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## The North Carolina Woman's Right to Know Act: An Unconstitutional Infringement on a Physician's First Amendment Right to Free Speech

Ryan Bakelaar

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THE NORTH CAROLINA WOMAN'S RIGHT TO  
KNOW ACT: AN UNCONSTITUTIONAL  
INFRINGEMENT ON A PHYSICIAN'S FIRST  
AMENDMENT RIGHT TO FREE SPEECH

Ryan Bakelaar\*

*The North Carolina Woman's Right to Know Act represents the crossroads of the Supreme Court's First Amendment, informed consent, and abortion-related jurisprudence. The Act requires physicians to perform an obstetric ultrasound, verbally convey specific information regarding ultrasonographic findings, and communicate a host of other information to patients seeking abortions. The purported goal of the Act is to ensure that physicians obtain appropriate informed consent from such patients. By compelling a physician to convey this information, the State violates the physician's First Amendment rights. Indeed, the State may not compel an individual to convey the State's ideological message. Further, any statute that mandates that an individual speak alters the content of that speech and is, therefore, subject to strict scrutiny. Pursuant to current United States Supreme Court precedents on compelled and content-based speech, the relevant portions of the Act are unconstitutional. Further, the claim made by the Act's proponents that the speech involved is commercial speech, subject to a lesser degree of First Amendment scrutiny, fails under the Court's commercial speech precedents. The State may reasonably regulate the medical profession by mandating that physicians obtain informed consent and convey limited, truthful information to patients. However, the Act's extensive and one-size-fits-all approach to informed consent is not a reasonable regulation of medical practice. What is left, therefore, is an unconstitutional attempt by the State to infringe on the First*

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*Amendment rights of physicians providing abortions in North Carolina.*

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#### INTRODUCTION

The North Carolina Woman's Right to Know Act ("the Act") seeks to ensure that physicians and associated qualified professionals<sup>1</sup> obtain appropriate informed consent from patients who seek to undergo abortions.<sup>2</sup> By requiring that physicians perform an obstetric ultrasound and verbally convey specific information regarding ultrasonographic findings—collectively known as the "speech and display requirement"—as well as communicate a host of other information to patients,<sup>3</sup> the Act greatly expands traditional

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1. N.C. GEN. STAT. ANN. § 90-21.85 (Westlaw through 2013 Reg. Sess.). While the Act specifically permits either "the physician who is to perform the abortion[ ] or a qualified technician working in conjunction with the physician" to perform the ultrasound, *id.*, this Article will refer to these parties collectively as "physician."  
 2. See Woman's Right to Know Act, 2011 N.C. Sess. Laws 405.  
 3. §§ 90-21.82, 90-21.85 (Westlaw).

notions of informed consent. These requirements also raise constitutional concerns for both physicians and their patients.

This Article discusses whether compelling a physician to verbally convey information that he<sup>4</sup> would not otherwise communicate<sup>5</sup> to patients seeking abortions in order to further the State's admitted interest in discouraging abortion<sup>6</sup> violates the physician's First Amendment rights under the United States Constitution. Two general and inter-related First Amendment principles are relevant to this discussion. First, a state may not compel an individual to speak on its behalf.<sup>7</sup> Second, when a state does mandate that an individual speak, it necessarily alters the content of that speech.<sup>8</sup> Courts apply strict scrutiny to such content-based speech regulations.<sup>9</sup> The speech and display requirement both compels physicians to speak and fails to satisfy strict scrutiny analysis. Additionally, the speech that the Act compels is inconsistent with commercial speech; however, even if commercial speech jurisprudence was to control, the Act fails under standard commercial speech analysis. Solely from a First Amendment perspective, therefore, these portions of the North Carolina Woman's Right to Know Act are unconstitutional.

Such a conclusion would be inadequate without addressing additional Fourteenth Amendment due process concerns. Indeed, the Act represents the crossroads of the Supreme Court's First Amendment, informed consent, and abortion-related jurisprudence. Generally, the Supreme Court has held that states may act to ensure that women undergoing abortions give informed consent.<sup>10</sup> Fundamental flaws in the language of the Act itself, however, result in an informed consent statute that fails to achieve informed consent for certain patients. Further, the Court has averred the right of a state, under its police power, to reasonably regulate the medical profession.<sup>11</sup> However, a one-size-fits-all approach to informed consent, especially when it requires that all physicians verbally convey a predetermined script, is simply not a reasonable regulation of medical practice. The Supreme Court's reproductive autonomy jurisprudence, therefore, does not control. Conse-

4. For the sake of clarity and to avoid confusion, throughout this Article, the generic physician will be referred to as "he" or "him," while the patients seeking abortions will be referred to as "she" or "her."

5. See *Stuart v. Huff*, 834 F. Supp. 2d 424, 429 n.4, 432 n.7 (M.D.N.C. 2011).

6. *Stuart*, 834 F. Supp. 2d at 428, 429 n.4, 432.

7. See *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

8. See *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988).

9. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 961 (4th ed. 2011).

10. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 837 (1992) (plurality opinion).

11. See *Whalen v. Roe*, 429 U.S. 589 (1977).

quently, the Supreme Court's First Amendment jurisprudence remains dispositive. Overall, the speech and display requirement, which compels a physician to perform an obstetric ultrasound and to communicate to patients specific fetal anatomical findings, violates the physician's First Amendment rights.

#### I. THE WOMAN'S RIGHT TO KNOW ACT: NORTH CAROLINA AND OTHER JURISDICTIONS

The North Carolina Woman's Right to Know Act is "an act to require a twenty-four-hour waiting period and the informed consent of a pregnant woman before an abortion may be performed."<sup>12</sup> The North Carolina House of Representatives passed the bill on June 8, 2011 with the State Senate following suit on June 15, 2011.<sup>13</sup> Governor Beverly Purdue vetoed the bill on June 27, 2011.<sup>14</sup> The bill became law upon a legislative override of the Governor's veto on July 28, 2011.<sup>15</sup> A group of physicians and physician organizations, on behalf of themselves and their patients seeking abortions, filed suit on September 29, 2011 seeking injunctive and declaratory relief and challenging the constitutionality of the Act.<sup>16</sup> On October 25, 2011, one day prior to the statute's effective date,<sup>17</sup> Judge Catherine Eagles of the United States District Court for the Middle District of North Carolina granted, in part, plaintiff's motion for a preliminary injunction.<sup>18</sup>

At oral argument regarding the preliminary injunction, the State<sup>19</sup> contended that the Act will "protect[ ] abortion patients from psychological and emotional distress . . ."; "prevent[ ] women from being coerced into having abortions . . ."; and "promot[e] life and discourage abortion."<sup>20</sup> In order to achieve these purposes, the Act purports to ensure that a physician obtains from his patients appropriate informed consent prior to performing

12. Woman's Right to Know Act, 2011 N.C. Sess. Laws 405.

13. *Abortion-Woman's Right to Know Act*, N.C. GEN. ASSEMBLY, <http://www.ncga.state.nc.us/gascripts/BillLookUp/BillLookUp.pl?Session=2011&BillID=H854> (last visited Nov. 9, 2013).

14. *Id.*

15. *Id.*

16. *See* *Stuart v. Huff*, 834 F. Supp. 2d 424, 426 (M.D.N.C. 2011).

17. *Stuart*, 834 F. Supp. 2d at 426.

18. *Stuart*, 834 F. Supp. 2d 424 (order granting preliminary injunction).

19. Defendants in this action include the President of the North Carolina Medical Board, the North Carolina Attorney General, the Secretary of the North Carolina Department of Health and Human Services, and eight North Carolina district attorneys. *See* Complaint for Injunctive and Declaratory Relief at 1, *Stuart*, 834 F. Supp. 2d 424 (No. 11CV00804), 2011 WL 4494253, at 1. For this Article, I will refer to these defendants collectively as "the State."

20. *Stuart*, 834 F. Supp. 2d at 432.

the procedure.<sup>21</sup> To that end, the Act requires that physicians perform an obstetric ultrasound, orally describe specific fetal anatomical findings to the patient, and provide patients with information regarding the physician's malpractice insurance and hospital admitting privileges.<sup>22</sup> The bill also directs North Carolina to create a website and disseminate information regarding, *inter alia*, fetal development and organizations that provide information regarding alternatives to abortion.<sup>23</sup> Lastly, it creates a civil cause of action by both patients undergoing abortion and "any father of an unborn child that was the subject of an abortion" against physicians who do not comply with the statute.<sup>24</sup>

With respect to the speech and display requirement, the Act provides, *inter alia*, that:

[A]t least four hours before a woman having any part of an abortion performed or induced, and before the administration of any anesthesia or medication in preparation for the abortion on the woman, the physician who is to perform the abortion, or qualified technician working in conjunction with the physician, shall do each of the following:

- (1) Perform an obstetric real-time view of the unborn child on the pregnant woman.
- (2) Provide a simultaneous explanation of what the display is depicting, which shall include the presence, location, and dimensions of the unborn child within the uterus and the number of unborn children depicted. The individual performing the display shall offer the pregnant woman the opportunity to hear the fetal heart tone. . . .
- (3) Display the images so that the pregnant woman may view them.
- (4) Provide a medical description of the images, which shall include the dimensions of the embryo or fetus and the presence of external members and internal organs, if present and viewable.<sup>25</sup>

The Act further states that:

[C]onsent to an abortion is voluntary and informed only if all of the following conditions are satisfied:

21. See N.C. GEN. STAT. ANN. § 90-21.85 (Westlaw through 2013 Reg. Sess.).

22. *Id.* at § 90-21.82, 90-21.85.

23. *Id.* at § 90-21.83.

24. *Id.* at § 90-21.88.

25. *Id.* at § 90-21.85.

- (1) At least 24 hours prior to the abortion, a physician or qualified professional has orally informed the woman, by telephone or in person, of all of the following:
  - a. The name of the physician who will perform the abortion.
  - b. The particular medical risks associated with the particular abortion procedure to be employed, including, when medically accurate, the risks of infection, hemorrhage, cervical tear or uterine perforation, danger to subsequent pregnancies, including the ability to carry a child to full term, and any adverse psychological effects associated with the abortion.
  - c. The probable gestational age of the unborn child at the same time the abortion is to be performed.
  - d. The medical risks associated with carrying the child to term.
  - e. The display of a real-time view of the unborn child and heart tone monitoring that enable the pregnant woman to view her unborn child or listen to the heartbeat of the unborn child are available to the woman. . . .
  - f. If the physician who is to perform the abortion has no liability insurance for malpractice in the performance . . . of an abortion, that information shall be communicated.
  - g. The location of the hospital that offers obstetrical or gynecological care located within 30 miles of the location where the abortion is performed . . . and at which the physician performing . . . the abortion has clinical privileges. If the physician . . . has no local hospital admitting privileges, that information shall be communicated.
- (2) The physician or qualified professional has informed the woman, either by telephone or in person, of each of the following at least 24 hours before the abortion:
  - a. That medical assistance benefits may be available for prenatal care, childbirth, and neonatal care.
  - b. That public assistance programs under Chapter 108A of the General Statutes may or may not be available as benefits under Federal and State assistance programs.
  - c. That the father is liable to assist in the support of the child, even if the father has offered to pay for the abortion.

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

e. . . . The physician or a qualified professional shall orally inform the woman that the materials [described in N.C. GEN. STAT. ANN. § 90-21.83 (Westlaw through 2013 Reg. Sess.)] have been provided by the Department and that they describe the unborn child and list agencies that offer alternatives to abortion. If the woman chooses to view the materials other than on the Web site, the materials shall either be given to her at least 24 hours before the abortion or be mailed to her . . . .<sup>26</sup>

In overriding the Governor's veto, the General Assembly added North Carolina to an expanding list of jurisdictions that have sought to regulate abortion by requiring the performance of an obstetrical ultrasound as a fundamental facet of abortion-related informed consent.<sup>27</sup> After the Supreme Court's decisions in both *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>28</sup> and *Gonzales v. Carhart*,<sup>29</sup> states have focused on informed consent as a means of regulating abortion.<sup>30</sup> States have increasingly concluded that ultrasound is a component of abortion-related informed consent; in fact, twenty-two states have enacted some type of legislation requiring that physicians either perform or offer to perform obstetric ultrasounds on patients seeking abortions, and more are considering similar legislation.<sup>31</sup> Four states, Louisiana, North Carolina, Oklahoma, and Texas, have enacted statutes that require physicians to both perform ultrasounds and verbally convey detailed and specific ultrasonographic findings to their patients prior to performing an abortion. These statutes provide different exceptions in limited circumstances such as rape, incest, medical emergency, or the presence of specific fetal medical conditions.<sup>32</sup>

26. *Id.* at § 90-21.82.

27. See 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, 647-52 (2012) (providing both a comprehensive listing and tabulations of abortion-related statutes and proposed bills).

28. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 881-87 (1992).

29. *Gonzales v. Carhart*, 550 U.S. 124, 160 (2007).

30. See § 90-21.82 (Westlaw); see also Rachel B. Gold & Elizabeth Nash, *State Abortion Counseling Policies and the Fundamental Principles of Informed Consent*, 10 GUTTMACHER POL'Y REV. 6, 8 (2007).

31. See *State Policies in Brief: Requirements for Ultrasound*, GUTTMACHER INST. (Oct. 1, 2013), [http://www.guttmacher.org/statecenter/spibs/spib\\_RFU.pdf](http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf).

32. See, e.g., TEX. HEALTH & SAFETY CODE ANN. § 171.0122 (Westlaw through 2013). North Carolina's Act requires ultrasounds be performed in all cases of abortion ex-



Not surprisingly, these statutes have given rise to constitutional challenges in both state and federal district courts. Trial court judges in North Carolina, Oklahoma, and Texas have enjoined the enforcement of the ultrasound-related provisions of the respective statutes.<sup>33</sup> Appellate courts have addressed the constitutionality of the Oklahoma and Texas statutes. The Oklahoma County District Court and the Oklahoma Supreme Court have twice enjoined and declared void different versions of the Oklahoma Woman's Right to Know Act, first on state constitutional grounds and more recently on federal constitutional grounds.<sup>34</sup> In *Texas Medical Providers Performing Abortion Services v. Lakey*, however, the Fifth Circuit Court of Appeals vacated the preliminary injunction that had been preventing the enforcement of the ultrasound-related provisions of the Texas Woman's Right to Know Act.<sup>35</sup> Given the divergent opinions among members of the state and federal judiciary, the constitutionality of requiring physicians to discuss ultrasonographic findings with patients seeking abortions is a topic ripe for discussion.

## II. THE FIRST AMENDMENT

The Act violates a physician's First Amendment rights. By requiring that he verbally describe, in detail, ultrasonographic findings regarding fetal anatomy, it compels him to engage in content-based speech as part of the State's admitted attempt to "promot[e] life and discourage abortion."<sup>36</sup> Given that the Supreme Court has, on multiple occasions, held that the State may not compel an individual to convey an ideological message on the State's behalf,<sup>37</sup> the Act's speech and display provisions are unconstitutional. Further, the Act does not pass constitutional muster under strict scrutiny, the standard lens through which the Court views content-based speech re-

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cept when there exists a statutorily defined "medical emergency." N.C. Gen. Stat. Ann. § 90-21.86 (Westlaw).

33. See *Nova Health Sys. v. Pruitt*, No. CV-2010-533 (Okla. Dist. Ct. Mar. 28, 2012) (order granting permanent injunction); *Stuart v. Huff*, 834 F. Supp. 2d 424, 437 (M.D.N.C. 2011) (order granting preliminary injunction); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 806 F. Supp. 2d 942, 977-78 (W.D. Tex. 2011); *Nova Health Sys. v. Edmondson*, No. CV-2010-533 (Okla. Dist. Ct. Aug. 3, 2010) (order granting temporary injunction).
34. See *Pruitt*, No. CV-2010-533 (Okla. Dist. Mar. 28, 2012) (order granting permanent injunction), *aff'd*, 2012 OK 103, ¶ 3, 292 P.3d 28, 29 (Okla. 2012); *Edmondson*, No. CV-2010-533 (Okla. Dist. Ct. Aug. 3, 2010) (order granting temporary injunction), *aff'd*, 233 P.3d 380 (Okla. 2010).
35. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 584 (5th Cir. 2012).
36. *Stuart*, 834 F. Supp. 2d at 432.
37. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796-98 (1988).

strictions.<sup>38</sup> The Court, therefore, should invalidate the speech and display requirement of the Act.

*A. The First Amendment Prohibits Government-Compelled Speech*

The First Amendment generally prohibits statutes that abridge an individual's free speech and protects individuals from being required to engage in government-compelled speech. In relevant part, the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech . . ."<sup>39</sup> The Supreme Court has construed the freedom of speech clause broadly, holding that "the First Amendment guarantees freedom of speech, a term necessarily comprising the decision of both what to say and what not to say."<sup>40</sup> The Court has further stated that "at the heart of the First Amendment is the notion that an individual should be free to believe as he will and that in a free society, one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."<sup>41</sup> Overall, "where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."<sup>42</sup>

The government may not compel an individual to convey a state-sponsored message.<sup>43</sup> In *Wooley v. Maynard*, the Court addressed "whether [New Hampshire] may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public."<sup>44</sup> Maynard, a Jehovah's Witness, both excised a portion of his license plate and placed tape on the plate, thereby either removing or obscuring from view portions of the state motto, "Live Free or Die."<sup>45</sup> After being found guilty three times for violating a New Hampshire statute making it a misdemeanor to knowingly cover figures or letters on an automobile's license plate, Maynard sought injunctive and declaratory relief from further enforcement of the law.<sup>46</sup> In an affidavit filed in District Court,

38. *See Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009) ("[A]ny restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest . . .").

39. U.S. CONST. amend. I.

40. *Riley*, 487 U.S. at 796–97; *see also* *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 633–34 (1943).

41. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234–35 (1977).

42. *Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

43. *Wooley*, 430 U.S. at 715.

44. *Wooley*, 430 U.S. at 713.

45. *Wooley*, 430 U.S. at 708 n.4.

46. *Wooley*, 430 U.S. at 707–09.

Maynard stated, “I refuse to be coerced by the State into advertising a slogan which I find morally, ethically, religiously, and politically abhorrent.”<sup>47</sup> The Court determined that such refusal was appropriate; indeed, the Court held that the First Amendment protected individuals who refuse to convey a state-sponsored ideological message with which they disagree.<sup>48</sup>

Further, the government may not compel an organization to convey factual statements that the organization would otherwise prefer to avoid.<sup>49</sup> In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, the Supreme Court addressed “whether Massachusetts may require private citizens who organize a parade to include among the marchers a group imparting a message the organizers do not wish to convey.”<sup>50</sup> Here, the sponsor of the Boston Saint Patrick’s Day Parade refused to permit a group of gay, lesbian, and bisexual individuals of Irish descent to march in the parade.<sup>51</sup> The defendant group’s members sought to “express pride in their Irish heritage . . . , to demonstrate that there are such men and women among those so descended, and to express their solidarity with like individuals who sought to march in New York’s St. Patrick’s Day Parade.”<sup>52</sup> The Massachusetts Supreme Court affirmed the lower court’s opinion finding that the defendant group was “entitled to participate in the Parade on the same terms and conditions as other participants.”<sup>53</sup> A unanimous Supreme Court, however, reversed and stated that Massachusetts “may not compel affirmance of a belief with which the speaker disagrees. Indeed, this general rule, that the speaker has the right to tailor [his own] speech[,] applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid.”<sup>54</sup> The Court described the case as “boil[ing] down to the choice of a speaker not to propound a particular point of view, [where] that choice is presumed to lie beyond the government’s power to control.”<sup>55</sup> Indeed, the State “is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.”<sup>56</sup>

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47. *Wooley*, 430 U.S. at 713.

48. *Wooley*, 430 U.S. at 715, 717.

49. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995).

50. *Hurley*, 515 U.S. at 559.

51. *Hurley*, 515 U.S. at 561.

52. *Hurley*, 515 U.S. at 561.

53. *Hurley*, 515 U.S. at 563–64.

54. *Hurley*, 515 U.S. at 573–74, 581 (citations omitted).

55. *Hurley*, 515 U.S. at 575.

56. *Hurley*, 515 U.S. at 579.

Just as the defendants in both *Wooley* and *Hurley* attempted to require individuals to adopt, as their own, the messages of others, North Carolina's Act "compel[s] unwilling speakers to deliver the State's message discouraging abortion."<sup>57</sup> Specifically, the Act requires that a physician "[p]rovide a simultaneous explanation of what the [ultrasound] display is depicting" and "[p]rovide 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."<sup>58</sup> The provision of this information is inextricably linked to conveying the State's anti-abortion message. Indeed, in *Stuart*, the State did not dispute at oral argument that one of the "purpose[s] of the speech-and-display requirements was to persuade women not to have abortions by presenting 'compelling' visual and personal information."<sup>59</sup> Additionally, the State did not contradict the "undisputed evidence establish[ing] that th[is] information is not generally medically necessary."<sup>60</sup> In fact, "the uncontradicted evidence establishe[d] that there is no medical purpose for requiring the speaking or showing of this material to an unwilling listener."<sup>61</sup> Further, the Court wrote that the State did not provide any evidence to support the claim that the speech and display requirement would protect patients from potential psychological distress, one of the State's purported interests in passing this legislation.<sup>62</sup> To the contrary, the only evidence presented to the Court was that the ultrasound provision would, in actuality, "harm the psychological health of the very group the [S]tate purports to protect."<sup>63</sup>

From this evidence, coupled with the fact that the State failed to contradict it, one can reasonably conclude that a physician would otherwise not present this information as part of routine informed consent discussions with patients. Further, considering the undisputed evidence that the speech and display requirement may actually harm patients, the plaintiff physicians in *Stuart* reasonably preferred exercising their constitutional right under *Wooley* and *Hurley* to act in concert with their own beliefs over becoming a vehicle conveying the State's anti-abortion message.<sup>64</sup> More broadly, this message may be in direct conflict with the physician's ethical obligations to individual patients. The speech and display portion of the Act places a physician in the unenviable position of having to choose between Scylla or Cha-

57. *Stuart v. Huff*, 834 F. Supp. 2d 424, 428 (M.D.N.C. 2011).

58. N.C. GEN. STAT. ANN. § 90-21.85 (Westlaw through 2013 Reg. Sess.).

59. *Stuart*, 834 F. Supp. 2d at 429 n.4.

60. *Stuart*, 834 F. Supp. 2d at 429 n.4.

61. *Stuart*, 834 F. Supp. 2d at 432 n.7.

62. *Stuart*, 834 F. Supp. 2d at 432.

63. *Stuart*, 834 F. Supp. 2d at 432.

64. *Stuart*, 834 F. Supp. 2d at 428.

rybdis:<sup>65</sup> violate the statute or violate his oath and the foundational principles of medicine. However, the First Amendment and the Supreme Court's compelled speech jurisprudence protect a physician who provides abortion services from having to face this ethical dilemma. Indeed, by requiring physicians to express the State's ideological message, the Act violates one of the foundational principles of the First Amendment: the State may not compel an individual to convey an ideological message that is not his own.

### *B. Content-Based Speech Regulations Are Subject to Strict Scrutiny*

Even if courts decide, for whatever reason, to disregard the Supreme Court's compelled speech jurisprudence, the Act, which is a content-based speech regulation, is not narrowly tailored to achieve its goal and, therefore, does not survive strict scrutiny. The Court has developed a "two-tier system of review" of regulations affecting free speech: courts review content-based regulations under strict scrutiny and employ intermediate scrutiny when evaluating a content-neutral regulation.<sup>66</sup> The Act's requirement that a physician verbally describe fetal anatomical findings to patients obligates that physician to engage in content-based speech.<sup>67</sup> This is because "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech."<sup>68</sup> The Supreme Court has also averred that "[a]bove all else, the First Amendment means that government has no power to [control] expression because of its message, its ideas, its subject matter, or its content."<sup>69</sup> Consistent with this statement, the Court views content-based speech regulations with substantial skepticism.<sup>70</sup> In fact, the Court has declared that "content-based regulations of speech are presumptively inva-

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65. Scylla and Charybdis are figures from Greek mythology who presented a choice to sailors. Avoiding Scylla, a six-headed sea monster, would require passing near Charybdis, another sea monster often embodied in the form of a whirlpool which would devour ships. The choice that Odysseus faced in Homer's *Odyssey* came to symbolize a difficult choice of two options, either of which would result in some injury. See *Between Scylla and Charybdis*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Between\\_Scylla\\_and\\_Charybdis](http://en.wikipedia.org/wiki/Between_Scylla_and_Charybdis) (last visited Nov. 9, 2013).

66. See *Stuart*, 834 F. Supp. 2d at 429 (quoting *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 469 (2009)).

67. See CHEMERINSKY, *supra* note 9, at 961; see also *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994).

68. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)

69. *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

70. See *Mosley*, 408 U.S. at 95; see also *Turner*, 512 U.S. at 622; *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992); CHEMERINSKY, *supra* note 9, at 960.

lid.”<sup>71</sup> Here, because the Act compels content-based speech, it is subject to strict scrutiny.<sup>72</sup> In order to satisfy the strict scrutiny requirement, a content-based “restriction must be narrowly tailored to serve a compelling government interest.”<sup>73</sup>

The Supreme Court applies strict scrutiny to government regulations that compel individuals to convey specific content on behalf of the State.<sup>74</sup> In *Wooley*, the Court also addressed whether a statute that made it a misdemeanor to cover figures or letters on an automobile’s license,<sup>75</sup> thereby mandating the display of the state motto on passenger automobiles, was narrowly tailored to achieve New Hampshire’s stated goals of “(1) facilitat[ing] the identification of passenger vehicles, and (2) promot[ing] appreciation of history, individualism, and state pride.”<sup>76</sup> In support of its holding, the Court stated the following:

Even were we to credit the State’s reasons and ‘even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.’<sup>77</sup>

The Court held that the statute in question was not narrowly tailored to achieve the State’s goals.<sup>78</sup> The State could have required that all passenger vehicle license plates contain a specific combination of letters and numbers, rather than the state motto, in order to identify that a car was displaying the proper passenger plates as opposed to, for example, a commercial license plate.<sup>79</sup> In fact, the Court noted that there were “any number of ways” that the State could have achieved its second avowed interest without affecting a citizen’s First Amendment rights.<sup>80</sup> Where New Hampshire’s stated purposes could have been achieved in a fashion that did not “stifle

71. *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 188 (2007) (citing *R.A.V.*, 505 U.S. at 382).

72. *See* *Stuart v. Huff*, 834 F. Supp. 2d 424, 429 (M.D.N.C. 2011).

73. *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009).

74. *See generally* *Wooley v. Maynard*, 430 U.S. 705 (1977).

75. *Wooley*, 430 U.S. at 707.

76. *Wooley*, 430 U.S. at 716.

77. *Wooley*, 430 U.S. at 716–17 (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)).

78. *Wooley*, 430 U.S. at 716.

79. *Wooley*, 430 U.S. at 717 n.13.

80. *Wooley*, 430 U.S. at 717.

fundamental personal liberties,”<sup>81</sup> the statute requiring passenger vehicles to display the state motto failed strict scrutiny. The Court, therefore, declared the law unconstitutional.<sup>82</sup>

In the arena of content-based speech restrictions, the Supreme Court has applied the least restrictive means test in order to determine whether a statute is narrowly tailored to its stated purpose.<sup>83</sup> In *Ashcroft v. ACLU*, the Supreme Court reviewed a First Amendment challenge to the Child On-line Protection Act (“COPA”), which made it a criminal offense to disseminate content over the internet that would be “harmful to minors,” a phrase that the Act broadly defined to include pornographic materials.<sup>84</sup> COPA also provided that an individual “may escape conviction . . . by demonstrating that he ‘has restricted access by minors to material that is harmful’” by employing one of a variety of age verification techniques.<sup>85</sup> Because of COPA’s focus on sexual speech in particular, the Court determined that the statute was a content-based restriction and employed strict scrutiny.<sup>86</sup> The Court held that requiring webmasters to utilize age verification techniques inappropriately infringed upon their free speech rights, especially when these techniques were not the least restrictive means by which to address the problem of minors viewing internet pornography.<sup>87</sup> Among these lesser restrictive means was filtering software that parents could install on home computers to prevent display of lewd content.<sup>88</sup> Because COPA did not utilize the least restrictive means and, thus, was not narrowly tailored to achieve the government’s stated goal, the Court upheld a preliminary injunction barring its enforcement.<sup>89</sup>

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81. *Wooley*, 430 U.S. at 716.

82. *Wooley*, 430 U.S. at 717.

83. *See e.g.*, *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 673 (2004).

84. *Ashcroft*, 542 U.S. at 660, 661–62 (quoting 47 U.S.C. §§ 231(a)(1), 231(e)(6) (Westlaw through 2013 P.L. 113-31)).

85. *Ashcroft*, 542 U.S. at 662 (quoting 47 U.S.C. § 231(c)(1) (Westlaw)).

86. *Ashcroft*, 542 U.S. at 670 (“The closest precedent on the general point is our decision in *Playboy Entertainment Group. Playboy Entertainment Group*, like this case, involved a content-based restriction designed to protect minors from viewing harmful materials.”) (citing *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803 (2000)); *see also Ashcroft* 542 U.S. at 767 (Scalia, J., dissenting) (“Both the Court and Justice Breyer err, however, in subjecting COPA to strict scrutiny.”).

87. *Ashcroft*, 542 U.S. at 668–69.

88. *Ashcroft*, 542 U.S. at 668–69.

89. *Ashcroft*, 542 U.S. at 673; *see also Playboy Entm’t Grp.*, 529 U.S. at 803 (holding that a statute which prohibited signal bleed only of sexual images, which occurred when non-subscribers to specific cable television channels were nonetheless able to view such images from those channels, was a content-based restriction subject to strict scrutiny).

The Woman's Right to Know Act is a content-based speech regulation and is, therefore, subject to strict scrutiny.<sup>90</sup> The Act is content-based because it mandates that a physician verbally describe specific fetal anatomical findings from ultrasounds performed on patients who are seeking abortions; in doing so, the Act requires that the physician engage in speech in which he would otherwise not engage, thereby necessarily altering the content of his speech.<sup>91</sup> Indeed, in *Stuart*, the State did not dispute evidence tending to show that plaintiffs would not otherwise communicate the information that the real-time speech and display provision requires unless a patient requested that they do so.<sup>92</sup>

Pursuant to *Wooley* and *Ashcroft*, the Act, in order to be narrowly tailored, must utilize the least restrictive means to achieve its stated goals.<sup>93</sup> The State has proffered its interest in "promoting life and discouraging abortion" in order to "justify[ ] the compelled speech."<sup>94</sup> Assuming that this is a substantial interest,<sup>95</sup> requiring that a physician verbally convey the State's message is not the least restrictive means by which North Carolina might have otherwise achieved its goal. In *Wooley*, the configuration of letters and numbers allowed police to recognize inappropriately displayed license plates without burdening individuals to speak on behalf of the State.<sup>96</sup> Similarly, in *Ashcroft*, the use of filtering software by concerned parents on their home computers represented a means by which a webmaster's speech would not be burdened.<sup>97</sup>

With respect to the Woman's Right to Know Act, there are alternative means by which to accomplish the State's goal without impermissibly restraining a physician's fundamental personal liberties.<sup>98</sup> The most appropri-

90. See *Planned Parenthood Minn., N.D., S.D. v. Daugard*, 799 F. Supp. 2d 1048, 1070 (D.S.D. 2011) (holding that a South Dakota statute requiring physicians to describe defined risks of the abortion procedure is subject to strict scrutiny).

91. See *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988).

92. *Stuart v. Huff*, 834 F. Supp. 2d 424, 429 n.5 (M.D.N.C. 2011).

93. *Ashcroft*, 542 U.S. at 673; *Wooley v. Maynard*, 430 U.S. 705, 716 (1977).

94. *Stuart*, 834 F. Supp. 2d at 432.

95. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876 (1992) (concluding that the State has "a substantial interest in potential life"). *Casey* does not refer to the state's interest in protecting life as compelling. However, the word choice here does not change the outcome. Even if the interest were compelling, the Act would still fail for the reasons discussed. If the Act fails to achieve its goal assuming that the state's interest is compelling, it would still most certainly fail if the state's interest were described by some term of lesser degree.

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

97. *Ashcroft*, 542 U.S. at 668-69.

98. Judge Eagles commented that "[t]hese alternatives might include making the information at issue available to the patient in written form, or possibly offering to provide the verbal or visual information to the patient but respecting the patient's



ate of these alternative means would be to inform patients that information generally related to their choice to undergo an abortion is available from the State for their purview.<sup>99</sup> Instead of the diagrams of the fetus that Pennsylvania made available in *Casey*,<sup>100</sup> North Carolina might depict and publish ultrasound images demonstrating fetal characteristics at two-week gestational intervals.<sup>101</sup> This has three pillars of support. First, this alternative would be consistent with prior Supreme Court jurisprudence; the plurality in *Casey* held that a “State may . . . require doctors to inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health.”<sup>102</sup> Second, this would bypass the burden on physicians who would otherwise be compelled to speak as emissaries of the State, conveying a message that is not their own.

Third, by enabling a woman to choose whether she deems this information relevant to her decision, it would empower her to exercise her own autonomy. This option would cede power back to the patient and her physician to control the deliberative and dynamic process by which a patient gives informed consent within the confines of the doctor-patient relationship.<sup>103</sup> The State may disagree with a woman’s ultimate decision to undergo an abortion. The woman’s choice to terminate her pregnancy,

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rejection of hearing or seeing the information.” *Stuart*, 834 F. Supp. 2d at 432–33 (citations omitted); *see also* *Brown v. Hartlage*, 456 U.S. 45, 54 (1982) (holding that in order to demonstrate narrow tailoring, the state must demonstrate that the statute does not “unnecessarily circumscrib[e] protected expression”).

99. *See* *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988) (stating that publication of information by the State “would communicate the desired information to the public without burdening a speaker with unwanted speech . . .”).
100. *See Casey*, 505 U.S. at 881, 907.
101. To a degree, the North Carolina Woman’s Right to Know Act does provide women with the option to review these materials by requiring that the State create a website that contains “[m]aterials designed to inform the woman of the probable anatomical and physiological characteristics of the unborn child . . .” N.C. GEN. STAT. ANN. § 90-21.83 (Westlaw through 2013 Reg. Sess.). By creating this website, the State has enabled a woman seeking an abortion to review, at her leisure and in private, information related to the pregnancy at any given gestational age. She herself is able to determine its relevance to her personal decision. Further, this requirement does not in the least adversely affect the First Amendment rights of physicians.
102. *Casey*, 505 U.S. at 882.
103. COMM. ON ETHICS, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, COMMITTEE OPINION NO. 439, INFORMED CONSENT I (2009), available at <http://www.acog.org/-/media/Committee%20Opinions/Committee%20on%20Ethics/co439.pdf?dmc=1&ts=20131025T1701394930> (“Informed consent should be looked on as a process rather than a signature on a form. This process includes a mutual sharing of information over time between the clinician and the patient to facilitate the patient’s autonomy in the process of making ongoing choices.”).

however, is subject to the Supreme Court's recognition of "the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>104</sup> For whatever reason, North Carolina determined that the public dissemination of this information alone would not achieve its goal of "promoting life and discouraging abortion."<sup>105</sup>

The Act compels a physician to communicate information that he would otherwise not convey. This violates the First Amendment pursuant to the Supreme Court's compelled speech jurisprudence. Further, even if, *arguendo*, a court were to disregard these cases, the Act, a content-based speech regulation, would still be subject to strict scrutiny. Providing patients with generic ultrasound pictures of fetuses at various gestational ages presents an alternative that is substantially similar to one that the Supreme Court has previously upheld as constitutional<sup>106</sup> and that does not involve a physician speaker. Given the availability of this less burdensome option, the Act's speech and display requirement is not narrowly tailored to achieve its primary goal and fails under strict scrutiny analysis.

### *C. The North Carolina Woman's Right to Know Act Does Not Involve Commercial Speech*

As an attempt to avoid strict scrutiny, proponents of the North Carolina Act have advanced the theory that the compelled speech that the Act requires of physicians is commercial speech.<sup>107</sup> Overall, the Supreme Court has stated that commercial speech is "expression related solely to the economic interests of the speaker and its audience."<sup>108</sup> The Court came closest to specifically defining commercial speech in *Bolger v. Youngs Drug Products Corporation*:<sup>109</sup> "under th[e] approach [in *Bolger*], commercial speech has three characteristics: (1) It is an advertisement of some form, (2) it refers to a specific product, and (3) the speaker has an economic motivation for the

104. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (emphasis in original) (citation omitted).

105. *Stuart v. Huff*, 834 F. Supp. 2d 424, 432 (M.D.N.C. 2011). Further, Judge Eagles offered an additional solution, namely "offering to provide the verbal or visual information to the patient but respecting the patient's rejection of hearing or seeing the information." *Id.* at 432–33. She further noted that "the state has provided no evidence that alternatives more in proportion to the resulting burdens placed on speech would not suffice." *Id.* at 432.

106. *See Casey*, 505 U.S. at 884; *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 800 (1988).

107. *See Stuart*, 834 F. Supp. 2d at 430.

108. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n.*, 447 U.S. 557, 561 (1980).

109. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66–67 (1983).

speech.”<sup>110</sup> As applied to these facts, the Act’s speech and display requirement does not involve advertising.<sup>111</sup> Additionally, given the State’s admission that one purpose of this Act is to reduce the number of abortions performed, it can hardly be stated that a physician would have an economic incentive for conveying this information.<sup>112</sup> However, even if courts were to recognize some degree of commercial speech in the speech and display requirement, “where, as here, the component parts of a single speech are inextricably intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase . . . . Therefore, [the Supreme Court] appl[ies its] test for fully protected expression.”<sup>113</sup>

The likely reason that proponents of the Act argue that the speech and display requirement is commercial speech is because the judicial adoption of this approach would allow for a lesser degree of judicial scrutiny pursuant to the four-pronged test described in *Central Hudson Gas & Electric Corporation v. Public Services Commission*.<sup>114</sup> According to *Central Hudson*, the government may regulate commercial speech in the following circumstances: (1) if the speech at issue concerns lawful activity, (2) when there is a substantial state interest in regulating the speech, (3) when the regulation di-

110. CHEMERINSKY, *supra* note 9, at 1125 (citing *Bolger*, 463 U.S. at 66–67).

111. The Supreme Court has addressed abortion-related advertisements in *Bigelow v. Virginia*, 421 U.S. 809 (1975). There, a Virginia newspaper published information regarding the availability of abortion services in New York, violating a Virginia law prohibiting advertising which encouraged obtaining an abortion. *Id.* at 812–13. Because the announcement “did more than simply propose a commercial transaction” as it “contained factual material of clear ‘public interest,’” the Court held that the Virginia statute was an improper limitation on First Amendment rights. *Id.* at 822, 829. It would seem to reason, therefore, that the privileged communications between a physician and his patient would be regarded as something more than just commercial speech.

112. Arguably, the Act provides an economic disincentive for abortion providers to provide such information to patients. If the proponents of the Act consider it to be a means by which to discourage abortion, an abortion provider, in abiding by the Act’s requirements, would theoretically be acting against his own economic interests. But, even if a court were to hold that such a disincentive were commercial, the Supreme Court has not clearly defined the boundary between what is commercial speech versus professional speech. *See Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988) (“It is not clear that a professional’s speech is necessarily commercial whenever it relates to that person’s financial motivation for speaking.”); *see also* Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771 (1991) (discussing the relationship between the medical profession and the Supreme Court’s First Amendment jurisprudence).

113. *Riley*, 487 U.S. at 796.

114. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n.*, 447 U.S. 557, 566 (1980).

rectly advances the asserted state interest, and (4) when the regulation is not more extensive than is necessary to accomplish the state's goal.<sup>115</sup>

Applying commercial speech principles to the Act is inappropriate for two primary reasons. First, as stated previously, the conversation between a physician and his patient does not qualify as commercial speech according to *Bolger*.<sup>116</sup> Second, assuming, *arguendo*, that the Act both qualifies as commercial speech and satisfies the first two prongs of *Central Hudson*, the Act fails to satisfy the third and fourth prongs. Specifically, the speech and display requirement both fails to advance the State's interest, at least in some cases, and is more extensive than is necessary to achieve the State's goal. As to the third prong, the patient may, according to the statute itself, avert her eyes from the images on the ultrasound screen and not listen to the description that the physician provides to her.<sup>117</sup> When the patient avails herself of the opportunity to look away from the screen providing information that the State has deemed necessary to her informed consent and refuses to hear the physician's compelled message, the Act fails to ensure the patient's "informed consent."<sup>118</sup> Thus, the Act fails to advance the State's interest as to that individual. In *Stuart*, Judge Eagles commented on this contradiction:

[a]t oral argument, the Defendants suggested that this is in fact what the Act allows because women can turn their heads or use some sort of technological device if they do not wish to see or hear the compelled message. It is not clear that this is so as to the "compelled listening." The statute requires the woman to certify in writing that the speech-and-display requirements have been met. It is hard to understand how she could do this if she "refuse[s] to hear." Assuming this is possible, it results in compelling an unwilling speaker to deliver visual and spoken messages to a listener who is not listening or looking. The Defendants have not shown how this requirement is reasonably tailored to meet the state's interests.<sup>119</sup>

115. *Cent. Hudson*, 447 U.S. at 566.

116. *Bolger*, 463 U.S. at 66–67.

117. See N.C. GEN. STAT. ANN. § 90-21.85(b) (Westlaw through 2013 Reg. Sess.) ("Nothing in this section shall be construed to prevent a pregnant woman from averting her eyes from the displayed images or from refusing to hear the simultaneous explanation and medical description.").

118. See Woman's Right to Know Act, 2011 N.C. Sess. Laws 405 ("An act to require a twenty-four-hour waiting period and the informed consent of a pregnant woman before an abortion may be performed.").

119. *Stuart v. Huff*, 834 F. Supp. 2d 424, 433 n.9 (M.D.N.C. 2011) (citation omitted).

With respect to the fourth prong, the State may make available ultrasound images depicting the fetus at various stages of gestational development, as discussed previously. Given this reasonable alternative that bypasses requiring a physician to speak on the State's behalf, the Act does not use the least restrictive means possible to achieve its goal.

Because the speech and display requirement does not involve commercial speech, a heightened level of scrutiny is required. Even if a court were to deem this to be commercial speech, requiring an unwilling physician to convey a message to a non-listening patient cannot achieve the Act's goal when there are other less restrictive means of ensuring informed consent. The speech and display requirement, therefore, fails to satisfy the third and fourth prongs of *Central Hudson*. Under a commercial speech approach, this failure would also render this portion of the Act unconstitutional. For the two reasons previously discussed, the application of commercial speech principles to the Act is inappropriate. Given that commercial speech jurisprudence does not control, the Act's speech and display requirement is subject to the standard "test[s] for fully protected expression."<sup>120</sup>

What appears, however, to be a straightforward application of basic First Amendment principles oversimplifies the issues raised by these types of statutes. Indeed, the North Carolina Act is at the crossroads of the Supreme Court's First Amendment, informed consent, and abortion-related jurisprudence. This Article, until now, has focused on First Amendment issues in a vacuum. The First Amendment issues, however, are inextricably linked to the Supreme Court's decisions dealing with informed consent and a woman's liberty interests in obtaining an abortion. To decide the constitutionality of the Act based solely on the First Amendment would be improper. The ultimate determination of the Act's constitutionality requires careful review of the relationship between the Act and current Supreme Court jurisprudence in the area of reproductive autonomy.

### III. THE WOMAN'S RIGHT TO KNOW ACT: AT THE CROSSROADS OF FIRST AMENDMENT, INFORMED CONSENT, AND ABORTION JURISPRUDENCE

Courts will not determine the constitutionality of the Act based solely on the First Amendment. Since *Roe v. Wade*, abortion-related jurisprudence has matured from questioning whether women have an individual liberty-based right to obtain an abortion, to whether the State may reasonably regulate abortions to the extent that women seeking them are not unduly burdened. A state requirement for physicians to speak on the State's behalf, and

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120. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988).

in the name of protecting patients from making decisions with which the State disagrees, is another step on this continuum. In this highly litigated area, we must appreciate where abortion-related jurisprudence has been, where it is now, and where the compelled speech issues presented in the Woman's Right to Know Act will take it in the future.

#### *A. Where We Have Been: A Brief History of Abortion-Related Jurisprudence*

In *Casey*, Justices O'Connor, Kennedy, and Souter stated that "[l]iberty finds no refuge in a jurisprudence of doubt."<sup>121</sup> Supreme Court decisions since *Roe*, however, have done little to dispel the doubt which, to this day, pervades the Court's reproductive autonomy jurisprudence.

Early reproductive autonomy cases relied on two separate constitutional foundations. In *Griswold v. Connecticut*, the Supreme Court invalidated a statute that prohibited the use and distribution of contraceptives.<sup>122</sup> Writing for the majority, Justice Douglas stated that "specific guarantees in the Bill of Rights have penumbras, formed by emanations of those guarantees that help give them life and substance. Various guarantees create zones of privacy."<sup>123</sup> In *Roe v. Wade*, the Court expanded this notion of a right to privacy, albeit in reliance on the Due Process Clause of the Fourteenth Amendment rather than the aforementioned penumbras, and determined that there existed, prior to fetal viability, a right to terminate a pregnancy.<sup>124</sup> The Court, therefore, determined that a state may restrict access to abortion only where there is a compelling state interest.<sup>125</sup> In response, both state and local jurisdictions began to pass abortion-related statutes containing informed consent provisions. In 1976, in *Planned Parenthood of Central Missouri v. Danforth*, the Court upheld a Missouri law requiring that a patient document her consent to an abortion while averring "that her consent is informed and freely given and is not the result of coercion."<sup>126</sup>

For a period thereafter, however, the Court was hostile to any additional abortion-related statute purportedly aimed at ensuring informed consent. In *City of Akron v. Akron Center for Reproductive Health*, the Court struck down an informed consent provision that was "designed not to inform the woman's consent but rather to persuade her to withhold it altogether."<sup>127</sup> Similar to the North Carolina Act, the city ordinance at issue in

121. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992).

122. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

123. *Griswold*, 381 U.S. at 484 (citations omitted).

124. *See Roe v. Wade*, 410 U.S. 113 (1973).

125. *Roe*, 410 U.S. at 163.

126. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 65–66 (1976).

127. *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 444 (1983).

*City of Akron* required the physician to provide a detailed description of “the anatomical and physiological characteristics of the particular unborn child.”<sup>128</sup> The Court was clear “that the State’s interest in ensuring that consent to abortion is informed, does not permit the State to impose regulations ‘designed to influence the woman’s informed choice between abortion and [sic] childbirth.’”<sup>129</sup> The Court further stated that the responsibility to obtain informed consent “remains primarily the responsibility of the physician.”<sup>130</sup>

The Supreme Court in subsequent opinions reinforced the *City of Akron* decision.<sup>131</sup> In *Thornburgh v. American College of Obstetricians and Gynecologists*, the Court invalidated Pennsylvania’s Abortion Control Act, which required that physicians convey five of seven specific types of information to patients seeking abortions.<sup>132</sup> Of note, North Carolina’s Act currently requires that all of these types of information are conveyed to patients seeking abortions.<sup>133</sup> The Court stated that the Act was “nothing less than an outright attempt to wedge the Commonwealth’s message discouraging abortion into the privacy of the informed consent dialogue between the woman and her physician.”<sup>134</sup> Further, the Court stated that “[a]ll this is, or comes close to being, state medicine imposed upon the woman, not the professional medical guidance she seeks, and it officially structures—as it obviously was intended to do—the dialogue between the woman and her physician.”<sup>135</sup> Recognizing that “a rape victim should not have to hear gratuitous advice that an unidentified perpetrator is liable for support if she continues the pregnancy to term” and that “the ‘information’ in its very rendition may be cruel as well as destructive of the physician-patient relationship,” the Court concluded that “[t]his type of compelled information is the antithesis of informed consent.”<sup>136</sup> In *Thornburgh* and *City of Akron*, the Court addressed substantially similar questions as those that the Act currently poses. If these cases were still controlling precedent, courts would have clear guidance when reviewing the Act.

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128. *City of Akron*, 462 U.S. at 444.

129. Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL’Y 223, 245 (2009) (quoting *City of Akron*, 462 U.S. at 443–44).

130. *City of Akron*, 462 U.S. at 443.

131. *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 759 (1986).

132. *Thornburgh*, 476 U.S. at 760–61.

133. Compare *Thornburgh*, 476 U.S. at 760–61, with N.C. GEN. STAT. ANN. § 90-21.82(1) (Westlaw through 2013 Reg. Sess.).

134. *Thornburgh*, 476 U.S. at 762.

135. *Thornburgh*, 476 U.S. at 763.

136. *Thornburgh*, 476 U.S. at 763–64.

In 1992, however, the Supreme Court in *Casey* partially overruled and severely curtailed the holdings of *Thornburgh* and *City of Akron* with respect to statutes requiring physicians to provide specific information to patients.<sup>137</sup> Specifically,

To the extent that *Akron I* and *Thornburgh* find a constitutional violation where the government requires . . . the giving of truthful, nonmisleading information about the nature of the abortion procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus, those cases . . . are inconsistent with *Roe's* acknowledgement of an important interest in potential life, and are overruled.<sup>138</sup>

Further, *Casey* overruled outright the previous cases' holdings that twenty-four hour waiting periods were unreasonable, finding that such intervals were not an undue burden to a woman's access to abortion services.<sup>139</sup> *Casey* also rejected *Roe's* trimester approach.<sup>140</sup> The *Roe* approach prohibited any regulation affecting the availability of abortion in the first trimester, allowed for reasonable regulation aimed at "promoting . . . the health of the mother" provided that the regulation did not ban the procedure in the second, and permitted outright bans of abortion in the third trimester after viability.<sup>141</sup> The *Casey* Court focused on viability rather than this trimester scheme.<sup>142</sup> Before viability, while the government could not prohibit abortion, the State could regulate abortion provided that such statutes did not place an undue burden upon the availability of, and a patient's access to, the procedure.<sup>143</sup> Specifically, the Court noted the following:

To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.<sup>144</sup>

137. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 883 (1992).

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

139. *Casey*, 505 U.S. at 885–86.

140. *Casey*, 505 U.S. at 873.

141. *Roe v. Wade*, 410 U.S. 113, 164–65 (1973).

142. *Casey*, 505 U.S. at 876–77.

143. *See Casey*, 505 U.S. at 876–77.

144. *Casey*, 505 U.S. at 878.



The Supreme Court in *Casey* partially upheld the Pennsylvania statute in question,<sup>145</sup> holding that a state could require a physician to inform patients seeking abortions of the gestational age of the fetus and the availability of specific printed materials potentially related to the informed consent of patients.<sup>146</sup> These materials, published by the State, included anatomical and developmental descriptions of the unborn fetus, a list of agencies offering abortion alternatives, information regarding the availability of insurance benefits that may be available to defray the cost of pregnancy, and the fact that the father of the unborn child may be liable for child support.<sup>147</sup> The statute permitted the last requirement to be omitted in cases of rape.<sup>148</sup> Yet the Court did not address whether the holdings of *Thornburgh* and *City of Akron* were still in effect with respect to the unconstitutionality of provisions that required physicians themselves to provide a detailed description of the “the anatomical and physiological characteristics of the particular unborn child.”<sup>149</sup> Recognizing, however, that the statute implicated a physician’s First Amendment rights, the Court stated:

All that is left of petitioners’ argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician’s First Amendment rights not to speak are implicated, see *Wooley v. Maynard*, 430 U.S. 705 (1977), but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, cf. *Whalen v. Roe*, 429 U.S. 589, 603 (1977). We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.<sup>150</sup>

145. *Casey* partially upheld and partially invalidated the Pennsylvania statute in question. The portions of the statute that the Court invalidated were a spousal notification requirement and a reporting requirement for failure to notify one’s spouse. See *Casey*, 505 U.S. at 898.

146. *Casey*, 505 U.S. at 901–02.

147. *Casey*, 505 U.S. at 901–03.

148. *Casey*, 505 U.S. at 903.

149. See *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 444–45 (1983).

150. *Casey*, 505 U.S. at 884. The final word of this quote, “here,” is significant. Assuming that this refers to the Pennsylvania statute in question, the Court appears to address the specific requirements of the law as not violating the First Amendment. The Court did not, however, delineate what, if any, additional requirement might violate a physician’s First Amendment right. Indeed, the only direct speech involved in this Act is the conveyance of the gestational age of the fetus to the patient and nothing more than the availability of a variety of other information and materials available from the State. *Id.* at 902. The statute in *Casey* involves significantly less physician

The plurality further opined that “a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure.”<sup>151</sup>

Since *Casey*, the Court’s internal struggle with respect to abortion rights has continued. In *Stenberg v. Carhart*, the Court, in a 5-4 decision, invalidated Nebraska’s ban of the dilation and extraction procedure, the so called “partial-birth abortion,” on the basis of expert medical testimony that, in certain cases, this procedure was preferred over the more common dilation and evacuation procedure.<sup>152</sup> Seven years after *Stenberg*, when the Court’s composition had changed, the Supreme Court upheld a very similar legislation enacted federally, entitled the Partial Birth Abortion Ban Act.<sup>153</sup>

Given that the “jurisprudence of doubt”<sup>154</sup> continues to this day, statutes seeking to limit abortion continue to “chip away at the private choice shielded in *Roe v. Wade*.”<sup>155</sup> Informed consent laws exemplify this unresolved jurisprudence. This point is made by Professor Erwin Chemerinsky, a renowned scholar in constitutional and First Amendment law and Dean of the University of California, Irvine School of Law:

The issue that *Casey* leaves unresolved is how far the government can go in this direction in the form of informed consent laws. For example, do *Akron* and *Thornburgh* remain good law that the government could not require that women be given detailed descriptions of the fetus, or shown photographs, or told that human life begins at conception? There is a strong argument that all of these go much further than the Pennsylvania law in *Casey* and thus that the Court might find them to be an undue burden on access to abortion.<sup>156</sup>

#### B. *Where We Are Now: The Federal Circuits*

Both the Eighth and Fifth Circuits have recently addressed the constitutionality of several abortion-related informed consent statutes. In *Planned Parenthood of Minnesota, North Dakota, South Dakota v. Rounds*, a case in-

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speech than the North Carolina Act. *Compare id.*, with N.C. GEN. STAT. ANN. §§ 90-21.81–21.92 (Westlaw through 2013 Reg. Sess.).

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

152. *Stenberg v. Carhart*, 530 U.S. 914, 940, 945 (2000).

153. *Gonzales v. Carhart*, 550 U.S. 124, 168 (2007).

154. *Casey*, 505 U.S. at 844.

155. *Stenberg*, 530 U.S. at 952 (Ginsburg, J., concurring).

156. CHEMERINSKY, *supra* note 9, at 854.

volving a series of appeals and remands, the Eighth Circuit upheld a South Dakota statute requiring that physicians inform patients “that the abortion will terminate the life of a whole, separate, unique, living human being” that a patient “has an existing relationship with that unborn human being and that the relationship enjoys protection under the United States Constitution and under the laws of South Dakota,” and “that by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship will be terminated.”<sup>157</sup> The Eighth Circuit justified this holding by asserting that the State can demand that physicians provide patients with certain kinds of information:

while the State cannot compel an individual simply to speak the State’s ideological message, it 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 the patient to choose childbirth over abortion.<sup>158</sup>

This set of decisions, in addition to being rather perverse in upholding provisions requiring physicians to provide information to their patients regarding the constitutional rights of fetuses, involves issues substantially similar to those addressed by the Fifth Circuit.

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157. See *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 653 F.3d 662, 665–66 (8th Cir. 2011) (quoting S.D. CODIFIED LAWS §§ 34-23A-10.1(1)(b)–(d) (Westlaw through 2013 Reg. Sess.)). This case resulted in a complex set of district and circuit court opinions that the Fifth Circuit Court of Appeals best summarized in a footnote in *Lakey*:

See *Planned Parenthood Minn. v. Rounds*, 375 F. Supp. 2d 881 (D.S.D. 2005) (granting preliminary injunction) (vacated); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (en banc) (vacating grant of preliminary injunction and remanding); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 650 F. Supp. 2d 972 (D.S.D. 2009) (granting partial summary judgment in favor of plaintiffs and partial summary judgment in favor of defendants) (affirmed in part, reversed in part); *Planned Parenthood Minn. v. Rounds*, 653 F.3d 662 (8th Cir. 2011) (reversing grant of summary judgment in favor of plaintiffs on all but one claim and remanding) (vacated in part); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 662 F.3d 1072 (8th Cir. 2011) (vacating panel’s affirmance of partial summary judgment in favor of plaintiffs and granting rehearing en banc on that issue).

*Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 574 n.1 (5th Cir. 2012).

158. *Rounds*, 530 F.3d at 734–35 (en banc).

Similar to the statute in question in *Rounds*, the Fifth Circuit recently concluded that the Texas Woman's Right to Know Act was a constitutional exercise of the State's power to regulate the practice of medicine.<sup>159</sup> In *Texas Medical Providers Providing Abortion Services v. Lakey*, the Appellate Court vacated a preliminary injunction of the Texas Act, which, except for the fact that Texas included limited exemptions in cases of rape, incest, and other medical conditions, is substantially similar to the North Carolina Act.<sup>160</sup> The Fifth Circuit's decision was based on two interrelated foundations: first, the Court determined that strict scrutiny does not apply to compelled speech by physicians in the arena of abortion; second, the Court determined that any law that requires truthful, nonmisleading, and relevant disclosures is a reasonable regulation of medical practice.<sup>161</sup> The Court further stated that "[a]ppellees must confront the Supreme Court's holding in [*Casey*] that reaffirmed a woman's substantive due process right to terminate a pregnancy but also upheld an informed consent statute over precisely the same 'compelled speech' challenges made here."<sup>162</sup>

The speech in *Casey*, however, is not at all similar to the speech in either the South Dakota, Texas, or North Carolina statutes. Overall, both the Fifth and Eighth Circuits based their opinions on two reasonable assumptions: first, that *Casey* allows a physician to communicate the availability of information that the State deems relevant to a patient's decision to obtain an abortion, and second, that the State may reasonably regulate the practice of medicine.<sup>163</sup> From these assumptions, these circuit courts concluded that it is constitutionally permissible for the State to compel the physician to verbally describe specific fetal anatomic findings and convey specific, non-medical information in order to ensure informed consent. The Supreme Court, however, should not accept the conclusions of these circuit courts without addressing at least one substantive question: where is the boundary between appropriate dissemination of truthful and nonmisleading information and the unconstitutional infringement of a physician's First Amendment rights?

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

160. See TEX. HEALTH & SAFETY CODE ANN. § 171.0122(d) (West 2011).

161. *Lakey*, 667 F.3d at 576, 578.

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

163. See generally *Lakey*, 667 F.3d at 575, 578; *Rounds*, 530 F.3d at 734–35.

C. *Where We Are Going: The Supreme Court's Opportunity to Vindicate a Physician's Right to Free Speech*

Overall, “what a [S]tate can say itself is very different from what the [S]tate can compel individuals to say.”<sup>164</sup> Further, because the North Carolina Woman’s Right to Know Act, by its own language, fails, in certain circumstances, to ensure that the patient’s consent will indeed be informed, *Casey* does not control. Therefore, the Supreme Court’s First Amendment jurisprudence is dispositive in determining the constitutionality of the Act’s speech and display requirement.

The Act’s speech and display requirement not only burdens physician speakers, but also fails to achieve its primary goal to ensure informed consent. Section 91-21.85(b) of the Act states, “[n]othing in this section shall be construed to prevent a pregnant woman from averting her eyes from the displayed images or from refusing to hear the simultaneous explanation and medical description.”<sup>165</sup> As previously described, this tacit permission to not hear the information that the physician provides is fundamentally at odds with the process of informed consent, which requires two engaged parties.<sup>166</sup> Indeed, while attempting to ensure informed consent, this statute “results in compelling an unwilling speaker to deliver visual and spoken messages to a listener who is not listening or looking.”<sup>167</sup> In this situation, with the patient neither looking at ultrasound images nor listening to the description of the fetus, both of which the State has deemed necessary to achieving informed consent for abortions, it is impossible for the State to ensure that such consent is indeed informed for those patients who decline

164. *Stuart v. Huff*, 834 F. Supp. 2d 424, 430 n.6 (M.D.N.C. 2011). Further, “when the government speaks for itself, it ‘may make content-based choices’ but that ‘in the realm of private speech or expression, government regulation may not favor one speaker over another.’” *Id.* (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828, 833 (1995)).

165. N.C. GEN. STAT. ANN. § 90-21.85(b) (Westlaw through 2013 Reg. Sess.).

166. *See Manian*, *supra* note 129.

To the physician, whose training enables a self-satisfying evaluation, the answer may seem clear, but it is the prerogative of the patient, not the physician, to determine for himself the direction in which his interests seem to lie.’ The court reasoned that informed consent liability should rest on a patient-based standard of disclosure, because ‘[r]espect for the patient’s right of self-determination on particular therapy demands a standard set by law for physicians rather than one which physicians may or may not impose upon themselves.’

*Id.* at 238 (quoting *Canterbury v. Spence*, 464 F.2d 772, 781, 784 (D.C. Cir. 1972)).

167. *Stuart*, 834 F. Supp. 2d at 433 n.9.

to look and listen.<sup>168</sup> As such, the Act is not an abortion-related informed consent law that *Casey* and its progeny would otherwise control. Rather, it is an unreasonable, content-based restraint on a physician's First Amendment right to free speech, one of our "most precious freedoms."<sup>169</sup> As a result, courts should apply strict scrutiny to the speech and display provisions of the Act in order to prevent government overreach.<sup>170</sup>

Also troubling is the fact that a physician who abides by the Act's extensive requirements will still be out of compliance with the general informed consent provision of the North Carolina General Statutes.<sup>171</sup> The Act provides that "consent to an abortion is voluntary and informed only if all of the following conditions are satisfied . . . ."<sup>172</sup> Thus, the Act statutorily redefines informed consent specifically for abortion; if the physician satisfies all of the Act's conditions, the resulting consent is deemed, by statute, to be informed. It would appear, therefore, that the State has obviated the requirement of physicians to comply with the general informed consent statutes when it comes to obtaining informed consent for abortion. While the physician is compelled to inform the patient of a host of information, the Act does not require that the patient have a "general understanding of the procedure[ ] or treatment[.]" a hallmark of general informed consent as defined in Section 90-21.13 of the North Carolina General Statutes.<sup>173</sup> Technically, a physician could obtain from his patient appropriate informed consent as defined by the Woman's Right to Know Act while actually failing to impart a general understanding of the procedure to the patient. In so doing, while the physician would satisfy the informed consent provisions of the Act, the obtained consent would not be truly informed. It would appear that this would not represent a violation of the law as written because the physician would have complied with the Act and, as such, would have obtained legal, albeit inadequate, informed consent as the Act now defines it specifically for abortion.

168. This argument might encourage a supporter of the Act to amend its language and write out the exception. This exception and the Act as currently written may very well be a violation of the First Amendment rights of physicians; however, if the exception were written out of the Act, then there would be significant questions involving not only physician First Amendment rights, but also of whether the State's blanket requirement that women look at and listen to the State's ideological message represents an undue burden under *Casey*.

169. *NAACP v. Button*, 371 U.S. 415, 438 (1963).

170. See generally *United States v. Carolene Products, Inc.*, 304 U.S. 144, 153 n.4 (1938); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 *VAND. L. REV.* 793, 798-805 (2006).

171. See N.C. GEN. STAT. ANN. § 90-21.13 (Westlaw through 2013 Reg. Sess.).

172. *Id.* at § 90-21.82.

173. See *Id.* at § 90-21.13.

Even if, however, an appellate court were to disregard these fundamental flaws, North Carolina's Act begs the question of whether there exists an outer boundary of permissible informed consent laws. Generally, "informed consent requirements exist to protect the rights of patients and to honor their autonomy, not to provide states with an excuse to impose heavy-handed, paternalistic, and impractical restrictions on the practice of medicine."<sup>174</sup> The notion of informed consent first gained widespread recognition in *Schloendorff v. Society of the New York Hospital*, when then New York State Justice Benjamin Cardozo wrote, "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits assault . . . ."<sup>175</sup> Decades later, the D.C. Circuit Court, in a seminal case, stated that the informed consent doctrine relies on "the patient's understanding of alternatives to and risks of the therapy"<sup>176</sup> Indeed, "found 'in the fiducial qualities of [the physician-patient] relationship [is] the physician's duty to reveal to the patient that which in his best interests it is important that he should know.'<sup>177</sup> Further, "a patient cannot make an informed, intelligent decision to consent to a physician's suggested treatment unless the physician discloses what is material to the patient's decision, i.e., all of the viable alternatives and risks of the treatment proposed."<sup>178</sup> Finally, the North Carolina Supreme Court has stated that the following is required to meet the statutory standard of informed consent:

[T]he health care provider must provide the patient with sufficient information about the proposed treatment and its attendant risks to conform to the customary practice of members of the same profession with similar training and experience situated in the same or similar communities. In addition, the health care provider must impart enough information to permit a reasonable person to gain a 'general understanding' of both the treatment or procedure and the 'usual and most frequent risks and hazards' associated with the treatment.<sup>179</sup>

174. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, No. A-11-CA-486-SS, 2012 WL 373132, at \*2 n.5 (W.D. Tex. Feb 6, 2012).

175. *Schloendorff v. Soc'y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914).

176. *Canterbury v. Spence*, 464 F.2d 772, 780 n.15 (D.C. Cir. 1972).

177. *Canterbury*, 464 F.2d at 782 (quoting *Emmett v. E. Dispensary & Cas. Hosp.*, 396 F.2d 931, 935 (D.C. Cir. 1967)).

178. *Adler ex rel Johnson v. Kokemoor*, 545 N.W.2d 495, 498 (Wisc. 1996) (citing *Martin v. Richards*, 531 N.W.2d 70 (Wisc. 1995)).

179. *Foard v. Jarman*, 387 S.E.2d 162, 164 (N.C. 1990); *see also* N.C. GEN. STAT. ANN. § 90-21.13 (Westlaw through 2013 Reg. Sess.) (containing the provision entitled "[i]nformed consent to health care treatment or procedure").

Compared to statutory and common law standards for informed consent, the Act is not consistent with current notions of this doctrine. The performance of an ultrasound, coupled with a physician's description of the ultrasonographic findings, goes far beyond the elements required for informed consent as the State previously defined it. The ability of ultrasound to graphically demonstrate the presence of a fetal liver or a lower extremity does not aid in a general understanding of the abortion procedure itself. Further, if courts follow the Fifth Circuit and deem this to be relevant information in making an informed decision, where is the logical end? When abortions still occur despite the Act, will North Carolina deem it necessary for a physician to read all one thousand six hundred and sixty-eight pages of Williams Obstetrics, a premier text in the field,<sup>180</sup> to a patient twenty-four hours prior to an abortion? After all, doing so would provide truthful, non-misleading information to patients. Additionally, because the patient is pregnant, the information included in the text would represent the epitome of relevance. Such a requirement would be absurd. Yet, aside from the volume of information required, such a regulation is no different from the current law: they both require transmittal of information which, while truthful and nonmisleading, does not guide a patient and her physician in their unified goal of obtaining informed consent. It is only helpful to the State so that it may achieve its goal of "promoting life and discouraging abortion."<sup>181</sup>

According to *Casey*, informed consent requirements "must be calculated to inform the woman's free choice, not hinder it."<sup>182</sup> The North Carolina Act and other similar statutes fundamentally disregard this notion. Overall, at its most basic level, the freedom to give informed consent must also coexist with the freedom to withhold it.<sup>183</sup> But, the issue that the Act creates is whether a woman's decision to undergo an abortion can indeed be

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A health care provider fails to obtain consent by not providing information to the patient which would, under the same or similar circumstances, have given a reasonable person a general understanding of the procedures and treatments to be used, and the usual and most frequent risks and hazards inherent in them as recognized by other health care providers in the same or similar communities.

Comm. on Pattern Jury Instructions, N.C. Conference of Superior Court Judges, North Carolina Pattern Jury Instructions for Civil Cases § 809.45 (2012).

180. See F. GARY CUNNINGHAM ET AL., WILLIAMS OBSTETRICS (21st ed. 2001).

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

182. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992).

183. See Manian, *supra* note 129, at 239 n.107 ("Anglo-American law starts with the premise of thorough-going self determination. It follows that each man is considered to be master of his own body and he may, if he be of sound mind, expressly prohibit the performance of lifesaving surgery, or other medical treatment.") (quoting *Natanson v. Klein*, 350 P.2d 1093, 1104 (Kan. 1960)) (internal quotation marks omitted).



considered unhindered when the State itself is requiring that an ultrasound be performed and that the physician disclose information that is only tangentially related to the performance of the procedure itself.<sup>184</sup> It is difficult to imagine that a patient who enters a physician's office seeking an abortion does not realize that, should she undergo the procedure, she will be terminating her pregnancy and will not carry her fetus to term. Given that patients, especially those seeking abortion services, are likely aware of what abortion generally is, an ultrasound and the required physician disclosures do not increase the likelihood of a patient's informed consent. The Woman's Right to Know Act, passed in order to facilitate and ensure informed consent, in actuality does nothing more than attempt to coerce a patient into withholding that consent. This is the "antithesis of informed consent."<sup>185</sup>

Even if the speech and display requirement succeeds in conveying the State's interest in protecting life, the Act will fail to achieve its nominal objective of ensuring un-coerced informed consent in two ways. First, the patient may not even be listening to the information that the physician conveys.<sup>186</sup> Second, the patient is not able to exercise absolute autonomy in her decision. Assuming that "the patient, not the physician, [may] deter-

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184. Proof of the tangential nature of these disclosures lies in the fact that, in *Stuart*, "[t]he evidence before the Court establishes without dispute or contradictions that the plaintiffs would not communicate the message required by the speech-and-display requirement in the absence of the statute or patient request." *Stuart*, 834 F. Supp. 2d at 429 n.5. Further, "[t]he uncontradicted evidence establishes that there is no purpose for requiring the speaking or showing of this material to an unwilling listener." *Id.* at 432 n.7. Lastly, "the undisputed evidence offered by the plaintiffs establishes that these provisions are likely to harm the psychological health of the very group the state purports to protect." *Id.* at 432.

185. *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 764 (1986); see also Amanda M. Roe *Not-so-Informed Consent: Using the Doctor-Patient Relationship to Promote State-Supported Outcomes*, 60 CASE W. RES. L. REV. 205, 223 n.113 (2009).

Though [such] information may not be inaccurate, it is no less of an imposition on the physician-patient relationship. In fact, there is interesting evidence suggesting that even a truthful message can be misleading when it inappropriately takes advantage of emotional influence in order to bias an individual in favor of a particular decision.

*Id.* (citing Jeremy A. Blumenthal, *Abortion, Persuasion, and Emotion: Implications of Social Science Research on Emotion for Reading Casey*, 83 WASH. L. REV. 1, 1 (2008)); Manian, *supra* note 129; Rebecca Dresser, *From Double Standard to Double Blind: Informed Consent in Abortion Law*, 76 GEO. WASH. L. REV. 1599 (2008). But see Kaitlin Moredock, "Ensuring So Grave a Choice Is Well Informed": The Use of Abortion Informed Consent Laws to Promote State Interest in Unborn Life, 85 NOTRE DAME L. REV. 1973 (2010).

186. See N.C. GEN. STAT. ANN. § 90-21.85(b) (Westlaw through 2013 Reg. Sess.).

mine for [her]self the direction in which [her] interests seem to lie,"<sup>187</sup> it can in no way be permissible for the State to supplant the physician to achieve its own goals. As such, the Act actively contravenes the State's attempt to ensure that abortions are un-coerced.

The Supreme Court has ruled that, under its police power, a state may reasonably regulate the practice of medicine.<sup>188</sup> In *Whalen v. Roe*, the Court upheld a New York statute that required physicians to write prescriptions for medications of potential abuse in triplicate, identifying the physician, dispensing pharmacy, drug name, dosage, and patient's name, address, and age.<sup>189</sup> The physician was then required to send a carbon copy to the New York Department of Health, which then recorded this data for potential use in criminal investigations.<sup>190</sup> The appellees in this case alleged that the "statute threaten[ed] to impair . . . their interest in making important decisions independently."<sup>191</sup> The Court found neither record evidence supporting this allegation nor anything "unreasonable in the assumption that the patient-identification requirement might aid in the enforcement of laws designed to minimize the misuse of dangerous drugs."<sup>192</sup> Overall, the Court held the statute was a constitutional, "reasonable exercise of New York's broad police powers."<sup>193</sup> As Judge Eagles notes with respect to the Woman's Right to Know Act, "[t]hat is not, however, this case."<sup>194</sup>

A one-size-fits-all state-mandated script that physicians must convey to patients seeking abortions is not a reasonable regulation of the practice of medicine. In *Casey*, the Supreme Court recognized that, "[t]o be sure, the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here."<sup>195</sup> However,

[t]he [North Carolina Woman's Right to Know] Act goes 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

187. Manian, *supra* note 129, at 238 n.102 (quoting *Canterbury v. Spence*, 464 F.2d 772, 781 (D.C. Cir. 1972)).

188. *Whalen v. Roe*, 429 U.S. 589, 598 (1977).

189. *Whalen*, 429 U.S. at 593.

190. *Whalen*, 429 U.S. at 593, 595.

191. *Whalen*, 429 U.S. at 600.

192. *Whalen*, 429 U.S. at 597–98, 603.

193. *Whalen*, 429 U.S. at 598.

194. *Stuart v. Huff*, 834 F. Supp. 2d 424, 431 (M.D.N.C. 2011).

195. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884.

fetus. The Act also goes well beyond the provision approved in *Casey*, which only required providers to “make available” state-generated written materials which contained a viewpoint.<sup>196</sup>

The plurality in *Casey* further stated that “[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”<sup>197</sup> Further, “[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 to have an abortion.”<sup>198</sup> The Fifth Circuit held that the Texas Woman’s Right to Know Act is not an obstacle to obtaining an abortion.<sup>199</sup> The Court noted that, “[f]irst, informed consent laws that do not impose an undue burden on the woman’s right to have an abortion are permissible if they require truthful, nonmisleading, and relevant disclosures. Second, such laws are part of the state’s reasonable regulation of medical practice.”<sup>200</sup> But, these conclusions disregard the prohibition in *Casey* that informed consent requirements cannot be required of physicians if the required information might harm their patients:

Our prior cases also suggest that the straightjacket of particular information which must be given in each case interferes with a constitutional right of privacy between a pregnant woman and her physician. As a preliminary matter, it is worth noting that the statute now before us does not require a physician to comply with the informed consent provisions if he or she can demonstrate by a preponderance of the evidence that he or she reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient. In this respect the statute does not prevent the physician from exercising his or her medical judgment.<sup>201</sup>

Based on this, by compelling a physician to perform an ultrasound and convey all of the additional related disclosures to all patients seeking an abortion without exception, North Carolina impermissibly intrudes into the

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196. *Stuart*, 834 F. Supp. 2d at 431–32 (citations omitted).

197. *Casey*, 505 U.S. at 878.

198. *Casey*, 505 U.S. at 878.

199. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 580 (5th Cir. 2012).

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

201. *Casey*, 505 U.S. at 883–84 (citations omitted) (internal quotation marks omitted).

doctor-patient relationship. Indeed, “it is the physician, not the Legislature, who is in the best position to make [relevant informed consent] determination[s] as to each individual patient. The [Texas Act’s] one-size-fits-all approach [is] wholly inconsistent with reasonable regulation of medical practice.”<sup>202</sup> This statement provides further support that the speech and display requirement is an unreasonable regulation of the medical profession as it represents an inappropriate encroachment on a physician’s ability to tailor appropriate medical care to individual patients.<sup>203</sup> While the Act may not represent an undue burden on a woman’s access to abortion services,

202. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, No. A-11-CA-486-SS, 2012 WL 373132, at \*3 n.8 (W.D. Tex. Feb 6, 2012).

203. As a practicing, board-certified obstetrician-gynecologist, I find the effects of this law astounding and agree with the plaintiff’s affiants in *Stuart* that the Act’s “provisions are likely to harm the psychological health of the very group the state purports to protect.” *Stuart v. Huff*, 834 F. Supp. 2d 424, 432 (M.D.N.C. 2011). The Act defines abortion as the following:

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

N.C. GEN. STAT. ANN. § 90-21.81 (Westlaw through 2013 Reg. Sess.). First, there are no exceptions for women seeking abortion in the setting of a pregnancy complicated by any one of a host of lethal conditions that are incompatible with life (e.g., Tay-Sachs Disease or Trisomy 13). The notion of performing an ultrasound and counseling a patient, who otherwise desired the pregnancy, regarding the formed anatomic features of a twelve-week fetus with either of these conditions whose fate is predetermined is astounding. Further, while I have not practiced in the realm of family planning, many OB/GYNs will, in the normal course of their practice, encounter situations where standard medical practice may involve induction of labor of a non-viable fetus, a procedure that this Act would include under its definition of abortion. In cases of early mid-trimester preterm premature rupture of the membranes, fetal survival is low and there exists a significant risk, if intervention is not performed, of maternal infection and significant morbidity. Certainly, in this situation, an ultrasound may be indicated to evaluate and measure remaining pockets of amniotic fluid. However, being required to describe in detail the “presence of external members and internal organs” and offer “the opportunity to hear the fetal heart tone” to a patient who desires the pregnancy but recognizes the risk to her own health places an unnecessary burden and needless stress not only on the physician, but also, and more importantly, on the patient. §§ 90-21.83, 90-21.85 (Westlaw). As Justice Scalia noted, “it is safer to assume that the people are smart enough to get the information they need than to assume that the government is wise or impartial enough to make the judgment for them.” *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 804 (1988) (Scalia, J., concurring).

the Act directly contradicts other portions of the *Casey* opinion. Indeed, given *Casey*'s reliance on the reasonable regulation of medical practice as being a cornerstone of informed consent laws,<sup>204</sup> any statute that is unreasonable cannot find refuge under *Casey*'s umbrella.

The issue is, therefore, not whether the Act represents an undue burden on abortion access, but rather whether the Act is a reasonable regulation of the medical profession.<sup>205</sup> It is not. The Act grants tacit permission to a patient to not view the ultrasound images or hear the physician's verbal description thereof.<sup>206</sup> When the patient does not look or listen, the compelled speech no longer has any demonstrable purpose. Further, the Act defines a new standard of informed consent for abortion which fails to include a requirement that a physician provide the patient with a general understanding of the procedure itself. This version of informed consent would be inadequate for all other medical interventions according to North Carolina law.<sup>207</sup> A law that seeks to ensure informed consent but fails on at least two accounts to do so is an unreasonable regulation of the medical profession. As such, *Casey* does not control because *Casey* only contemplates reasonable regulations of medical practice.<sup>208</sup> All that remains, therefore, is the Supreme Court's First Amendment jurisprudence as the dispositive polar star. The Act compels a physician to alter the content of his conversation with his patient in order to convey the State's ideological message. Given that the speech and display requirement fails to achieve informed consent, the Act is not narrowly tailored to accomplish its nominal goal. The State, therefore, fails to meet its heavy burden under strict scrutiny.

#### CONCLUSION

The North Carolina Woman's Right to Know Act represents a novel mechanism by which the State seeks to convey, via a physician intermediary, its interest in protecting the lives of fetuses. At its core, the Act creates tension between the State's ability to reasonably regulate the practice of medicine and the physician's First Amendment protections. Despite the Supreme Court's seeming invitation to state legislatures to regulate abortion-

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204. See *Casey*, 505 U.S. at 884 ("To be sure, the physician's First Amendment rights not to speak are implicated, see *Wooley v. Maynard*, 430 U.S. 705 (1977), but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, cf. *Whalen v. Roe*, 429 U.S. 589, 603 (1977).").

205. See *supra* note 203.

206. § 90-21.85(b) (Westlaw).

207. See *Id.* at § 90-21.13.

208. *Casey*, 505 U.S. at 884-85.

related informed consent in *Carhart v. Gonzales*,<sup>209</sup> this specific Act and its brethren have placed the judicial system in the challenging position of determining the appropriate balance between protecting a physician's constitutional right to free speech—one of “our most precious freedoms[,]”<sup>210</sup>—and attempting to ensure that physicians provide the State's version of informed consent to patients seeking abortion prior to the procedure.

From a pure First Amendment analysis, the Act is unconstitutional. Indeed, the Supreme Court has developed within its jurisprudence a clear disdain for government-compelled speech.<sup>211</sup> Looking at the statute through another First Amendment framework, the Act fails under strict scrutiny as it is not narrowly tailored to achieve its purported goal of ensuring that patients give truly informed consent. Indeed, not only do less restrictive means by which the State might accomplish this goal exist, but also the plain language of the statute itself dooms the Act to failure, at least when patients avail themselves of the right to not view and hear the State's message. As a result of the latter, the Act compels an individual to speak on its behalf in a manner that is potentially futile with respect to the Act's averred purpose. The Act, therefore, is not a reasonable regulation of the medical profession that seeks to ensure informed consent. Rather, the Act is an unreasonable regulation that compels physician speech. As such, the undue burden analysis of *Casey* falls away and all that remains is the First Amendment analysis. This analysis reveals that the speech and display requirement of the North Carolina Woman's Right to Know Act is an unconstitutional violation of a physician's rights under the First Amendment. ❖

209. See *Gonzales v. Carhart*, 550 U.S. 124, 160 (2007); see also Manian, *supra* note 129, at 289 (“Within abortion law, *Carhart's* woman-protective rationale has already had significant impact in the courts and in the public arena, as exhibited particularly by legislatures enacting even more biased abortion ‘informed consent’ laws . . .”).

210. *NAACP v. Button*, 371 U.S. 415, 438 (1963).

211. See generally *Wooley v. Maynard*, 430 U.S. 701 (1977); *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557 (1995).

