not displaying speech from the State on his license plate, which he finds morally objectionable, triggered his First Amendment protection but was not enough to deem the statute unconstitutional: further analysis is required.²³ The Court also assessed whether the statute was narrowly tailored and whether it served a compelling state interest.²⁴ New Hampshire license plates were readily distinguishable from other state license plates without the state motto; thus, the statute was not narrowly tailored, as New Hampshire could clearly meet its need to distinguish its license plates from other states' license plates without infringing upon personal liberties.²⁵ More importantly for this Article, though, the Court reasoned that a state could not communicate its ideological message in a manner that outweighs an individual's First Amendment protection, even if it is narrowly tailored and is a compelling state interest.²⁶ Ultimately, for compelled speech to be unconstitutional, a First Amendment protection must be triggered and the protection

19. *Id.* at 706-07.

20. Maynard had covered up the motto on his license plate and refused to pay the fines in conjunction with his citation for violating the statute. He was fined and sentenced to serve fifteen days in jail. *Id.* at 707-8.

21. *Id.* at 713.

22. The Court stated that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Id.* at 714.

23. *Id.* at 715.

24. *Id.* at 716.

25. *Id.*

26. The Court stated that a state cannot convey its ideological message in a manner that "outweigh[s] an individual's First Amendment right to avoid becoming the courier for such message[.]" no matter how acceptable that message is to some of its citizens. *Id.* at 717.

must outweigh the narrowly tailored, compelling state interest.²⁷

Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio

Although *Zauderer* pertains to compelled speech in the commercial context, it parallels with compelled disclosures in the medical profession. The appellant in *Zauderer* was an attorney in Ohio who was subject to the Ohio Code of Professional Responsibility.²⁸ He violated the Code when he published a newspaper advertisement that offered a contingency-fee arrangement to clients that did not inform them “they would be liable for costs (as opposed to legal fees) even if their claims were unsuccessful”²⁹ The advertisement violated an Ohio Disciplinary Rule because it may deceive a layperson into thinking representation by the attorney is a win-win situation because he or she does not know the legal nuances that make a legal fee different from a legal cost.³⁰ The appellant challenged the constitutionality of the Disciplinary Rule arguing that it violated his First Amendment right not to speak.³¹

The Supreme Court distinguishes between “disclosure requirements and outright prohibitions on speech,”³² stating that “disclosure requirements trench much more narrowly on an advertiser’s interests than do flat prohibitions on speech.”³³ Because of this difference, the Supreme Court held that an advertiser’s First Amendment rights are “adequately protected as long as disclosure requirements are reasonably related to the

27. *Id.* at 716-17; In addition to triggering First Amendment protections, a physician’s First Amendment right not to speak is viewed within the “practice of medicine, subject to reasonable licensing and regulation by the State.” *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 575 (5th Cir. 2012).

28. *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 629 (1985).

29. *Id.* at 633. Specifically, the advertisement violated DR 2-101(A) and DR 2-101(B)(15). *Id.* at 635.

30. *Id.* at 631-33, 652.

31. *Id.* at 636, 650.

32. *Id.*

33. *Id.* at 651.

State's interest in preventing deception of consumers."³⁴

THE SPEECH-AND-DISPLAY LAWS

The Texas Statute

The Texas Health and Safety Code Section 171.012 lays out the parameters of obtaining informed consent in an abortion procedure.³⁵ In pertinent part, it requires a physician who is to perform an abortion to inform a patient of the "probable gestational age of the unborn child."³⁶ It further requires a physician, "or an agent of [a] physician who is also a sonographer certified by a national registry of medical sonographers[,] to take and display a sonogram "in a quality consistent with current medical practice."³⁷

A physician or qualified sonographer must also describe certain features of the sonogram "in a manner understandable to a layperson," including: a "medical description of the dimensions of the embryo or fetus, the presence of cardiac activity, and the presence of external members and internal organs."³⁸ A physician or sonographer must also make "audible the heart auscultation for [a] pregnant woman to hear, if present, in a quality consistent with current medical practice" and provide a verbal explanation of the heartbeat.³⁹

The Texas statute requires a patient to sign an election form, which ensures that she received the aforementioned information.⁴⁰ The election form also provides exceptions for receiving an ultrasound display and description for patients who are pregnant "as a result of a sexual assault, incest, or other violation of the Texas Penal Code that has been reported to law

34. *Id.*

35. TEX. HEALTH & SAFETY CODE ANN. § 171.012 (West 2012 & Supp. 2012).

36. *Id.* §171.012(1)(C).

37. *Id.* § 171.012(a)(4)(A)-(B).

38. *Id.* § 171.012(a)(4)(C).

39. *Id.* § 171.012(a)(4)(D).

40. *Id.* § 171.012(a)(5)(1)-(6).

enforcement authorities or that has not been reported because" of fear of exposure to retaliation "resulting in serious bodily injury."⁴¹ It also provides an exception for minors, irreversible medical conditions or abnormalities, and for women who live 100 miles or more from the nearest abortion provider.⁴²

The Oklahoma Statute

The standard for obtaining informed consent in Oklahoma is set forth in Title 63 of the Oklahoma Public Health Code Section 1-738.2.⁴³ The statute requires an ultrasound provider to inform the patient of the availability of a sonogram and heart monitoring by telephone or in person.⁴⁴ Not only does the disclosure in Oklahoma not have to be made in person, but speech-and-display of a sonogram is made optional.⁴⁵ It need only be offered. The statute uses the term "unborn child" to describe a fetus.⁴⁶

The North Carolina Statute

The North Carolina General Statute Section 90-21.82 requirement for obtaining informed consent requires that physicians or qualified professionals provide oral information

41. *Id.* § 171.012(a)(5)(6)(alteration of original).

42. *Id.*

43. This statute was deemed unconstitutional and void under the single subject rule in *Nova Health Sys. v. Edmondson*, 233 P.3d 380, 382 (Okla. 2010). The court did not need to consider the merits of the statute because it contained more than one subject. *Id.*

44. OKLA. STAT. ANN. tit. 63 § 1-738.2(B)(1)-(2) (West 2004 & Supp. 2012-2013). The statute states that "[e]xcept in the case of a medical emergency, consent to an abortion is voluntary and informed if and only if" the patient is informed "by telephone or in person, by the physician who is to perform the abortion, or by a referring physician, or by an agent of either physician . . . that ultrasound imaging 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 pregnant woman." *Id.* § 1-738.2(B)(1)(a)(5). "The physician or agent of the physician shall inform the pregnant woman that the web site and printed material, described in Section 1-738.3 of this title, contain phone numbers and addresses for facilities that offer such services at no cost . . ." *Id.*

45. *See generally id.* § 1-738.2.

46. *Id.*

including, the “probable gestational age of the *unborn child* at the time the abortion is to be performed.”⁴⁷ An ultrasound provider must then display 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”⁴⁸ The North Carolina statute does not explicitly require a simultaneous description of the fetal life.⁴⁹ A physician or qualified professional is merely required to provide information regarding the risk of carrying the pregnancy to term, the risks of the procedure, the name of the physician who is to perform the abortion, and other information that is not directly related to the ultrasound.⁵⁰

The Louisiana Statute

Louisiana has passed the most comprehensive and up-to-date speech-and-display statute. Louisiana Session Law Service 685,⁵¹ the statute, identifies who is qualified to perform an ultrasound, which includes the “physician who is to perform the abortion or a qualified person who is the physician’s agent.”⁵² That qualified person must perform an obstetric ultrasound at least twenty-four hours prior to conducting the operation and “simultaneously display the screen which depicts the active ultrasound images so that the pregnant woman may view them.”⁵³ A physician must give a woman the opportunity to hear the heartbeat by using technology that is “in a quality consistent with the current medical practice.”⁵⁴ The statute merely requires a physician to offer to display the sonogram to a patient and to make audible the heart auscultations; it does not

47. N.C. GEN. STAT. § 90-21.82(1)(c) (2011) (emphasis added).

48. *Id.* § 90-21.82(1)(e) (emphasis added).

49. *See id.* § 90-21.82.

50. *Id.* § 90-21.82(1)(a)-(g).

51. 2012 LA. ACTS 685 (S.B. 708) (codified at LA. REV. STAT. ANN. § 40:1299 (2013)).

52. *Id.* § 40:1299.35.2(D)(1).

53. *Id.* § 40:1299.35.2(D)(2)(a).

54. *Id.*

require physicians to actually display it, nor does it require patients to hear the heartbeat.⁵⁵

The statute also requires that an ultrasound provider “provide a simultaneous and objectively accurate oral explanation of what the ultrasound is depicting, in a manner understandable to a layperson.”⁵⁶ The description should include “the presence and location of the *unborn child*. . .the number of unborn children depicted, the dimensions of the unborn child, and the presence of cardiac activity if present and viewable, along with the opportunity for the pregnant woman to ask questions.”⁵⁷ Again, a physician need only offer the explanation, but he or she is not required to give it if a patient refuses.⁵⁸ Also, Louisiana employs the use of the term “unborn child” when referring to fetal life.⁵⁹

Louisiana requires a patient seeking an abortion to sign an “Ultrasound Before Abortion Notice and Election Form.”⁶⁰ This form provides patients with important disclaimers, including: the right to look away when the ultrasound provider displays the ultrasound; to listen to, or decline to listen to, the heartbeat of the fetal life; to opt out of the ultrasound in the event of rape or incest; and the option to obtain a print depicting the unborn child.⁶¹ The statute requires a woman opting not to have the ultrasound conducted for reason of rape or incest to certify that she has reported the rape or incest to law enforcement officials.⁶² Lastly, the Louisiana statute lists the medical emergency exceptions and the civil penalties and other penalties for failure of a physician to comply with the statute.⁶³

55. *Id.* §§ 40:1299.35.2(D)(2)(a), 3(a)-(d).

56. *Id.* § 40:1299.35.2(D)(2)(b).

57. *Id.* (emphasis added).

58. *Id.* §§ 40:1299.35.2(D)(2)(a)-(b), 3(d).

59. *See generally id.* § R.S. 40:1299.35.2.

60. *Id.* § 40:1299.35.2(D)(2)(d).

61. *Id.*

62. *Id.*

63. *Id.* §§ 40:1299.35.2(D)(4)(a)-(b), (5)-(6) (Medical emergency is defined in the statute as “the existence of any physical condition, not including any emotional, psychological, or mental condition, which a reasonably prudent physician, with

SPEECH-AND-DISPLAY CASES*Texas Medical Providers Performing Abortion Services v. Lakey*

In *Lakey*, the Fifth Circuit addressed the issue of whether Texas H.B.15 abridges physicians' First Amendment rights against compelled speech by requiring them to take and describe a sonogram to patients seeking abortions.⁶⁴ The court held that H.B. 15 did not violate physicians' First Amendment rights because the State can play a "significant role . . . in regulating the medical profession[,]"⁶⁵ and the State's informed consent laws are permissible if they do not place an undue burden on the patient and are "truthful, non[-]misleading, and relevant disclosures" that do not constitute ideological speech.⁶⁶

The court's opinion outlined the major points of contention within Texas H.B. 15 and then immediately compared the facts of *Casey* with the facts at hand.⁶⁷ The court followed the

knowledge of the case and treatment possibilities with respect to the medical conditions involved, would determine necessitates the immediate abortion of the pregnancy to avert the pregnant woman's death or to avert substantial and irreversible impairment of a major bodily function arising from continued pregnancy.").

64. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 574 (5th Cir. 2012). The court considered the First Amendment abridgment issue amongst other alleged violations of Texas H.B. 15, which are not important to the discussion in this Article. *Id.* at 580-84.

65. *Id.* at 576 (citing *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007)).

66. *Lakey*, 667 F.3d at 576. The physician's relevant disclosures include not only the risks to the patient but also the risks to the unborn fetus. *Id.* The government can use its regulatory authority to protect the life of an unborn fetus. *Id.* (citing *Gonzales*, 550 U.S. at 128). The state has a legitimate interest in protecting the rights of the life within a woman. *Id.* Because Texas H.B. 15 does not fall within "ideological speech," as it requires a physician to provide objective, relevant information in describing a sonogram, it does not receive a strict scrutiny review; rather, the state need only have a legitimate state interest that need not be compelling or narrowly tailored. *Id.* Furthermore, providing "truthful, non[-]misleading information" that is "relevant" to a patient's decision whether to have an abortion does not impose an undue burden on a patient and is permissible under the Fourteenth Amendment. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992).

67. *Lakey*, 667 F.3d at 573-74. The cases align in that *Casey* required physicians to provide patients seeking an abortion with the "probable gestational age" of the fetal life and required written consent. *Casey*, 505 U.S. at 881. Likewise, *Lakey* required the physician to provide a description of a sonogram and a written

precedent set in *Casey*, identifying that the First Amendment analysis in *Casey* was the “antithesis” of strict scrutiny.⁶⁸ In doing so, the court was able to apply a more lenient tier of scrutiny, requiring merely a legitimate state interest to infringe upon a physician’s right not to speak within the medical profession.⁶⁹ When a physician is operating within the medical profession, his or her right not to speak is subject to the regulations of the State.⁷⁰ Those regulations, placing no undue burden on a patient seeking an abortion prior to fetal viability, need only be truthful, non-misleading, and relevant to the decision to perform an abortion.⁷¹

The court then cited *Gonzales* to show that among the legitimate state interests in infringing upon a physician’s right not to speak is showing a “profound respect for life within the woman.”⁷² The court finalized its reasoning that requiring physicians to take a sonogram and describe it to patients seeking an abortion does not violate the First Amendment right not to speak by leaning on the Eighth Circuit’s interpretation of *Casey* and *Gonzales* in *Rounds*. In *Rounds*, the Eighth Circuit held that a state could use its regulatory authority to “require a physician to provide truthful, non-misleading information relevant to a patient’s decision to have an abortion, even if that information might also encourage a patient to choose childbirth over abortion.”⁷³

consent. *Lakey*, 667 F.3d at 574.

68. *Lakey*, 667 F.3d at 575.

69. *Id.* By applying a rational basis-type review, the court then isolated physicians’ right not to speak within the medical field, which is subjected then to the “reasonable licensing and regulation by the State[.]” *Id.* (citing *Casey*, 505 U.S. at 884).

70. *Id.*

71. See *Casey*, 505 U.S. at 882.

72. *Lakey*, 667 F.3d at 576. This interest is also supported with an interest in protecting a woman seeking an abortion from the potential physiological damages associated with having an abortion and later finding out new information that may have swayed a woman’s decision whether to have an abortion. *Id.*

73. *Id.* at 576-77 (emphasis omitted). The court also acknowledged that even the dissent in *Planned Parenthood Minn., N.D., S.D. v. Rounds* acknowledged that a “state’s reasonable medical regulation of abortion includes its assertion of ‘legitimate interests in the health of the mother and in protecting the potential life

The court shifted to the Abortion Provider's contention with Texas H.B. 15's written consent requirement.⁷⁴ The court held that this provision of Texas H.B. 15 was not unconstitutional per precedent set in *Casey*.⁷⁵ The court then broke down the specific objections of the Providers and stated that a sonogram is medically necessary⁷⁶ and that requiring a physician to directly provide the information regarding a sonogram, rather than pointing a woman to written information or brochures, in order to receive written consent is not unconstitutional.⁷⁷ The court reasoned that the "mode of delivery does not make a constitutionally significant difference from the 'availability' provision in *Casey*."⁷⁸ Therefore, the written consent provision of Texas H.B. 15 was held "sustainable under *Casey*," and "within the State's power to regulate the practice of medicine,

within her.'" *Id.* at 577 (citing *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 741 (8th Cir. 2008)).

74. *Lakey*, 667 F.3d at 578.

75. *Id.* The court rejected Providers' argument that any disclosure pertaining to the fetus beyond that of its gestational age was "medically unnecessary[.]" amounting to "advocacy by the state." *Id.* at 578-79. The court also rejected Provider's second argument that distinguished *Casey* from *Lakey* in that *Casey* merely required the physician to point the patient toward information, whereas *Lakey* requires physicians to provide the information, making the physicians a "mouthpiece" for the State. *Id.* at 579. The court rejected this argument, as well, and lumped the two arguments of Providers together to state that Providers were interpreting *Casey* to place a "ceiling" on informed consent regulations. *Id.* The court advised that the federal courts provide principles of law, not a "repository for regulation of the practice of medicine." *Id.*

76. The only way a sonogram is medically unnecessary is if a pregnancy is treated as a "condition to be terminated." *Id.* at 579. Informed consent is a measure used to provide a patient with enough information to make a sound decision; a sonogram provides a patient with the necessary information to make a decision about an abortion, and the potential effect of discouraging an abortion is acceptable. *Id.*

77. *Id.*

78. *Id.* In *Casey*, the physicians merely had to inform the patient of the availability of printed information. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 881 (1992). In *Lakey*, the physicians were required to directly converse with their patients about each patient's sonogram. *Lakey*, 667 F.3d at 579. The court reasoned that the only difference between the two cases is the "mode" of transmitting the information, which is constitutionally insignificant. *Id.* The analysis in *Casey* regarded requiring physicians to provide specific information, not how it was provided. *Id.* The court further supported its reasoning by stating that *Wooley* was unconcerned with how the state compelled speech, but rather, the court was concerned with the content of the compelled speech. *Id.* at 580.

and therefore [does] not violate the First Amendment.”⁷⁹ The court vacated “the district court’s preliminary injunction,” and remanded “for further proceedings consistent with [its] opinion.”⁸⁰

Stuart v. Huff

The key issue facing the North Carolina District Court in *Stuart v. Huff* was whether the petitioners were likely to succeed on a First Amendment objection to the speech-and-display requirements, which constitute compelled speech, so as to grant a preliminary injunction while the pending constitutional issues are being resolved.⁸¹ The petitioners brought a First Amendment objection to the speech-and-display requirements, contending that the State was “compelling unwilling speakers to deliver the state’s message discouraging abortion[s].”⁸²

The court deemed the speech ideological and applied strict scrutiny analysis, which resulted in the granting of a preliminary injunction.⁸³ The court held that the State did not have a compelling interest in compelling physician’s speech, and that the means used to meet state interest were not shown to be narrowly tailored.⁸⁴ The court reasoned that First Amendment

79. *Id.* The court also ruled on the constitutionality contention from the Providers that the provisions of Texas H.B. 15 were vague, holding that the Providers could not support this claim. *Id.* at 584.

80. *Id.*

81. *Stuart v. Huff*, 834 F. Supp.2d 424, 426-27 (M.D.N.C. 2011). The court held that the void-for-vagueness claim was unlikely to succeed. *Id.* at 427. Yet, the court did not address the substantive due process claim and the vagueness claim in that same section because it was unnecessary given that the First Amendment claim was held to be likely to succeed on the merits. *Id.*

82. *Id.* at 428. N.C. GEN. STAT. § 90-21.85 required that a “qualified technician working with the physician” display the ultrasound taken at least twenty-four hours prior to performing the abortion in a manner “so that the patient may view [it].” *Id.* (citing N.C. GEN. STAT. § 90-21.85(a)(2)-(4) (2011)). The technician must then explain the ultrasound to the patient, highlighting the “presence, location, and dimensions of the unborn child within the uterus’...and 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.’” *Id.* (citing N.C. GEN. STAT. § 90-21.85(a)(2)-(4) (2011)).

83. *Id.* at 429-32.

84. *Id.* at 432.

protections were triggered and that strict scrutiny applied.⁸⁵

Furthermore, the court discounted an argument for intermediate scrutiny, which the Supreme Court applies to “compelled speech in the ordinary informed-consent context, given the historical interest the state has in regulating certain aspects of medical care.”⁸⁶ The court also discounted all three compelling state interests proffered by the defendants.⁸⁷ Lastly, the court discounted the statute because the burden placed on speech was not narrowly tailored to promote a compelling state interest.⁸⁸

*Planned Parenthood Minnesota, North Dakota, South Dakota v.
Rounds*

The Eighth Circuit interpreted *Casey* and *Gonzales* and determined that it is not unconstitutional compelled speech to expand informed consent to entail information about a fetus in addition to risks to a patient.⁸⁹ The pertinent issues in *Rounds* were whether the information physicians were compelled to

85. *Id.* at 429. It was uncontested that the speech the statute required was compelled; however, the court based its reasoning for applying strict scrutiny not on compelled speech alone, but on compelled ideological speech, as provided by the United States Supreme Court in *Wooley*. *Id.* (citing *generally* *Wooley v. Maynard*, 430 U.S. 705 (1977)).

86. *Id.* at 431 (citing *Whalen v. Roe*, 429 U.S. 589, 603 n.30 (1997)). The court distinguished the North Carolina statute’s informed consent from that which was deemed ordinary in *Whalen*, as the North Carolina statute required a “physician to physically speak and show the state’s *non-medical* message to patients unwilling to hear or see [it].” *Id.* at 432 (emphasis added) (citing *Whalen*, 429 U.S. at 603 n. 30).

87. *Id.* at 432. The three compelling interests proffered were “[1]protecting the psychological health of the patient, [(2)] preventing coercive abortions, and [(3)] expressing its preference for the life of the unborn.” *Id.* at 428. The court held that even if the first interest were compelling, the speech-and-display requirement does not further them. *Id.* at 432. The court said the same of the second interest, again not deciding whether the interest was compelling. *Id.* Of the third interest, the court deferred to *Casey*, stating that nowhere in *Casey* does the Court state that a preference for the life of the unborn is a compelling interest. *Id.*

88. *Id.* at 428-32 (citing no authority for this proportionality analysis). The court rejected the speech-and-display requirement because the defendants did not show that alternatives, such as writing information and speech without display, that were more in proportion to the burden on speech were not viable options. *Id.* at 432.

89. *Id.* at 428-36.

convey to a patient by a South Dakota statute were ideological,⁹⁰ untruthful, misleading, or not relevant to the decision of an abortion, and if that compelled speech violated a physician's First Amendment right not to speak.⁹¹ Planned Parenthood challenged that statutory language that required physicians to state that the abortion would "terminate the life of a whole, separate, unique, living human being"⁹² as being ideological speech because, they contended, a fetus is not a "whole, separate, unique living being" as a matter of scientific or medical fact.⁹³ The statute, however, defined "human being" as "an individual living member of the species of *Homo sapiens* . . . during [its] embryonic [or] fetal age[]." ⁹⁴

The court in *Rounds* held that Planned Parenthood did not meet its burden "to produce sufficient evidence to establish that it is likely to prevail on the merits of its compelled speech claim."⁹⁵ The compelled speech was not unconstitutional, as Planned Parenthood "fail[ed] to give effect to the statutory definition of 'human being' in . . . the Act."⁹⁶ Interpreting the holdings in *Gonzales* and *Casey*, the court reasoned that the State "can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion, even if that information might also encourage a patient to choose childbirth over

90. Ideological speech is defined by the United States Supreme Court as speech that conveys a "point of view." *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

91. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 727 (8th Cir. 2008). South Dakota Legislature had enacted House Bill 1166, which required physicians performing an abortion to provide a statement twenty-four hours prior to conducting an abortion that informed the patient that the abortion would "terminate the life of a whole, separate, unique, living human being." *Id.* at 726. It also provided that physicians inform the patient that the "pregnant woman has an existing relationship with that unborn human being . . .," and that "by having an abortion, her existing relationship . . . will be terminated." *Id.* at 726-727.

92. *Id.* at 726.

93. *Id.* at 727-228. The court discussed the definition of a human being in detail; however, because the statute defined human beings, per *Meese v. Keene*, the court "must follow that definition." *Id.* at 728, 735 (citing *Meese v. Keene*, 481 U.S. 465, 484-85 (1987)).

94. *Id.* at 735-36.

95. *Id.* at 737.

96. *Id.* at 737-38.

abortion.”⁹⁷ The language in the statute deeming a fetus as a “whole, separate, unique, living human being” did not encompass an ideological message of the State, and, when read with the provided statutory definition of “human being,” did not consist of untruthful, irrelevant, or misleading information, which Planned Parenthood would have had to show to successfully prove that the compelled speech was unconstitutional.⁹⁸ Because the compelled speech was truthful, non-misleading, and relevant to the patient’s abortion decision, the narrowly tailored action constitutionally furthered the State’s compelling interest of protecting fetal life.⁹⁹

CONSTITUTIONAL MODEL LEGISLATION THAT PROMOTES GOOD PUBLIC POLICY

Because clear depictions of ultrasounds promote clear decisions of patients seeking an abortion, it is essential that states wishing to protect patients’ mental health and fetal life draft legislation that passes First and Fourteenth Amendment muster. It is also essential that states draft legislation that is good public policy. The model statute that I propose in the Appendix strikes a middle ground for pro-life and pro-choice camps, so women’s health and fetal life are protected without infringing upon a patient’s or a physician’s rights. By leveraging the attempts that some states have taken at drafting speech-and-display legislation, I propose a model statute for states attempting to adopt a speech-and-display statute of their own.¹⁰⁰ The five key features of the model statute are (1) the type of ultrasound required, (2) employing “fetal life” in describing the

97. *Id.* at 734-35.

98. *Id.* at 735-36.

99. *Id.* at 734-36.

100. Louisiana and Texas provide the most comprehensive attempts at drafting speech-and-display statutes. Four speech-and-display statutes have been subjected to litigation (North Carolina, North Dakota, Oklahoma, and Texas). *See, e.g.*, N.C. GEN. STAT. § 90-21.82(1)(e) (2011); N.D. CENT. CODE § 14-02.1; OKLA. STAT. ANN. tit. 63 § 1-738.2(a) (West 2004 & Supp. 2012); TEX. HEALTH & SAFETY CODE ANN. §171.012(4)(B) (West 2010 & Supp. 2012).

ultrasound image, (3) authorizing a broad range of providers to perform the ultrasound, (4) exceptions for those required to have an ultrasound displayed and described prior to an abortion, and (5) the election form physicians must provide and have signed by a patient.

ELEMENTS OF THE MODEL STATUTE

The type of ultrasound and description that must be provided

The model statute provides that an ultrasound provider should take a non-invasive ultrasound, display it, and simultaneously describe it to a patient as part of obtaining informed consent. The required ultrasound shall provide a patient with a real-time view of the fetus by way of an obstetric ultrasound,¹⁰¹ or, if a patient chooses, a transvaginal ultrasound.¹⁰² The real-time view must be the obstetric ultrasound with the option of having a transvaginal ultrasound, and it should not contain language that requires an ultrasound “consistent with current medical practice”¹⁰³ unless the language is qualified to provide that a transvaginal ultrasound or other invasive procedures cannot be required by the State but may only be opted into by a patient.¹⁰⁴ There are limited grounds to object to a transabdominal, obstetric ultrasound because it is a

101. N.C. GEN. STAT. § 90-21.82(1)(e) (2011); The Louisiana statute offers to “simultaneously display the screen which depicts the active ultrasound images so that the pregnant woman may view them.” 2012 LA. ACTS 685 (S.B. 708) *supra* note 51, § 40:1299.35.2(D)(2)(a); Offering to show the ultrasound falls short of requiring that it be shown in that the information may not be conveyed, thus, defeating the purpose of informed consent. The North Carolina statute goes too far in deeming the displayed image an “unborn child,” which, as discussed *infra*, may be deemed ideological speech. N.C. GEN. STAT. § 90-21.82(1)(e) (2011).

102. To provide a patient with full autonomy over her reproductive decision, the choice of a transvaginal or transabdominal ultrasound should be offered, but only the transabdominal should be required.

103. TEX. HEALTH & SAFETY CODE ANN. §171.012(4)(B) (West 2010 & Supp. 2012) contains this language, which was upheld in *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 577, 584 (5th Cir. 2012).

104. This provides a safeguard from the State promulgating an invasive ultrasound requirement by relying on the current medical practice as a guide, while allowing for the statute to naturally update with technological innovations.

reasonable, less invasive, alternative procedure; thus, a statute with this requirement is more likely to be efficiently enacted.¹⁰⁵

The public has already displayed its sentiments toward attempts of the Alabama and Virginia legislatures¹⁰⁶ to require transvaginal ultrasounds, with some critics deeming the procedure *state-mandated rape*.¹⁰⁷ Unless a patient opts to have a

105. Limited grounds may include medical emergencies and geographical constraints. Planned Parenthood, for example, will not provide an abortion without first conducting an ultrasound. Alana Goodman, *Planned Parenthood Says it Won't Do Abortions Without Ultrasounds*, COMMENTARY MAG. (Feb. 22, 2012), <http://www.commentarymagazine.com/2012/02/22/planned-parenthood-abortion-ultrasounds/>. "That's just the medical standard," said Adrienne Schreiber, an official at Planned Parenthood's Washington, D.C., regional office. *Id.*; "To confirm the gestational age of the pregnancy, before any procedure is done, you do an ultrasound." *Id.*; Planned Parenthood's "What Happens During an In-Clinic Abortion?" write-up contains a clause that says the patient will "have a physical exam –which may include an ultrasound." *What Happens During an Abortion - In-Clinic Abortion Cost*, PLANNED PARENTHOOD, <http://www.plannedparenthood.org/health-topics/abortion/in-clinic-abortion-procedures-4359.asp> (last visited Nov. 8, 2013); "May include an ultrasound" is misleading in that a patient must have an ultrasound prior to any abortion procedure to determine the gestational age of the fetus.

106. Alabama Senator Scofield proposed legislation that required that prior to conducting an abortion, a physician must "[p]erform an obstetric ultrasound on the pregnant woman, using either a vaginal transducer or an abdominal transducer, whichever would display the embryo or fetus more clearly." S.B. 12, Reg. Sess. (Al. 2012); By requiring the ultrasound that displays the embryo or fetus more clearly, a patient may be subjected to an invasive procedure without her consent. Virginia had previously attempted to do the same in House Bill 462. However, Gov. Bob McDonnell revoked his support of HB 462's transvaginal ultrasound requirement stating that, "Mandating an invasive procedure in order to give informed consent is not a proper role for the state[.] No person should be directed to undergo an invasive procedure by the state, without their consent, as a precondition to another medical procedure." Laura Bassett, *Virginia Ultrasound Bill Passes in House*, HUFFINGTON POST (Feb. 22, 2012), http://www.huffingtonpost.com/2012/02/22/virginia-ultrasound-bill-abortion_n_1294026.html.

107. Senator Linda Coleman, an Alabama Democrat, sums up the sentiment nicely by stating, "You can't tell me forcing a probe into a woman's vagina against her consent is anything but rape... You can put icing on it, dress it up, but this is the forced penetration of a woman's vagina without her consent." Tyler Kingkade, *Alabama Picks Up Where Virginia Left Off With Ultrasound Law*, CAMPUS PROGRESS (March 1, 2012), http://campusprogress.org/articles/alabama_picks_up_where_virginia_left_on_with_ultrasound_law/; An argument can be made that nonconsensual penetration of a woman's vagina without the existence of an emergency, albeit for medical purposes, could legally constitute sexual battery in Mississippi, for example. "A person is guilty of sexual battery if he or she engages in sexual penetration with: another person without his or her consent. . ." MISS. CODE ANN. § 97-3-95(1) (1973-2006); Sexual penetration is defined including

transvaginal ultrasound, a transabdominal ultrasound suffices to determine the information necessary for a patient to make an informed decision without triggering a strong, emotional response from the public.

Employing "fetal life" in describing the ultrasound image

Chief among the required speech is that a fetus depicted in the ultrasound be referred to as a "fetal life" rather than an "unborn child"¹⁰⁸ or a "potential life,"¹⁰⁹ which should minimize the statute's exposure to succumbing to strict scrutiny analysis

"cunnilingus, fellatio, buggery or pederasty, any penetration of the genital or anal openings of another person's body by any part of a person's body, and insertion of any object into the genital or anal openings of another person's body." MISS. CODE ANN. § 97-3-97(a); Advocates for the transvaginal ultrasound posit that it is often used in the first trimester of pregnancy because it is "the most effective method for viewing early-stage pregnancies," and it is likely to be used despite legislation as a means to "date their pregnancies." Carole Joffe, *Crying Rape*, SLATE (Feb. 29, 2012), http://www.slate.com/articles/double_x/doublex/2012/02/transvaginal_ultrasounds_why_pro_choice_advocates_shouldn_t_call_them_rape_.html; Joffe further states, "In the end, whether an ultrasound is performed, and which method is used, reflects either the practice of the abortion provider, the patient's medical history, or—for a relatively small number of women—an aversion to the transvaginal method. Most of the time, however, the transvaginal ultrasound is a useful and common tool that helps providers perform abortions safely and well." *Id.* Because the procedure is commonly used out of medical necessity, *state-mandated rape* is likely a harsh misnomer; however, if consent to the procedure is given by the state rather than the patient, patient's will be justified in feeling violated. *Id.*

108. Because the term "unborn child" is also medically and legally cognizable as an objectively accurate term of fetal life, states may desire to use it. However, the term is not narrowly construed to be as objective as possible because it opens the debate as to whether a fetus is a child, among other connotations. At the very least, "unborn child" should be used in conjunction with either "fetal life" or "fetus," but never in isolation, so as to circumvent the threat of becoming ideological speech. Again, states can circumvent this issue entirely by simply employing the use of "fetal life," as seen in the model statute.

109. The term "potential life" is employed throughout *Roe v. Wade*, 410 U.S. 113 (1973). However, "potential life" is not a narrowly construed term to describe the image because the fetus is living; thus, it is *actual* life. Pro-life legislators may raise an objection to the usage of this term because it does not suggest that a life-form is being terminated. Furthermore, there is room for debate as to when the fetus gains the potential to become a "human life." To avoid unnecessary debate, the term "potential life" should be avoided.

for ideological speech¹¹⁰ because it is non-ideological and medically accurate. In *Gonzales*, Justice Kennedy employed the term “fetal life.”¹¹¹ Justices O’Connor and Souter also use the term “fetal life” in *Casey*.¹¹² Whether the fetus is a human being constitutes one of the central and highly contested issues in the abortion debate. Whereas, it is uncontroverted that a healthy fetus is living, which can be confirmed by an ultrasound.¹¹³ Because there is no doubt as to whether there is a fetus within the patient’s womb and that it is living, though not on its own, the term “fetal life” is objectively accurate and does not trigger ideological speech concerns.

Lastly, to promote the goals of the legislature while maintaining objectivity, all disclosures made by ultrasound providers are to be made orally¹¹⁴ “in a manner understandable to a layperson.”¹¹⁵ While it is constitutional to compel an

110. Ideological speech would trigger strict scrutiny, the very thing that may invalidate the statute. See generally *Wooley v. Maynard*, 430 U.S. 705 (1977); “Fetal life” is a purely scientific. The Louisiana, North Carolina, Oklahoma, and Texas statutes regarding speech-and-display fail in providing “objectively accurate” information in the language they employ, especially in their use of the term “unborn child.” See generally N.C. GEN. STAT. § 90-21.82 (2011); 2012 LA. ACTS 685 (S.B. 708) *supra* note 51; TEX. HEALTH & SAFETY CODE § 171.012(a)(3)(iii) (West 2010 & Supp. 2012); OKLA. STAT. ANN. tit. 63 § 1-738.2(a) (West 2004 & Supp. 2012); The phrase “unborn child” is, in itself, seemingly contradictory. Although Black’s Law Dictionary defines an unborn child as “a child not yet born,” how exactly is “child” defined? BLACK’S LAW DICTIONARY 233 (7th ed. 1999); The debate over the definition of child is worthy of its own article, and the issue can be avoided by employing terminology that is equally effective in meeting the state’s goals without infringing on ideological speech; therefore, the term “unborn child” should be avoided in favor of a term that evokes a lesser ideological connotation.

111. See generally *Gonzales v. Carhart*, 550 U.S. 124 (2007).

112. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 860 (1992).

113. *Fetal Ultrasound*, JOHNS HOPKINS MED. HEALTH LIBRARY, http://www.hopkinsmedicine.org/healthlibrary/test_procedures/gynecology/fetal_ultrasound_92,P09031 (last visited Nov. 8, 2013).

114. The ultrasound providers must verbally provide the information during the consultation, and not by means of a tape recording or similar device. OKLA. STAT. ANN. tit. 63 § 1-738.2(B)(1)(c) (West 2004 & Supp. 2012-2013); All disclosure must be personalized to further the State’s legitimate interest in protecting the mental health of the patient. *Casey*, 505 U.S. at 846; To protect the specific patient, it is essential that each specific patient receive personalized information because she is make the decision for herself, not society as a whole.

115. TEX. HEALTH & SAFETY CODE ANN. §171.012(4)(c) (West 2010 & Supp. 2012).

ultrasound provider to provide the information as part of a reasonable regulation of the medical profession,¹¹⁶ a patient maintains the right to look away or tune out the information provided¹¹⁷ to avoid creating an undue burden. A patient should also be informed that she could opt out of having an abortion at any time.¹¹⁸

Providers authorized to perform the ultrasound

The category of individuals capable of providing an ultrasound is broad to prevent creating an undue burden for a patient in obtaining an ultrasound.¹¹⁹ The model statute provides a comprehensive model by authorizing “the physician who is to perform the abortion or a qualified person who is the physician’s agent”¹²⁰ to perform the ultrasound. The authorized individuals hereinafter are referred to as “ultrasound providers.” The ultrasound serves the purpose of providing a physician with the gestational age of the fetus, and a physician need not personally take the ultrasound to obtain that information. However, a professional who takes the ultrasound must be medically qualified to describe the ultrasound to a patient to make the speech-and-display statute effective; therefore, the limitations provided by the Louisiana statute serve as a safeguard against misinformation.

116. *See generally Casey*, 505 U.S. 833.

117. 2012 LA. ACTS 685 (S.B. 708) *supra* note 51, § 40:1299.35.2(D)(2)(d)(1).

118. N.C. GEN. STAT. § 90-21.82(2)(e) (2011).

119. Mississippi and Louisiana, for example, only have one abortion clinic in their entire states, respectively. How can I find a provider near me? NAT’L ABORTION FED’N, <http://www.prochoice.org/Pregnant/find/ms.html> (last visited Jan. 4, 2013); How can I find a provider near me? NAT’L ABORTION FED’N, <http://www.prochoice.org/pregnant/find/Louisiana.html> (last visited Jan. 4, 2013); Therefore, an overly broad limitation on who might provide an ultrasound makes a statute constitutionally null by way of creating an undue burden on patients seeking an abortion. *See generally Casey*, 505 U.S. 833.

120. 2012 LA. ACTS 685 (S.B. 708) *supra* note 51, § 40:1299.35.2(D)(1).

Exceptions for those required to have an ultrasound displayed and described prior to an abortion

As a matter of good public policy, the model statute provides for necessary exceptions to requiring the speech-and-display of an ultrasound prior to an abortion, including medical emergencies, rape and incest exceptions, other criminal activity exceptions, and distance exceptions.¹²¹

The election form physicians must provide and have signed by the patient

To ensure that physicians comply with the speech-and-display requirements and to ensure that a patient is fully informed, the model statute requires that an election form be signed by the patient and filed by the ultrasound provider prior to having the ultrasound performed. This creates an open dialogue between an ultrasound provider and a patient. It also prevents tangential legal issues as created by some of the previous speech-and-display statutes.¹²²

121. Although there are a multitude of reasons for obtaining an abortion, certain reasons are of a particular sensitivity, namely those that are motivated by a criminal activity for which the patient seeking the abortion was, and still is, a victim. The model statute is sensitive to this fact by providing exceptions to speech-and-display statutes for victims of rape or incest. The model statute also provides exceptions for medical emergencies, and it provides exceptions for geographical distance, which would prevent creating an undue burden on a woman living in a state in which the nearest abortion provider is located more than 100 miles away from her home. While the patient is still required to have an ultrasound prior to having an abortion, she is not required to have the burden of having it at least twenty-four hours prior to having the abortion. TEX. HEALTH & SAFETY CODE ANN. §171.012(a)(2)(C), (4) (West 2010 & Supp. 2012).

122. For example, the Louisiana statute runs afoul because it only provides an exception to an ultrasound for women who are victims of rape or incest “who have reported the act to law enforcement reports.” 2012 LA. ACTS 685 (S.B. 708) *supra* note 51, § 40:1299.35.2(E). It does not provide an exception to the consent form for individuals who are victim of a crime but have not reported because she has a reasonable belief that reporting the crime would expose her to the risk of retaliation resulting in serious bodily harm, like the Texas statute. *See id.*; *see also* TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(2)(C); The Louisiana statute currently requires that a woman report rape or incest to meet the medical exception. 2012 LA. ACTS 685 (S.B. 708), *supra* note 51, at § 40:1299.35.2(E). Coercing a victim of rape or incest into reporting the crime to obtain an abortion is contrary to the goal of obtaining informed consent in an effort to bolster the patient’s autonomy because it strips her

HOW THE ELEMENTS PROMOTE GOOD PUBLIC POLICY

By providing a clear depiction of an ultrasound and simultaneously describing the ultrasound to a patient, a state can be certain that it has furthered its legitimate interest in protecting the mental health of the patient and fetal life by informing a patient to an extent to which she can truly make an autonomous decision whether to have an abortion. For a patient to fully understand the implications of her decision so as to protect her mental health, the ultrasound she views must be live, as a stagnant view of her own ultrasound or that of another's would not be proportional to the procedure or the weight of her decision.¹²³ Furthermore, the model statute avoids unnecessary complications by taking additional measures, such as not requiring a physician to provide a patient with a photograph of the ultrasound¹²⁴ and by only requiring a physician to offer to make audible the heart auscultations for a patient to hear but not requiring it unless she specifically requests it as part of obtaining informed consent.¹²⁵

of the very autonomy the State is reporting to promote.

123. The live ultrasound displays an image of the fetus, and, assuming the fetus is healthy and living, at no point prior to the completion of the procedure will the fetus be anything other than live and developing. When a sperm unites with an ovum, a diploid cell is formed. *STEDMAN'S MED. DICTIONARY* 1422 (3d ed. 1972). Diploid denotes "the state of a cell containing twice the normal gametic number of chromosomes, one member of each chromosome pair derived from the father and one from the mother..." *Id.* at 356. A cell is "the *living*, active basis of all plant and animal organization." *Id.* at 220 (emphasis added). A zygote, which develops into an embryo, which develops into a fetus, then, is necessarily living. The debate is not over fetal life; rather, it is over whether the fetal life constitutes human life. To be more specific, it is over whether the fetal life is a human being. To promote legislative efficiency, the debate of whether a fetus is a human being should be avoided in drafting speech-and-display statutes.

124. The model statute avoids going beyond what is necessary in providing a patient with enough information to make a truly informed decision, which allows it to avoid unnecessary undue burden or compelled ideological speech issues. When the sonogram is displayed and simultaneously described, the patient has been informed to the extent necessary to make an autonomous decision; therefore, there is no need to supply the patient with a photograph unless she requests it.

125. The Louisiana Statute requires that the physician "make audible the fetal heartbeat, if present, in a quality consistent with current medical practice." 2012 LA. ACTS 685 (S.B. 708), *supra* note 51, at § 40:1299.35.2(D)(2)(a); North Carolina and Oklahoma require that the patient either view the ultrasound or listen to the

In the next section, I defend the constitutionality of the model speech-and-display statute. By drafting legislation that preemptively negates constitutional infirmities, states will be able to pass speech-and-display statutes more efficiently. Speech-and-display requirements raise two key constitutional issues: First Amendment protection against compelled speech¹²⁶ and Fourteenth Amendment right to privacy, which protects a woman's right to have an abortion without being subjected to an undue burden prior to fetal viability.¹²⁷ These two issues are addressed in Part IV and Part V.

HOW MODEL LEGISLATIONS PASSES THE UNDUE BURDEN STANDARD

MODEL STATUTE PASSES THE CASEY UNDUE BURDEN TEST

A speech-and-display requirement does not place an undue burden on a patient; thus, a Fourteenth Amendment argument cannot succeed and will not provide a basis for strict scrutiny analysis of the speech.¹²⁸ By applying the standards set forth in *Casey*, speech-and-display statutes do not violate the undue burden standard because they do not have the objective purpose or effect of creating a substantial obstacle in obtaining an

heartbeat of the fetus. N.C. GEN. STAT. § 90-21.82(1)(e) (2011); *See also* OKLA. STAT. ANN. tit. 63 § 1-738.2(B)(1)(a)(5) (West 2004 & Supp. 2012-2013). The Texas statute requires that the physician makes the heartbeat audible in a "quality consistent with current medical practice" and that the physician explain the heart auscultations to the patient. TEX. HEALTH & SAFETY CODE ANN. §171.012(4)(B) (West 2010 & Supp. 2012); Were the State to require the physician to provide ideological information that the patient did not want to hear, the statute may be deemed unconstitutional. *See Wooley v. Maynard*, 430 U.S. 705, 713-17 (1977). Within an ultrasound, the heartbeat is made visible. Listening to the heartbeat may help with the decision if the patient opts into hearing it, and it may also serve the purpose of protecting fetal life. However, requiring a patient to hear a heartbeat is more likely to be deemed ideological because the main purpose, almost axiomatically, is to inform the patient that an abortion will stop the beating heart that she hears, despite the fact that she can see the heart auscultations in the sonogram.

126. *Wooley*, 430 U.S. at 706, 713.

127. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 834 (1992).

128. *See Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 733-38 (8th Cir. 2008).

abortion.¹²⁹ A state regulation is invalid if it has “the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”¹³⁰ To determine whether the purpose of the statute constitutes a purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion, the court should look to the objective purpose of the statute, not the subjective motive of the legislatures who drafted the statute, as the Court did in *United States v. O'Brien*, a First Amendment case.¹³¹

In *O'Brien*, the Court upheld a statute that disallowed anyone from destroying a draft card because the objective purpose of the statute was to protect government property, not to suppress speech, which the defendant believed to be the subjective intent of the statute.¹³² Similarly, some politicians' rhetoric may lead people to believe the subjective motive of speech-and-display statutes is to discourage abortions; however, the objective intent is to protect a state's interest in protecting fetal life and the mental health of women through informed consent. Like in *O'Brien*, courts should look to the objective intent of the statutes, which do not have the purpose or effect of creating a substantial obstacle in the path of a woman seeking an abortion.

129. *Casey*, 505 U.S. at 877.

130. *Id.*

131. *United States v. O'Brien*, 391 U.S. 367, 384 (1968); In *O'Brien*, the U.S. Supreme Court upheld the conviction of David Paul O'Brien for violating federal law when he and “three companions burned their Selective Service registration certificates on the steps of the South Boston Courthouse.” *Id.* at 369; The federal law O'Brien violated was a statute that disallowed anyone from destroying a draft card. *Id.* at 369-70; O'Brien argued that the statute was unconstitutional “because it was enacted to abridge free speech, and because it served no legitimate legislative purpose.” *Id.* at 370; The Court held that the federal statute was constitutional as enacted and applied because it is facially neutral in that it makes certain conduct illegal, not certain speech. *Id.* at 375; The statute does not “distinguish between public and private destruction,” nor does it punish for the intended expression of the destruction; the law is merely designed to protect government property. *Id.*; The Court reasoned that the purpose of the statute was not to suppress symbolic speech. *Id.* at 376-82; In so reasoning, the Court looked to the objective intent of the statute rather than the subjective intent proffered by O'Brien. *Id.*; This case set a standard of statutory interpretation for First Amendment issues to look to the objective intent of the statute rather than the subjective intent. *See generally id.* at 367.

132. *Id.* at 375.

The Court in *Casey* reaffirmed *Roe*'s essential holding that "the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."¹³³ *Casey* held that "[t]o protect the central right recognized by *Roe* while at the same time accommodating the State's profound interest in [protecting] potential life . . . the undue burden standard should be employed."¹³⁴ The statutes pass *Casey*'s undue burden test because the objective purpose of the statute serves a legitimate state interest rather than the purpose of placing a substantial obstacle in the way of a patient seeking an abortion.¹³⁵ The key legitimate state interest that speech-and-display statutes further is to ensure that patients are fully informed of their decision to have an abortion. By providing a patient with this information, she can make a truly informed and autonomous decision.

In rejecting *Roe*'s rigid trimester framework, *Casey* held that "[t]o promote the State's interest in potential life throughout pregnancy, the State may take measures to ensure that the woman's choice is informed."¹³⁶ *Casey* further states that "[m]easures designed to advance this interest should not be invalidated if their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right."¹³⁷ Although politicians may exclaim that preventing abortions is the purpose of the statute, the law should look past the subjective motive that politicians champion and look to the objective purpose of the statute.¹³⁸ The objective purpose of speech-and-display statutes is to confirm that an abortion is the autonomous decision of a patient only after she is fully informed in an effort to protect fetal life and the mental

133. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (citing *Roe v. Wade*, 410 U.S. 113 (1973)).

134. *Id.* at 837 (internal citations omitted).

135. *Id.* at 877.

136. *Id.* at 837.

137. *Id.*

138. *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968).

health of patients, as allowed by *Casey*,¹³⁹ and statutorily sufficient if adhering to the interpretive rule laid out in *O'Brien*.¹⁴⁰

Furthermore, the statutes pass the *Casey* undue burden test because the effect of the speech-and-display is not a substantial obstacle in seeking an abortion. To obtain informed consent, physicians are required only to provide medical information that is truthful, non-misleading, and relevant to a patient's decision to have an abortion. The effect of providing a sonogram and a description of it is to personalize the information a patient receives so that she can make a fully informed decision based on her body, not the body of another depicted in a pamphlet. Discouragement of an abortion may be an effect but that only confirms the necessity of the informed consent requirement.¹⁴¹ If that truthful, non-misleading information has the effect of discouraging abortion,¹⁴² the information was clearly relevant to the patient's decision.¹⁴³

If a patient is fully informed of what her abortion procedure entails prior to an ultrasound and is intent on having the procedure, then any painful emotional reaction that is evoked in a patient is not likely a product of the speech-and-display of an ultrasound but is more likely the byproduct of the reality of her decision. At least one opponent to speech-and-display statutes assumes that "ultrasound viewings evoke painful emotional reactions," and the argument claims that the statutes are

139. *Casey*, 505 U.S. 833.

140. *O'Brien*, 391 U.S. at 377.

141. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576, 579 (5th Cir. 2012).

142. In *Casey*, the Court stated that "we permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion." *Casey*, 505 U.S. at 883. Therefore, the goal of informed consent to provide a patient with enough information to make a mature and informed decision is okay, even if the state shows a preference for life over an abortion, which, in effect, discourages an abortion.

143. Scott W. Gaylord & Thomas J. Molony, *Casey and a Woman's Right to Know: Ultrasounds, Informed Consent, and the First Amendment*, 45 CONN. L. REV. 595, 601, 603 (Dec. 2012-2013).

designed to do so.¹⁴⁴ The contention is well-grounded in the language used in only one of the statutes, though, which compels a physician to recite to a patient “that her abortion ‘will terminate the life of a whole, separate, unique, living human being’ with whom the woman shares an existing and constitutionally protected relationship.”¹⁴⁵ A court could deem this language from the North Dakota statute ideological; therefore, drafters should avoid employing similar language. If the description of the sonogram uses the non-ideological language proffered in Section III(A)(v) of this Article, though, the ultrasound viewing would be less likely to evoke a painful emotional response beyond what is necessary for the patient to fully understand the ramifications of her decision.

***SPEECH-AND-DISPLAY STATUTES PROVIDE INFORMATION THAT IS
MEDICALLY NECESSARY***

The Supreme Court, in *Casey*, also held that “the State may enact regulations to further the health or safety of a woman seeking an abortion,” but “[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.”¹⁴⁶ Therefore, a speech-and-display statute need not only be truthful, non-misleading, relevant, and non-ideological, but it must also be medically necessary.

Although the *Casey* Court was not clear as to what information is “unnecessary,” the Court did distinguish three disclosures that certainly were not unnecessary in that they protected the State’s interest in protecting “potential life:” “truthful, non[-]misleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the ‘probable gestational age’ of the fetus.”¹⁴⁷ More

144. Susan Frelich Appleton, *Reproduction and Regret*, 23 YALE J.L. & FEMINISM 255, 317 (2011).

145. *Id.* at 317-18 (citing N.D. CENT. CODE § 14-02.102 (2009)).

146. *Casey*, 505 U.S. at 878 (emphasis added).

147. *Id.* at 882.

importantly, the Court stated that utilizing informed consent to protect a woman's mental health and to protect fetal life is not unconstitutional and is thus medically necessary:

It cannot be questioned that psychological well-being is a facet of health. Nor can it be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision. In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed. If the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible.¹⁴⁸

Although *Casey* was exploring the informed consent of the Pennsylvania legislation, which required the disclosure be given by way of a pamphlet, the permitted content is not limited in form. Therefore, so long as the information provided in an attempt by the State to ensure that the patient "apprehend[s] the full consequences of her decision" is "truthful and not misleading," it is medically relevant.¹⁴⁹

Pre-abortion ultrasounds provide a patient with information that is medically necessary to her decision whether to have an abortion, as it is not unconstitutional to require a physician to inform a patient seeking an abortion of the "nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus," as long as the information a physician is required to provide is "truthful" and non[-]misleading."¹⁵⁰ The Court in *Casey* also reasoned that the age of the fetus was truthful and non-misleading information that the State could require a physician to provide because the information is important to a patient's abortion decision and may attribute to her overall mental

148. *Id.*

149. *Id.*

150. *Id.*

health.¹⁵¹

*MODEL STATUTE CONSTITUTIONALLY BROADENS INFORMED
CONSENT*

Although a patient's sonogram is more personalized and potentially more graphic, it is not unconstitutional to provide a patient with this information, as *Casey* does not place a ceiling on the content that can be provided nor does it limit the mode of communication that can be utilized.¹⁵² The key difference in pointing a patient toward ultrasound information and describing a patient's ultrasound to her is the mode of communication, which the court in *Lakey* deems constitutionally insignificant.¹⁵³ Furthermore, there is not a constitutional significance to a patient as to how she receives the information because the information provided is still truthful and non-misleading.¹⁵⁴ In sum, *Casey* provides that information that is truthful and non-misleading can be required of physicians to provide to patients, not how it can be provided, and the mode of communication is constitutionally insignificant to the patients.¹⁵⁵

Women's decision-making ability and autonomy is not compromised by fully informing them of what the procedure entails, as it is not based on "overbroad generalizations about the different talents, capacities, or preferences of males and females."¹⁵⁶ The purpose of the statute is not to protect women from themselves per a presumed handicap, but rather, it intends to provide patients with the information a layperson would not

151. *Id.* (reasoning that if a patient is not fully informed of the procedure and its ramifications, she may later discover information that would have played a role in her decision as to whether to receive the abortion and that information may be detrimental to her mental health).

152. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 578-79 (5th Cir. 2012).

153. *Id.* at 579.

154. *Casey*, 505 U.S. at 882, 884 (1992).

155. *Lakey*, 667 F.3d at 575, 579 (citing *Casey*, 505 U.S. at 882).

156. Ian Vandewalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics*, 19 MICH. J. GENDER & L. 1, 10 n. 39 (2012-13) (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

know of otherwise.¹⁵⁷

As the court in *Lakey* reasoned, showing and describing an ultrasound is the “epitome of truthful, non-misleading information[;]”¹⁵⁸ however, the language used in the description requirement should be very concise, as discussed in the model statute.

THE MODEL STATUTE CONSTITUTIONALLY COMPELS SPEECH

THE MODEL STATUTE SHOULD NOT RECEIVE STRICT SCRUTINY ANALYSIS

Speech-and-display statutes require the conveyance of non-ideological, narrowly tailored information to further states’ legitimate interest in promoting fetal life and the mental health of the woman; therefore, model speech-and-display statutes should not receive strict scrutiny analysis. In *Wooley*, the Supreme Court held that when the State compels ideological speech, it is only constitutional if the State’s interest in compelling speech is narrowly tailored, compelling, and it outweighs the First Amendment protection;¹⁵⁹ however, the Court did not determine what level of analysis should be applied to compelled speech that is non-ideological. The Supreme Court defined ideological speech as speech that conveys a “point of view.”¹⁶⁰

The court in *Lakey* appropriately applied a more lenient tier of scrutiny to the First Amendment review of the speech-and-display statute, whereas the *Stuart* court inappropriately applied strict scrutiny by deeming the speech ideological.¹⁶¹ Both courts

157. *Id.* at 3, 10 n. 39 (citing *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982)).

158. *Lakey*, 667 F.3d at 578.

159. The Court stated that a state cannot convey its ideological message in a manner that “outweigh[s] an individual’s First Amendment right to avoid becoming the courier for such message[.]” no matter how acceptable that message is to some of its citizens. *Wooley v. Maynard*, 430 U.S. 705, 716-17 (1977).

160. *See id.* at 720-21.

161. *Stuart v. Huff*, 834 F. Supp. 2d 424, 429, 431 (M.D.N.C. 2011). It was uncontested that the speech the statute required was compelled; however, the court

applied an analysis akin to the analysis laid out in *Wooley* by identifying whether a First Amendment protection was triggered and determining whether the compelling interest of the state outweighed the protection provided by the First Amendment.¹⁶² Both courts acknowledged that a First Amendment protection was triggered, and it was held that speech-and-display requirements constitute compelled speech.¹⁶³ The analysis then shifts to which level of scrutiny to apply and what interest the state has for infringing upon the First Amendment protection that is provided to physicians who are required to convey the state's message.¹⁶⁴

The court in *Stuart* diverged from the court in *Lakey* by deeming the compelled speech ideological.¹⁶⁵ When compelled speech is ideological, strict scrutiny applies.¹⁶⁶ However, as the court in *Lakey* reasoned, showing and describing a sonogram is not ideological speech.¹⁶⁷ Rather, it is the epitome of objectivity because it is purely scientific.¹⁶⁸ In *Stuart*, the court did not provide reasoning for deeming the speech ideological or misleading beyond stating it was a non-medical opinion.¹⁶⁹

Showing and describing a sonogram is not providing a patient with a point of view; rather, it provides a patient with enough information to ensure that she can make an informed and mature decision "even when in so doing the State expresses a preference for childbirth over abortion."¹⁷⁰ This information, as determined by *Casey*, is medically necessary and thus non-ideological. In accordance with the *Casey* Court, information

based its reasoning for applying strict scrutiny not on compelled speech alone, but on compelled ideological speech, as provided by the United States Supreme Court in *Wooley*. *Id.* (citing *Wooley*, 430 U.S. at 717).

162. *Wooley*, 430 U.S. at 715-16.

163. *Stuart*, 834 F. Supp. 2d at 429.

164. *Wooley*, 430 U.S. at 716-17.

165. *Stuart*, 834 F. Supp. 2d at 429, 431-32.

166. *Id.* at 429.

167. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 578 (5th Cir. 2012).

168. *Lakey*, 667 F.3d at 577-79.

169. *Stuart*, 834 F. Supp. 2d at 431.

170. *Casey*, 505 U.S. at 883

regarding fetal life is a type of medical information that is relevant to a patient's medical decision,¹⁷¹ and a sonogram is the most accurate way of providing a patient with fetal life information.

Because speech-and-display statutes that are drafted according to the model statute suggested in Part One are non-ideological, it follows that strict scrutiny does not apply in determining their constitutionality. Instead, a lesser tier of scrutiny applies; however, *Wooley* does not set a standard. *Casey* does, however, provide that a state may implicate First Amendment protections, but only "as part of the practice of medicine, subject to reasonable licensing and regulation by the State."¹⁷²

***A STATE MAY COMPEL PHYSICIAN'S SPEECH AS A REASONABLE
REGULATION OF THE MEDICAL FIELD***

If the Casey Standard Alone Were Applied

If the *Casey* standard alone were applied, a state could compel a physician to convey information of any content in any manner so long as it was a reasonable regulation of the medical field.¹⁷³ As determined in *Casey*, states have a legitimate interest in protecting fetal life and the mental health of a patient. Displaying and describing an ultrasound empowers a patient to make a truly autonomous, informed decision even if in doing so it discourages an abortion. Furthermore, discouragement is an effect, not a cause, and because the objective, truthful information of a sonogram being displayed and described has a deterring effect, it is clearly relevant information in obtaining consent.¹⁷⁴ In addition, information that may protect the mental health of a patient as well as the life of a fetus is, in fact, medical

171. *Id.* at 882; *See also Lakey*, 667 F.3d at 578.

172. *Casey*, 505 U.S. at 884.

173. *Id.* at 882.

174. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 585 (5th Cir. 2012).

information.¹⁷⁵

The information a physician is required to convey in a speech-and-display statute is truthful and non-misleading, as a physician is merely required to display a sonogram and describe it to a patient.¹⁷⁶ Like in *Casey*, in which the Court held that a state could require a physician to provide the gestational age of a fetus because it is important to a patient's abortion decision and may attribute to a patient's mental health, states should be allowed to require a physician to take and display a sonogram because it too contains important information to the patient's abortion decision and her mental health, which are both legitimate state interests.¹⁷⁷ Therefore, because speech-and-display requirements are truthful and non-misleading, a state may compel physicians to take a sonogram and describe it to a patient as a reasonable licensing and regulation of the medical profession so long as it also relevant.¹⁷⁸

Speech-and-display statutes require physicians to convey information that is relevant to promoting legitimate state interests of protecting a patient's mental health and of protecting fetal life. Speech that constitutes a reasonable regulation of the medical profession by a state must be truthful, non-misleading, and also *relevant*.¹⁷⁹ Relevance is seemingly treated as a component, if not entirely, as requiring a legitimate state interest to infringe upon physicians' right not to speak,¹⁸⁰ as relevance is considered in each decision related to speech-and-display requirements. For example, in *Casey*, obtaining informed consent in writing from the patient certifying that the physician provided her with information that did not pertain to her, but rather pertained to the fetus, was deemed relevant because it

175. *Lakey*, 667 F.3d at 576.

176. TEX. HEALTH & SAFETY CODE § 171.012(A)(4)(B)-(C) (West 2010 & Supp. 2012).

177. *Casey*, 505 U.S. at 882.

178. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 737-38 (8th Cir. 2008).

179. *Id.* at 738.

180. *Casey*, 505 U.S. at 882.

furthered the State's interest in protecting the life of the fetus.¹⁸¹ Also, in *Rounds*, identifying the fetus as a "human being" through statutory definition was relevant information, as South Dakota too had an interest in protecting the life of the fetus.¹⁸²

While opponents of speech-and-display requirements may yield the truthfulness of the anatomical image and factual description of an ultrasound, they are less likely to concede that it is not ideological speech. Opponents argue that providing additional, factually accurate information will not make a woman more informed than would simply supplying her with the gestational age and written materials, and it will not "enhance informed consent beyond what is already acceptable under *Casey*."¹⁸³ Human nature, however, renders this argument ineffective as an impersonalized, state-sponsored pamphlet depicting another woman's ultrasound simply cannot provide the same personalized, factual information that a sonogram of the actual patient can provide. A personal decision requires personal information.

Therefore, a state may require speech-and-display statutes as a reasonable regulation of the medical profession because states have a legitimate interest in protecting fetal life and the mental health of a patient and displaying and describing a sonogram is reasonably related to that interest.

Closing the potential gap left by the Casey and Wooley standards

Although I contend that *Casey* does address the issue, for the sake of argument, if *Casey* does not fully address the issue, speech-and-display statutes may pass an intermediate level of scrutiny, which would safeguard both the patient's rights and the physician's rights. The Court in *Casey* held that First Amendment protections that are implicated as part of the field of medicine receive a lesser level of scrutiny than strict scrutiny,

181. *Id.* at 881-83.

182. *Rounds*, 530 F.3d at 744-45.

183. John A. Robertson, *Abortion and Technology: Sonograms, Fetal Pain, Viability, And Early Prenatal Diagnosis*, 14 U. PA. J. CONST. L. 327, 356 (2011).

requiring only a legitimate state interest to infringe upon the right of a physician not to speak.¹⁸⁴ In *Casey*, the Court conceded that when a physician is required to provide information from the State, a physician's First Amendment protections are implicated, but only "as part of the practice of medicine, subject to reasonable licensing and regulation by the State."¹⁸⁵ The right of a physician not to speak is thus subject to the reasonable licensing and regulation by a state,¹⁸⁶ and a physician can be compelled to inform a patient of medical information so long as it is truthful and non-misleading.¹⁸⁷

A careful reading of the holding in *Casey* suggests that a rationale basis review should apply. However, *Casey* dealt with a statute that provided a physician performing an abortion with discretion regarding the type of information to provide to a patient in that the physician need only inform a patient of information a "*reasonable patient would consider material* to the decision of whether or not to undergo the abortion."¹⁸⁸ On the

184. *Casey*, 505 U.S. at 840, 884.

185. *Id.* at 884.

186. *Id.* at 838.

187. *Id.* at 882.

188. The statute required that:

"At least 24 hours prior to the abortion, the physician who is to perform the abortion or the referring physician has orally informed the woman of:

(i) The nature of the proposed procedure or treatment and of those risks and alternatives to the procedure or treatment that a *reasonable patient would consider material* to the decision of whether or not to undergo the abortion.

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

(iii) The medical risks associated with carrying her child to term.

(2) At least 24 hours prior to the abortion, the physician who is to perform the abortion or the referring physician, or a qualified physician assistant, health care practitioner, technician or social worker to whom the responsibility has been delegated by either physician, has informed the pregnant woman that:

(i) The department publishes printed materials which describe the unborn child and list agencies which offer alternatives to abortion and that she has a right to review the printed materials and that a copy will be provided to her free of charge if she chooses to review it.

(ii) Medical assistance benefits may be available for prenatal care, childbirth and neonatal care, and that more detailed information on the availability of such assistance is contained in the printed materials

contrary, speech-and-display statutes, in essence, obliterate discretion by compelling specific information to be provided in a specific manner. Furthermore, it required only that a physician point a patient to a description of a fetal life rather than to provide a personal account of the fetal life within a patient.¹⁸⁹ Speech-and-display statutes go a step further than the Pennsylvania statute in that they strip the discretion of what material to provide and the manner in which to provide it away from a physician; thus, a rational basis review may prove inadequate to protect a physician's First Amendment right when he or she is no longer protected by any level of discretion. Although the key difference seems to be the content and mode of communication required, for the sake of argument, let us assume that the nature of compelled speech changes when a physician is stripped of any discretion and compelled to provide a patient with specific information in a specific manner, as the court in *Stuart* seems to do.¹⁹⁰

Furthermore, the court in *Stuart* points out this contention that speech-and-display acts go "well beyond requiring disclosure of those items traditionally a part of the informed consent process, which include, in this context, the nature and risks of the procedure and the gestational age of the fetus."¹⁹¹ However, *Stuart* goes too far by applying strict scrutiny in that it does not show deference to the uniqueness of the procedure and the necessity of a state to protect its citizens from deception. The *Stuart* court should have created a new tier of scrutiny because the ideological speech necessary to trigger strict scrutiny was not present.¹⁹²

Applying a higher level of scrutiny than that provided by

published by the department.

(iii) The father of the unborn child is liable to assist in the support of her child, even in instances where he has offered to pay for the abortion. In the case of rape, this information may be omitted." tit. 18 PA. CONS. STAT. § 3205(a)(1)(i) (West 2012) (emphasis added).

189. tit. 18 PA. CONS. STAT. § 3205; *See also Casey*, 505 U.S. at 881.

190. *See generally Stuart v. Huff*, 834 F. Supp. 2d 424, 428-29 (M.D.N.C. 2011).

191. *Id.* at 431 (citing *generally Acuna v. Turkish*, 930 A.2d 416, 427-28 (2007)).

192. *See generally id.*; *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

Casey would provide a safeguard against any unnecessary compelled speech of a physician, while allowing a state to promote legitimate state interests. Because *Wooley* and *Casey* do not state the level of scrutiny applied to non-ideological compelled speech that is devoid of any discretion, assuming that the lack of discretion changes the level of analysis from that of *Casey*, the level of scrutiny applied to speech-and-display statutes must either be developed or borrowed from another context. The commercial content arena has handled a parallel issue regarding the attorney-client relationship, which, when coupled with the *Casey* medical regulation standard, provides an analysis to scrutinize speech-and-display statutes. The standard is deferential disclosure. The Court in *Zauderer* held that a required disclosure does not implicate an advertiser's rights so long as the disclosure is reasonably related to a state's interest in preventing deception of consumers.¹⁹³

Deferential Disclosure: The Proposed Standard of Analysis

Borrowing from *Zauderer*, and expanding upon *Casey*, a new standard could be adopted to determine the constitutionality of speech-and-display statutes: a standard of "deferential disclosure." Deferential disclosure is a standard in which compelled speech in the pre-abortion context is upheld so long as the compelled speech is reasonably related to a state's legitimate interest in protecting fetal life and women's mental health by preventing deception through providing individuals with information that is so valuable as to justify the implication of speech.¹⁹⁴ This would serve as a standard for legislatures to meet in drafting legislation that would prevent infringing upon physician's rights beyond what is necessary to promote state interests.

193. *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985).

194. Deferential disclosure borrows from *Casey* by merely requiring a legitimate state interest to compel speech as part of the regulation of the medical field. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992).

The aim of compelling speech in the commercial context is to provide consumers with information that is so valuable that the implication of free speech is justified.¹⁹⁵ *Zauderer* regulated commercial speech by attorneys, who are professionals just like physicians.¹⁹⁶ The Court in *Zauderer* upheld a State law, which compelled attorneys to disclose factual and uncontroversial information regarding their fee arrangements to protect clients from the potential for deception that can be created when attorneys do not distinguish between legal fees and legal costs.¹⁹⁷ The Court noted that compelling speech in the commercial context infringes less on the advertiser than prohibitions of speech, showcasing a preference for compelling speech over suppressing speech.¹⁹⁸

Although a speech-and-display statute does not fit within the realm of commercial speech as well as it fits within the realm of a medical regulation, there is a parallel with the aims of the protection. In commercial speech, "warning[s] or disclaimer[s] might be appropriately required . . . in order to dissipate the possibility of consumer confusion or deception."¹⁹⁹ Much like compelled commercial speech to prevent financial harm as a result of any confusion or deception, displaying and describing a sonogram safeguards against any mental harm to a patient and physical harm to fetal life as a result of misinformation, or lack thereof, that a patient may have.²⁰⁰ A layperson may not be fully informed of what the procedure entails without the sonogram and, therefore, may be subject to deception by any misinformation she may have received from non-physicians. Furthermore, even if the information a patient currently has is not false or deceptive, the disclosure requirement may "serve[]

195. *Zauderer*, 471 U.S. at 651.

196. *Id.* at 632.

197. *Id.* at 652-53.

198. *Id.* at 651 (Noting that "[D]isclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech...").

199. *Id.* (quoting *In re R.M.J.*, 455 U.S. 191, 201 (1982)).

200. Much like a layperson may not know the difference between contingent fees and costs. *Id.* at 652.

some substantial governmental interest other than preventing deception.”²⁰¹ Speech-and-display statutes serve a substantial and legitimate government interest in protecting fetal life and the mental health of a patient.

The speech compelled in *Zauderer* regarded fee arrangements to protect consumers from deception that could lead to loss of money by requiring attorneys to provide truthful, factual information.²⁰² The protection was afforded to prevent attorneys from deceiving clients to make money, even if the deception is unintentional.²⁰³ Similarly, the aim of speech-and-display statutes is to protect fetal life and mental health of the patient by compelling physicians to provide truthful, non-misleading information, which, in addition, prevents an abortion provider from acting out of self-interest to promote his or her business by increasing the number of abortions provided.²⁰⁴

The parallels between the aims of the commercial context and the aims of the speech-and-display statute are only amplified by its differences. The compelled speech in a speech-and-display statute provides information of greater importance, as the choice involves a potential life and an irreversible procedure. Although a consumer who is deceived out of money cannot get back the same money that he or she loses, he or she can still earn more money or file a lawsuit to get the money back. When a patient makes an uninformed decision regarding an abortion, she is unable to reverse that procedure. Thus, it is more essential to prevent deception or fraud in the medical, pre-abortion context than it is in the commercial context.

The balance struck by deferential disclosure allows the state to ensure that a physician performing an abortion informs a

201. *Id.* at 650.

202. *Id.* at 652.

203. *Id.* at 674, 679 (O'Connor, J., concurring).

204. Though a grim outlook on the abortion business, it is still a component of business. Business is designed to make a profit or to at least break even. Providers have self-interest in conducting an abortion: that is part of their business. To ensure that patients seeking an abortion are protected against any potential self-interest of abortion providers, it is essential that a state protect the interests of patients by compelling providers to convey a baseline of information.

patient to a level that promotes the legitimate interests of a state, while providing a safeguard against a state from infringing upon the rights of a physician. A rational basis review may allow the state too much leeway to infringe upon the First Amendment protections of a physician. A strict scrutiny standard may prevent the state from promoting its legitimate interest protecting fetal life and the mental health of the patient.

Applying the Deferential Disclosure Standard

To apply the deferential disclosure standard, a court must 1) determine that the state has a legitimate interest in regulating the medical field, *and* 2) that the compelled disclosures are reasonably related to that legitimate interest. In applying the deferential disclosure test to the speech-and-display statutes, the disclosure requirement is reasonably related to the state's legitimate interest in informing a patient so as to protect fetal life and women's mental health.

The state interest in protecting fetal life and mental health is a legitimate interest. Displaying and describing a sonogram is reasonably related to promoting those interests because it provides truthful, non-misleading, and medically relevant information that is directly related to the fetal life and to informing the patient to a level that mitigates her exposure to future mental health issues regarding her decision to have the abortion.

If Strict Scrutiny Were Applied

Although a state should draft a statute that passes the *Casey* standard and, to be cautious, the deferential disclosure statute, as well, a concisely drafted statute may be able to pass strict scrutiny analysis. The legitimacy of a state interest in protecting fetal life or protecting the mental health of a patient has not been disproved in this string of cases. In *Lakey*, the court borrowed from *Casey* and deemed that protecting the life of a fetus and protecting the mental health of a patient seeking an abortion are

legitimate state interests.²⁰⁵ In *Stuart*, these state interests were rejected.²⁰⁶ However, the court did not say whether the state interests of protecting the mental health of the patient or preventing coercive abortions were either compelling or legitimate; rather, the court merely ruled that, *even if they were compelling*, the State interests were not furthered by speech-and-display requirements.²⁰⁷ The court in *Stuart* also stated only that the Court in *Casey* did not deem protecting the life of a fetus to be a compelling state interest; however, it did not state that it was not a compelling state interest.²⁰⁸ Therefore, even if strict scrutiny were applied, protecting the life of a fetus, protecting the mental health of a patient seeking an abortion, and preventing coercive abortions may be compelling state interests.²⁰⁹

By correcting the language used in the Texas, Oklahoma, North Carolina, and Louisiana speech-and-display statutes, states can draft legislation that is narrowly tailored, as well. The court in *Stuart*, applying strict scrutiny, held that North Carolina's speech-and-display requirements were not narrowly tailored because no alternatives, which have a lesser burden on speech, were discounted by the State.²¹⁰ This presumes that there is a greater burden on speech by requiring a physician to display and describe a sonogram to a patient than to simply require a physician to point a patient toward written descriptions of the fetus and to convey the gestational age of the fetus, as deemed constitutional in *Casey*.²¹¹ However, there is no basis for declaring this burden to be greater, as the content of the speech is still truthful, non-misleading, and relevant toward furthering the legitimate state interests of protecting the fetus,

205. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576 (5th Cir. 2012) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 at 882 (1992)).

206. *Stuart v. Huff*, 834 F. Supp. 2d 424, 432 (M.D.N.C. 2011).

207. *Id.* (emphasis added)

208. *Id.*

209. *Id.*

210. *Id.*

211. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 881-82 (1992).

protecting the mental health of a patient seeking an abortion, or preventing coercive abortions.²¹²

CONCLUSION

Speech-and-display statutes, if drafted to conform to the model statute, should pass First and Fourteenth Amendment muster while promoting good public policy. The model statute does not create an undue burden on a patient because it does not have the purpose or effect of placing a substantial obstacle in the way of a patient seeking an abortion. The model statute also avoids a First Amendment violation because it compels physicians to convey information that is non-ideological, truthful, and medically relevant, an action that need only pass rational basis review. In the event that a higher level of scrutiny were to be applied, the model statute should pass an intermediate level "deferential disclosure" standard, which further ensures the protection of the First Amendment rights of abortion providers. It passes this intermediate level of scrutiny because the disclosure required is reasonably related to advancing legitimate state interests of protecting women's health and fetal life. Lastly, even if strict scrutiny is erroneously applied to the non-ideological model speech-and-display statute, the statute will likely pass this level of review because it is narrowly tailored to promote state interests that have not been deemed to be anything less than compelling. If legislatures follow the model speech-and-display statute, they can pass legislation that will protect the mental health of patients and fetal life while promoting women's autonomy.

212. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 737-38 (8th Cir. 2008).

MODEL SPEECH-AND-DISPLAY STATUTE²¹³

Be it enacted by the Legislature:

1. No abortion shall be performed upon a woman in this State without her voluntary and informed consent.²¹⁴
2. Except in the case of medical emergency or other exception listed herein, consent to an abortion of a fetal life at any stage of gestational development is voluntary and informed only if an ultrasound is performed in accordance with the provisions of this section.²¹⁵
 - a. *Qualifications to Perform an Ultrasound.* The physician who is to perform the abortion, the referring physician, or a qualified person working in conjunction with either the physician who is to perform the abortion or the physician's agent, shall perform the ultrasound. For purposes of this Section, "qualified person" means a person having documented evidence that he or she has completed a course in the operation of ultrasound equipment and is in compliance with any other requirements of law regarding the operation of ultrasound equipment,²¹⁶ hereinafter referred to as "ultrasound provider."
 - b. *Requirements.* At least twenty-four hours prior to the woman having any part of an abortion performed or induced, or at least two hours before the abortion if the pregnant woman waives this requirement by certifying that she currently lives 100 miles or more from the nearest abortion provider that is a facility licensed under the State or a facility that performs more than fifty abortions in any twelve-month period, and prior to the

213. Please note that much of the language employed in this section is derived verbatim from the Louisiana, North Carolina, Texas, and Oklahoma statutes. Direct statutory quotations are not in quotations; rather, they are referred to generally. Also note that the model statute is only concerned with the speech-and-display component of the statute. For a more comprehensive review of additional information to provide pre-abortion, please look directly to any one of the aforementioned states for their statutory language.

administration of any anesthesia or medication in preparation for the abortion on the woman,²¹⁷ the ultrasound provider shall comply with every one of the following requirements:

- i. Explain to the patient that only an obstetric, transabdominal ultrasound is required; however, offer the choice of having a transvaginal or other ultrasound consistent with the current medical practice instead.
- ii. Perform an obstetric, transabdominal ultrasound, unless patient opts for alternative ultrasound, on the patient and simultaneously display the screen which depicts the active ultrasound images so that the patient may view them. Nothing in this section shall be construed to prevent the patient from not viewing the images displayed on the ultrasound screen or to look away from the screen.
- iii. Provide a simultaneous and objectively accurate oral explanation of what the ultrasound is depicting, in a manner understandable to a layperson, which shall include the presence and location of the fetal life within the uterus and the number of fetal lives depicted, the dimensions of the fetal life, and the presence of external members and internal organs, cardiac activity, if present and viewable, and must provide the patient with the opportunity to ask questions.²¹⁸

214. N.C. GEN. STAT. § 90-21.82 (2012).

215. 2012 LA. ACTS 685 (S.B. 708), *supra* note 51, at § 40:1299.35.2(D).

216. *Id.* § 40:1299.35.2(D)(1).

217. *Id.* § 40:1299.35.2(D)(2); TEX. HEALTH & SAFETY CODE ANN. § 171.012(A)(4) (West 2010 & Supp. 2012).

218. 2012 LA. ACTS 685 (S.B. 708), *supra* note 51, at § 40:1299.35.2(D)(2)(a)-(b).

- iv. Offer to simultaneously make audible the heart auscultation for the patient to hear, if present, in a quality consistent with current medical practice, and, if the patient opts to hear the fetal heartbeat, offer to simultaneously provide an oral explanation of the heart auscultation in a manner understandable to a layperson²¹⁹ and allow the patient to ask questions.
 - v. The physician performing the abortion or the ultrasound provider shall refer to the image depicted as a “fetal life.” At no point shall the ultrasound provider or the abortion provider refer to the image depicted in the ultrasound as an “unborn child” alone, but he or she may employ the term “unborn child” in immediate conjunction with “fetus” or “fetal life.”
 - vi. An ultrasound photograph or print of the fetal life in a sealed envelope clearly marked “ultrasound print” can be offered, but is not required.
- c. *Consent Form.* Before receiving an ultrasound under Subsection 2(b) and before the abortion is performed and before any sedative or anesthesia is administered, the patient completes and certifies with her signature a dated election form complete with the exact time of signing, that states as follows:²²⁰
- i. *Ultrasound Before Abortion Notice and Election Form.* The law of this State requires an obstetric, transabdominal ultrasound examination (unless patient opts for an alternative ultrasound current with medical practice) prior to the performance of an abortion. By signing below, I certify that I understand the following:

219. *Id.*

220. TEX. HEALTH & SAFETY CODE ANN. § 171.012(A)(4) (West 2010 & Supp. 2012); 2012 LA. ACTS 685 (S.B. 708), *supra* note 51, at § 40:1299.35.2(D)(2)(d).

(a) I am required by law to have an ultrasound taken by an ultrasound provider and to have an oral explanation simultaneously provided unless I certify in writing to one of the following:

(i) I am pregnant as a result of a sexual assault, incest, or other violation of the State Penal Code that has been reported to law enforcement authorities or that has not been reported because I reasonably believe that doing so would put me in risk of retaliation resulting in serious bodily injury or death.

(ii) I am a minor and obtaining an abortion in accordance with judicial bypass procedures under State Family Code.

(iii) My fetus has an irreversible medical condition or abnormality, as identified by reliable diagnostic procedures and documented in my medical file.

(b) I have the option to look at or look away from the ultrasound display at any time.

(c) I have the option to listen to or tune out the oral description simultaneously provided by the ultrasound provider.

(d) I have the option to listen to the fetal heartbeat that is required to be made audible if I decide to hear it by initialing

here: _____

(e) I am required by law to hear an oral explanation of the ultrasound images, unless I certify below that I am pregnant due to an act of rape or incest that need not be reported.

(f) I have the option to ask and receive answers to any questions about the images of the fetal life.

(g) I have the option to receive an ultrasound photographic print depicting the fetal life, but I do not have to receive one if I opt out by initialing here: _____

(h) I am making this election of my own free will and without coercion.

(i) I may opt out of having the abortion at any time.²²¹

(j) For a woman who lives 100 miles or more from the nearest abortion provider that is a facility licensed under the State Code or a facility that performs more than fifty abortions in any twelve-month period, I waive the requirement to wait twenty-four hours after the sonogram is performed before receiving the abortion procedure. My place of residence is _____.

(k) Signature _____ Date ____ Time _____

221. N.C. GEN STAT. § 90-21.82(1)(f) (2011).

- d. *Execution of Consent Form.* Before the abortion is performed, the physician who is to perform the abortion receives a copy of the signed, written certification required by Subsection 2(c); and the patient is provided the name of each person who provides or explains the information required under this subsection. The physician must retain a copy or copies of the certification and 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, 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 eighteen, whichever is greater. The woman's medical file shall be kept confidential as provided by law.
3. *Medical Emergencies.* Means the existence of any physical condition, not including any emotional, psychological, or mental condition, which a reasonably prudent physician, with knowledge of the case and treatment possibilities with respect to the medical conditions involved, would determine necessitates the immediate abortion of the pregnancy to avert the pregnant woman's death or to avert substantial and irreversible impairment of a major bodily function arising from continued pregnancy. Upon a determination by a physician that a medical emergency exists with respect to a pregnant woman, the provider shall certify in writing the specific medical conditions that constitute the emergency. 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 eighteen, whichever is greater. The woman's medical files shall be kept confidential as provided by law.²²²
4. *Professional Disciplinary Action.* The State Board of Medical Licensure and Supervision and the State Board of Osteopathic Examiners shall promulgate rules to ensure that physicians who

222. 2012 LA. ACTS 685 (S.B. 708), *supra* note 51, at § 40:1299.35.2(D)(4)(b)

perform abortions and referring physicians or agents of either physician comply with all requirements of this section.²²³

5. *Penalties.* Any person who intentionally or knowingly fails to comply with any requirement of this Section shall be subject to penalties as provided for in the State Public Health and Safety Abortion provisions.²²⁴
6. *Protection of privacy in court proceedings.* In every civil or criminal proceeding or action brought under this Section, 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 such disclosure. The court may close any proceedings in the case and enter other protective orders to preserve the privacy of the woman upon whom the abortion has been performed or attempted. This Section may not be construed to conceal the identity of the plaintiff or of witness from the defendant.²²⁵

223. OKLA. STAT. ANN. tit. 63 § 1-738.2 (West 2004 & Supp. 2012-2013).

224. 2012 LA. ACTS 685 (S.B. 708), *supra* note 51, at § 40:1299.35.2(D)(5).

225. S.B. 353, 2013-14 Gen. Assemb., Reg. Sess. (N.C. 2013).

