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## The Constitutional Right to an Abortion Does Not Encompass the Right to Be Uninformed: The Fourth Circuit's Puzzling Approach to Evaluating Mandatory Ultrasound Provisions in *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014)

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Note\*

The Constitutional Right to an  
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The Fourth Circuit’s Puzzling  
Approach to Evaluating Mandatory  
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## I. INTRODUCTION

Imagine a scenario where a physician had a moral and religious objection to specific forms of birth control—namely the implantation of an intrauterine device (IUD). A patient, comes into the office to have a copper IUD (ParaGard)<sup>1</sup> inserted. State regulation requires the physician to provide truthful, non-misleading information with respect to the device. Accordingly, the physician must explain to the patient how ParaGard operates. In doing so, she explains that ParaGard is implanted in the uterus where it produces an inflammatory reaction that is toxic to sperm—ultimately preventing fertilization.<sup>2</sup> Most notably, she must inform the patient that ParaGard “can be used for emergency contraception if inserted within five days [following] unprotected sex.”<sup>3</sup>

But because of her moral and religious beliefs, the physician is particularly opposed to using ParaGard as emergency conception. It is her opinion that when used in that manner, ParaGard essentially causes an abortion. That is, ParaGard interferes with the development of a fertilized embryo.<sup>4</sup> Accordingly, the physician—and many other physicians sharing similar religious beliefs—choose not to inform patients that ParaGard can be used for emergency contraception.

In response, suppose the state legislature passes a statute requiring a physician to inform the patient of all relevant uses of ParaGard: including its use as emergency contraception. Following its enact-

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1. “ParaGard is an intrauterine device (IUD) that’s inserted into the uterus for long-term birth control (contraception). The T-shaped plastic frame has copper wire coiled around the stem and two copper sleeves along the arms that continuously release copper to bathe the lining of the uterus.” Mayo Clinic Staff, *ParaGard (Copper IUD)*, <http://www.mayoclinic.org/tests-procedures/paragard/basics/definition/prc-20013048> [<https://perma.unl.edu/73AP-9ZZ5>]. Specifically, “ParaGard produces an inflammatory reaction in the uterus that is toxic to sperm, which helps prevent fertilization.” *Id.*

2. *Id.*

3. Mayo Clinic Staff, *Paragard (Copper IUD, Why It's Done)*, <http://www.mayoclinic.org/tests-procedures/paragard/basics/why-its-done/prc-20013048> [<https://perma.unl.edu/ML2N-RFNZ>].

4. See Frequently Asked Questions, PARAGARD, <http://paragard.com/faqs.aspx> [<https://perma.unl.edu/99HA-PN28>] (“[Paragard] interferes with sperm movement, egg fertilization and possibly prevents implantation.”).

ment, the physician seeks to challenge the regulation, arguing the state is infringing on her First Amendment rights. To this end, she argues that the state cannot force her to inform the patient of ParaGard's use as emergency contraception without improperly infringing on her First Amendment freedom of religion and freedom from compelled speech. And by doing so, the state is imparting its preference for access to this method of birth control on the physician. Indeed, the requirement would likely persuade some women to choose ParaGard over alternative forms of birth control that do not serve as emergency contraception—such as the pill. Indeed, the First Amendment is not without limitations, and accordingly, such a regulation cannot be seriously challenged under the First Amendment.<sup>5</sup>

There are certainly some scenarios where the First Amendment would attach to physician speech. For example, a state requirement compelling physicians to chant, “Donald Trump is the best President of all time” three times before each exam would certainly be unconstitutional. But state regulations requiring a physician to provide truthful, relevant information to a patient relevant to the patient's health cannot be outside the bounds of reason. In fact, it would seem morally wrong to *deprive* a patient of relevant, truthful information about her contraceptive health based on some broad notion of physician First Amendment protection.

But in the abortion context, such logic seems not to apply. Specifically, abortion providers consistently challenge state legislation requiring the physician to do, and say, certain things prior to the patient undergoing an abortion. To adequately understand why the debate continues with respect to physician First Amendment protections and abortion jurisprudence, one must first explore the confines of abortion regulation and informed consent.

Part II of this Note begins by exploring the history and constitutionality of informed consent statutes and discusses the bounds and limits surrounding informed consent legislation. Part III examines

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5. There are several types of speech where the Supreme Court has extended less than absolute First Amendment protection. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that government cannot constitutionally forbid the advocacy of force or illegal action unless “such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (upholding a statute prohibiting “face-to-face words plainly likely to cause a breach of the peace by the addressee” as constitutional under the First Amendment); *New York v. Ferber*, 458 U.S. 747, 764 (1982) (holding that distribution of child pornography is “without the protection of the First Amendment”); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 562–63 (1980) (noting that the First Amendment protects commercial speech such that government may lack “complete power to suppress or regulate commercial speech”; nevertheless, the “Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”).

whether the First Amendment provides an additional hurdle for informed consent legislation to clear to be deemed constitutional. Specifically, this Part examines the protections—or lack thereof—afforded to physicians by the First Amendment. This Part also examines the reasoning behind the Fifth and Eighth Circuits' conclusion that informed consent provisions are legitimate forms of government regulation and must survive a rational-basis standard of review.<sup>6</sup> Part IV of this Note analyzes the facts, procedural history, and the holding in the Fourth Circuit's decision in *Stuart v. Camnitz*.<sup>7</sup> Part V addresses the inherent flaw in the reasoning applied by the Fourth Circuit and proposes instead that the court apply the rational-basis standard of review employed by the Fifth and Eighth Circuits. This Part suggests that by failing to adhere to the standard prescribed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>8</sup> and applied by the Fifth and Eighth Circuits, the Fourth Circuit's declaration that mandatory ultrasound provisions are unacceptable forms of compelled, ideological speech consequently compromises the health and well-being of both mothers and unborn fetuses. Finally, the Note concludes by emphasizing that the court's failure to acknowledge that the First Amendment provides little protection to professionals exemplifies an erroneous rejection of the legitimate state interest in the regulation of the medical profession and medical procedures. In doing so, the Fourth Circuit's decision created conflict among the circuits and contravened the constitutional interests of women contemplating abortions and the unborn fetuses inside.

## II. BACKGROUND

### A. The History and Constitutionality of Informed Consent Statutes

It is well recognized that the Supreme Court has weighed in on the pro-life vs. pro-choice debate and emphatically declared a woman has a right to choose. In *Roe v. Wade*, the Supreme Court held the Fourteenth Amendment created a constitutional right to abortion.<sup>9</sup> The right to an abortion was confirmed in *Doe v. Bolton*, emphasizing the

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6. The minimal level of review for the constitutionality of a law is the rational-basis test. A law will be upheld if it is rationally related to a legitimate government purpose. See *Pennell v. San Jose*, 485 U.S. 1, 15 (1988). This level of review awards great deference to the government because the challenger has the burden of proof, and the law will be upheld unless the challenge proves the law does not serve any conceivable government purpose. *Id.*

7. *Stuart*, 774 F.3d 238 (4th Cir. 2014).

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

9. *Roe v. Wade*, 410 U.S. 113, 163 (1973).

woman has the absolute right to choose.<sup>10</sup> While *Roe* proclaimed a woman has the right to an abortion, *Roe* also acknowledged the legitimate state interest in protecting the life and health of the woman as well as the fetus inside her.<sup>11</sup> The *Roe* Court concluded, however, that the state's ability to protect the fetus is not pertinent until the end of the first trimester when the fetus reaches viability.<sup>12</sup> Yet, even this alleged fetal protection was falsified in *Doe* as the Court widely defined the ability to circumvent the State's interest in protecting the fetus. Indeed, the *Doe* Court allowed for the termination of pregnancies throughout the final trimester if the physician determines carrying the fetus to term would negatively impact the physical or emotional well-being of the mother.<sup>13</sup>

While the decision in *Roe* was fundamental, it was not absolute.<sup>14</sup> And following *Roe* and *Doe*'s robust declaration that a woman may abort the fetus at essentially any time during her pregnancy, states began implementing legislation to diminish the discretion given to physicians to perform abortions.<sup>15</sup> Such regulation became known in the abortion context as informed consent legislation.<sup>16</sup> On several oc-

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10. *Doe v. Bolton*, 410 U.S. 179, 192 (1973). The statute at issue outlawed abortions except in cases where the doctor determined continuing the pregnancy would endanger the life and health of the mother, the fetus would likely be born with a developmental defect, or if the pregnancy was the result of rape. *Id.* at 181. The Supreme Court deemed this statute unconstitutional as it violated the constitutional right to an abortion. *Id.* at 199.

11. *Roe*, 410 U.S. at 162.

12. A fetus reaches viability when it potentially can survive outside the mother's womb. *Roe*, 410 U.S. at 162–63.

13. While facially *Roe* limited the constitutional right to abortion up until the point of viability, *Roe* allows for the termination of the life of the fetus if “it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.” *Roe*, 410 U.S. at 165. The *Doe* Court defined the health of the mother to encompass physical, emotional, or familial factors relevant to the well-being of the woman. *Doe*, 410 U.S. at 192. “In other words, although states have a theoretical power to proscribe post-viability abortions, no such law may be enforced to prohibit any abortion, no matter how late in the pregnancy, if the doctor performing the abortion determines in his medical judgment that the abortion will protect the emotional or even the familial well-being of the pregnant woman.” Richard F. Duncan, *Kermet Gosnell's Babies: Abortion, Infanticide and Looking Beyond the Masks of the Law*, 1 J. GLOBAL JUST. & PUB. POL'Y 76, 150 (2015).

14. *Colautti v. Franklin*, 439 U.S. 379, 386 (1979).

15. Duncan, *supra* note 13, at 150.

16. This note acknowledges that informed consent legislation is pertinent throughout the medical community. But for purposes of this note, Informed Consent Statutes refer to “statutes that require a woman who is seeking abortion to receive state authored, or state provided, information, require the woman to sign a consent form or otherwise acknowledge receipt of the information, and may require the woman to wait a mandatory period of time prior to performance of the abortion procedure.” Christine L. Raffaele, Annotation, *Validity of “Informed Consent” Statutes by Which Providers of Abortions Are Required to Provide Patient Seeking Abortion with Certain Information*, 119 A.L.R.5th 315 (2004).

casions, the Supreme Court has considered the constitutionality of informed consent legislation. In *Planned Parenthood of Central Missouri v. Danforth*, the Supreme Court held the government could mandate written informed consent for abortions just as the government could require written informed consent to other medical procedures.<sup>17</sup> While *Danforth* recognized the ability of the government to require written consent to the procedure, whether the State could go beyond the traditional realm of written consent and demand women receive specific information prior to undergoing the procedure became a point of contention for the Court.<sup>18</sup>

Originally, courts rejected government attempts to broaden the scope of informed consent beyond written consent. In *Akron*<sup>19</sup> and *Thornburgh v. American College of Obstetrics and Gynecologists*,<sup>20</sup> the Supreme Court took the position that states could only demand written consent but could not regulate abortions in a way to encourage childbirth.<sup>21</sup> But the Court departed from this view in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>22</sup> Indeed, the *Casey* decision vastly broadened the realm of permissible state legislation by deeming a Pennsylvania statute requiring a woman be provided certain information twenty-four hours prior to giving consent to

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17. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 67 (1976) (upholding a statutory provision that required the physician performing abortions complete and maintain records reasonably directed to the patient's health); see also *Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 452 (upholding informed consent requirements similar to other surgical informed consent requirements).
  18. Traditionally, informed consent statutes required a patient to sign a consent form where the patient acknowledges he/she has been "informed by her/his doctor of the risks and benefits of a proposed method of treatment so that the patient may make an informed decision about whether to allow the physician to proceed." A.D. Burnett III, *Suturing the Loophole: Informed Consent As A Requirement for Procedures Not Enumerated in Pennsylvania's Medical Informed Consent Statute*, 108 PENN ST. L. REV. 1249, 1251 (2004).
  19. *Akron*, 462 U.S. at 442–44 (holding the part of a regulation that prohibited a physician from performing an abortion until twenty-four hours after the pregnant woman signed the consent form, required the physician to state that an "unborn child is human life from conception," and required the physician to inform the patient of the "date of possible viability, and the physical and emotional consequences that may result from abortion" was unconstitutional).
  20. *Thornburgh v. Am. Coll. of Obstetrics and Gynecologists*, 476 U.S. 747, 760–61 (1986) (holding a portion of the regulation requiring physicians to inform a woman there could be detrimental physical and psychological effects to having an abortion, the possible availability of prenatal and child care, and the anatomical and physiological characteristics of the fetus at least twenty-four hours prior to giving consent to abortion unconstitutional).
  21. See *Akron*, 462 U.S. at 443; *Thornburgh*, 476 U.S. at 760.
  22. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 833–34 (1992) (a woman seeking an abortion must give her informed consent prior to the procedure and be provided with certain information at least twenty-four hours before the abortion is performed).

an abortion acceptable.<sup>23</sup> In *Casey*, the statute deemed constitutional was virtually identical to the statute declared unconstitutional in *Thornburgh*.<sup>24</sup>

The *Casey* plurality acknowledged its inability to distinguish between the current case and prior abortion decisions, and it implicitly overruled *Akron* and *Thornburgh*.<sup>25</sup> In doing so, the Court emphasized that a broad prohibition of requisite information related to the abortion procedure or the gestational age of the fetus would be inconsistent with *Roe*'s recognition of the important state interest in the fetus.<sup>26</sup> The *Casey* plurality went beyond the express overruling of *Akron* and *Thornburgh* and further broadened the government's ability to compel disclosure of specific information prior to consenting to an abortion.<sup>27</sup> While *Casey* ultimately preserved a woman's constitutional right to an abortion, the decision shifted the confines of permissible state regulation with respect to informed consent.<sup>28</sup>

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23. *Id.*

24. Compare *id.* at 844 (The *Casey* plurality explained that the Pennsylvania Act "requires that a woman seeking an abortion give her informed consent prior to the abortion procedure, and specifies that she be provided with certain information at least 24 hours before the abortion is performed." 18 PA. CONS. STAT. § 3205. "For a minor to obtain an abortion, the Act requires the informed consent of one of her parents, but provides for a judicial bypass option if the minor does not wish to or cannot obtain a parent's consent." *Id.* § 3206. "Another provision of the Act requires that, unless certain exceptions apply, a married woman seeking an abortion must sign a statement indicating that she has notified her husband of her intended abortion." *Id.* § 3209. "The Act exempts compliance with these three requirements in the event of a 'medical emergency' . . . . In addition to the above provisions regulating the performance of abortions, the Act imposes certain reporting requirements on facilities that provide abortion services. *Id.* §§ 3207(b), 3214(a), 3214(f), with *Thornburgh*, 476 U.S. at 758 ("This case, as it comes to us, concerns the constitutionality of six provisions of the Pennsylvania Act that the Court of Appeals struck down as facially invalid: § 3205 ('informed consent'); § 3208 ('printed information'); § 3214(a) and (h) (reporting requirements); § 3211(a) (determination of viability); § 3210(b) (degree of care required in postviability abortions); and § 3210(c) (second-physician requirement).").

25. *Casey*, 505 U.S. at 870.

26. *Id.*

27. "Specifically, the Court upheld a section of the statute that required that women be told information and that they be informed of the availability of other materials that describe the fetus, provide information about medical care for childbirth, and list adoption providers." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 868 (5th ed. 2015).

28. Compare *Casey*, 505 U.S. at 870 (upholding a statute mandating specific information be given to a mother prior to consenting to an abortion designed to dissuade women from having the procedure), with *Akron*, 462 U.S. at 444 (declaring a statute mandating specific information be given to a mother prior to consenting to an abortion designed to dissuade women from undergoing the procedure unconstitutional), and *Thornburgh*, 476 U.S. at 761 (holding statutes requiring specific information be provided to a mother prior to giving consent to an abortion unconstitutional).



Specifically, the *Casey* plurality emphasized that the *Roe* decision undervalued the state's interest in the fetal life.<sup>29</sup> Based on the conclusion that the state has a legitimate interest in both the health of the mother and the life of the fetus, the Court declared government regulation of abortions constitutional—regardless of the state's motive behind the regulation.<sup>30</sup> So long as the regulation requires the giving of truthful, non-misleading information and does not place an undue burden on the ability to access abortions, such regulation will be constitutional.<sup>31</sup> This requirement became known as the undue-burden test.<sup>32</sup> Following the declaration that State legislation will be constitutional so long as the regulation does not put an undue burden on the women's right to choose, the Court began to wrestle with the precise confines of the State's interest in the protection of the fetus.

*Stenberg v. Carhart*<sup>33</sup> formally adopted the undue-burden test and *Gonzales v. Carhart* reaffirmed.<sup>34</sup> While at first glance *Stenberg* and *Gonzales* seem juxtaposed in their conclusions, both decisions reiterate the state's legitimate interest in both the life of the fetus and the health of the mother—so long as this does not impose an undue burden on the mother's right to an abortion.<sup>35</sup> Most recently, in *Whole Woman's Health v. Hellerstedt*,<sup>36</sup> the Supreme Court again reiterated that in determining whether a regulation places an undue burden on

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

30. *Id.* at 876.

31. *Id.*

32. *Id.* The undue-burden test seems to imply a rational-basis-type standard of review. Indeed, “[w]hen defining the undue burden standard, the plurality repeatedly used terms like ‘legitimate interest’ and ‘reasonable’ or ‘rational relationship’ that traditionally appear in rational basis cases. For instance, the plurality referenced the legitimacy of the state’s stake in abortion regulation: ‘[A] statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman’s choice cannot be considered a permissible means of serving its legitimate ends.’” Emma Freeman, *Giving Casey Its Bite Back: The Role of Rational Basis Review in Undue Burden Analysis*, 48 HARV. C.R.-C.L. L. REV. 279, 292 (2013).

33. *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000). The Supreme Court used the test to strike down a Nebraska law that prohibited partial birth abortions on the basis that such restrictions placed an impermissible burden on the woman’s right to an abortion by (1) lacking an exception for the life of the mother and (2) placing an undue burden on the woman’s right to choose. *Id.*

34. *Gonzales v. Carhart*, 550 U.S. 124, 156 (2007) (holding the government’s interest in preventing partial birth abortions is sufficient to uphold the law and there was no undue burden on the woman’s right to an abortion).

35. “[R]egulations which . . . express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman’s exercise of the right to choose . . . .” *Gonzales*, 550 U.S. at 128; see also *Stenberg*, 530 U.S. at 921 (emphasizing government regulations may not create impose an undue burden on the woman’s ability to access and abortion).

36. *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).

the right to choose, courts are to consider “the burdens a law imposes on abortion access together with the benefits those laws confer.”<sup>37</sup>

After a multitude of Supreme Court precedent, one thing remains clear: the state has a legitimate interest in both the health of the mother and the life of the fetus.<sup>38</sup> But at precisely what point the costs of abortion regulation begin to outweigh the benefits remains unclear.<sup>39</sup> Proponents of the undue-burden test construe *Casey*, *Stenberg*, and *Gonzales* as articulating the conclusion that government regulations impacting abortions are constitutional so long they demand truthful, non-misleading information and do not place an undue burden on women’s ability to access an abortion.<sup>40</sup> These scholars have noted that failing to follow the undue-burden test established in *Casey* would repudiate the state’s interest in the life of the fetus.<sup>41</sup>

However, other academics and courts have construed the undue-burden test to be the minimum level of analysis applicable to the regulation of abortions. Opponents of the test contend the regulations compel physicians to share the state’s ideological message and must be analyzed using a strict scrutiny standard of review.<sup>42</sup> To properly

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37. *Id.* at 2324 (Thomas, J., dissenting).

38. The state may “enact rules and regulations designed to encourage women who are considering termination of their pregnancies to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term, and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of State assistance if the mother chooses to raise the child herself.” Jared H. Jones, *Women’s Reproductive Rights Concerning Abortion, and Governmental Regulation Thereof—Supreme Court Cases*, 20 A.L.R. Fed. 2d 1 (2007). Indeed, the *Casey* Court emphasized that because the State may express a profound respect for the life of the unborn, regulations creating structural mechanisms for the state to express this interest will be upheld if they are not a substantial obstacle to the woman’s exercise of the right to choose. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 899 (1992).

39. *Hellerstedt*, 136 S. Ct. at 2342 (Alito, J., dissenting). While *Hellerstedt* makes clear that that blanket surgical requirements on all abortions and the requirement that a physician performing an abortion must have privileges at a hospital at least thirty miles away impose an undue burden on the right to an abortion, in reaching this decision, the *Hellerstedt* Court reiterated that abortion facilities do not escape all means of government regulation. *Id.* at 2320. In fact, even the surgical-center requirement at issue in *Hellerstedt* can be imposed on abortions facilities performing abortions that take place during the second trimester. *Id.*; see also *Simopoulos v. Virginia*, 462 U.S. 506 (1983) (upholding second term abortion surgical requirements).

40. See CHEMERINSKY, *supra* note 27, at 867. “[U]nder the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest.” *Id.*

41. *Id.* at 868.

42. “Compelled speech laws that require physicians to engage in speech that expresses the state’s ideological message should be subject to strict scrutiny. Thus, while such laws do not automatically violate the First Amendment, the state would likely have a difficult time demonstrating that such laws serve a compel-

address these arguments, it is necessary to examine the balance between the state's legitimate interests in the regulation of abortions—as established by *Casey*—and the First Amendment protections afforded to physicians.

### B. The First Amendment and Its Limitations—Legitimate Government Regulation of Speech

Following *Casey*, if an abortion regulation not only burdens the access to an abortion, but also burdens protections afforded to the medical provider through First Amendment protection—this regulation would likely prove too constitutionally problematic. And if informed consent legislation infringes upon physician First Amendment protection, this would shift the level of judicial review up from the *Casey* undue-burden test to something greater—such as intermediate or strict scrutiny.<sup>43</sup> Accordingly, it is proper to analyze First Amendment jurisprudence.

The First Amendment has long protected the freedom of individuals to speak—and engage in expressive conduct—unencumbered by government restriction.<sup>44</sup> Moreover, whether government restrictions stifle or require speech is without constitutional significance.<sup>45</sup> While there certainly are factual distinctions between compelled speech and compelled silence, those differences do not justify alternative treatment by the First Amendment.<sup>46</sup>

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ling government interest, and that the law was narrowly tailored to serve that interest.” Jennifer M. Keighley, *Physician Speech and Mandatory Ultrasound Laws: The First Amendment's Limit on Compelled Ideological Speech*, 34 CARDOZO L. REV. 2347, 2378 (2013).

43. See *Stuart v. Camnitz*, 774 F.3d 238, 242 (4th Cir. 2014).

44. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I. “[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content.” *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (declaring an ordinance prohibiting picketing or demonstration within 150 feet of a school restricted speech and was unconstitutional because it restricted clearly protected First Amendment Speech). Moreover, the First Amendment applies to expressive conduct. *Texas v. Johnson*, 491 U.S. 397, 397 (1989). Conduct is expressive when the actor intends to communicate a particular message by his or her actions and that message will be understood by those who observe it because of the surrounding circumstances. *Id.* at 404.

45. “The right to speak and the right to refrain from speaking are complementary components of the broader concept of individual freedom of mind. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (citation omitted); CHEMERINSKY, *supra* note 27, at 1018 (“Just as there is a right to speak, so, it is clear, there is right to be silent and refrain from speaking.”).

46. *Riley v. Nat’l Fed’n of the Blind of N. Carolina, Inc.* 487 U.S. 781, 796–97 (1988) (“There certainly some difference between compelled speech and compelled si-

As a practical matter, informed consent legislation always implicates the First Amendment because it compels physician speech.<sup>47</sup> The constitutionality of compelled speech was first examined in *Wooley v. Maynard*, where the Supreme Court deemed legislation unconstitutional requiring all citizens of New Hampshire to display the motto “Live Free or Die” on all noncommercial vehicle license plates.<sup>48</sup> In reaching its conclusion, the Supreme Court declared the First Amendment extended to a person’s individual right not to speak at all.<sup>49</sup> Following *Wooley*, it became clear that the First Amendment encompasses the freedom from speaking.<sup>50</sup>

And where the government seeks to regulate in a way that infringes on First Amendment protections, such government regulation must be sufficiently justified. But the Supreme Court has “long recognized that not all speech is of equal First Amendment importance.”<sup>51</sup> To this end, simply acknowledging that a regulation implicates the First Amendment does not automatically render the provision unconstitutional. There are several categories of speech where the Supreme Court has afforded less than absolute First Amendment protections.<sup>52</sup>

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lence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees ‘freedom of speech,’ a term necessarily comprising the decision of both what to say and what not to say.”).

47. “Informed consent doctrine mandates the communication of medical knowledge to the end that a lay patient can receive the expert information necessary to make an autonomous, intelligent and accurate selection of what medical treatment to receive.” Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 972.
48. Ideological speech is defined by the United States Supreme Court as speech that conveys a “point of view.” *Wooley*, 430 U.S. at 713 (holding that requiring citizens to display a state motto, which compelled ideological speech, was unconstitutional).
49. The motto was offensive to the petitioner’s moral beliefs as a Jehovah’s Witness reasoning that a state cannot promote its ideological interests in a manner which outweighs the individual’s First Amendment protections. *Id.* at 706. Ultimately, for compelled speech to be constitutional it must survive a strict scrutiny standard, and the law must be narrowly tailored and advance a substantial government interest. *Id.* at 707; *see also* *W.Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that requiring students to salute the flag transcends constitutional power of the government).
50. “[I]f there is a fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein.” *W.Va. State Bd. of Educ.*, 319 U.S. at 642.
51. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985).
52. There are several types of speech where the Supreme Court has extended less than absolute First Amendment protection. *See* *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (holding that government cannot constitutionally forbid the advocacy of force or illegal action unless “such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (upholding a statute

Accordingly, the primary consideration for government regulations impacting the First Amendment is whether the regulation is content-neutral.<sup>53</sup> So long as the regulation is content-neutral, the Supreme Court has continually upheld regulations impacting speech typically protected by the First Amendment.<sup>54</sup>

The test for content neutrality is one of motivation rather than facially content-based restrictions.<sup>55</sup> In *Renton v. Playtime Theaters, Inc.*, the Supreme Court articulated this rule when it rejected a First Amendment challenge to a zoning ordinance.<sup>56</sup> The ordinance prohibited theaters showing adult content from being located within 1,000 feet of any residential zone, church, park, or school.<sup>57</sup> On its face, the ordinance appeared to be content-based—it applied only to theaters displaying sexually explicit films.<sup>58</sup> Yet, the *Renton* Court deemed the ordinance content neutral because “the law was motivated by a desire to control the secondary effects of adult movie theaters, such as crime, and not to restrict the speech.”<sup>59</sup> The Court specified the content-neutral designation encompasses regulatory motivations based on something other than the content of the regulated speech.<sup>60</sup>

Following *Renton*, the Court reaffirmed the government’s ability to regulate facially content-based restrictions when there are alternative justifications other than the chilling of speech. For example, in *Hill v. Colorado*, the Court upheld a Colorado law as content neutral even

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prohibiting “face-to-face words plainly likely to cause a breach of the peace by the addressee” as constitutional under the First Amendment); *New York v. Ferber*, 458 U.S. 747, 764 (1982) (holding that distribution of child pornography is “without the protection of the First Amendment”); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 562–63 (1980) (noting that the First Amendment protects commercial speech such that government may lack “complete power to suppress or regulate commercial speech”; nevertheless, the “Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”).

53. For a government regulation to be content-neutral, the regulation must be both viewpoint neutral and subject-matter neutral. *Perry Educ. Ass’n v. Perry Local Educator’s Ass’n*, 460 U.S. 37, 45 (1983). “The viewpoint-neutral requirement means that the government cannot regulate speech based on the ideology of the message. . . . The subject-matter-neutral requirement means that the government cannot regulate speech based on the topic of the speech.” Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court’s Application*, 74 S. CAL. L. REV. 49, 51 (2000).

54. See *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 47–48 (1986); *Hill v. Colo.*, 530 U.S. 703, 720 (2000).

55. *Renton*, 475 U.S. at 47–48.

56. *Id.*

57. *Id.*

58. *Id.* at 43 (prohibiting prohibits adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school).

59. CHEMERINSKY, *supra* note 27, at 981.

60. *Renton*, 475 U.S. at 48.

though its effect was content-based.<sup>61</sup> The Court deemed the law prohibiting protestors from approaching within eight feet of a person who is within 100 feet of a health care facility constitutional.<sup>62</sup> In its decision, the Court explained the State's interests in protecting access and privacy are unrelated to the content of the protestor's speech.<sup>63</sup> While the effect of the ordinance in *Hill* was to prevent anti-abortion speech near health care facilities, the Court focused on the motivation to protect those entering health facilities seeking abortions.<sup>64</sup>

Similarly, in *McCullen v. Coakley*, the Court upheld a Massachusetts law that created a thirty-five foot zone around reproductive health care facilities as content-neutral.<sup>65</sup> While ultimately deciding the law was not sufficiently tailored,<sup>66</sup> the Court acknowledged the law itself was not content-based.<sup>67</sup> The Court stated, "a facially neutral law does not become content-based simply because it may disproportionately affect speech on certain topics."<sup>68</sup> As evidenced by the decisions in *Renton*, *Hill*, and *McCullen*, the regulation of content-neutral speech is permissible so long as there is an additional motivation irrespective to the chilling of said speech.

But considerations other than content-neutrality also impact the strength of First Amendment protections afforded to certain forms of speech. Specifically, in *Riley v. National Federation of the Blind, Inc.*, the Supreme Court emphasized that to determine whether a regulation infringes on typical First Amendment protections the analysis must include the context of the regulated speech.<sup>69</sup> That is, the Court must ask the question: do the governmental interests outweigh the burdens on the First Amendment?

For example, regulations impacting commercial speech often impose restrictions on advertisements requiring the information to be

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61. *Hill v. Colo.*, 530 U.S. 703, 720 (2000).

62. *Id.* at 707.

63. *Id.*

64. *Id.* at 719 (emphasizing that the State interest in protecting access and privacy survives questions of content neutrality because "it is justified without reference to the content of regulated speech").

65. *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014).

66. To be sufficiently tailored, the State must use the least restrictive means to achieve the important government interest. CHEMERINSKY, *supra* note 27, at 566–67.

67. *McCullen*, 134 S. Ct. at 2531 (holding the law was content-neutral because it did not restrict speech based on a topic of view point, but the regulation burdened more speech than necessary to further the government's legitimate interests and thus, was unconstitutional).

68. *Id.*

69. 487 U.S. 781, 796 (1988) "Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon." *Id.*

truthful and non-deceptive.<sup>70</sup> The regulations do not run afoul to the First Amendment because of the governmental interest in facilitating economic prosperity and the protection of consumers receiving the information.<sup>71</sup> Additionally, the government frequently limits the First Amendment in secondary schools, prisons, and the military based on the judgment of the Supreme Court that the justifications for regulation outweigh the value of expression.<sup>72</sup>

Comparably, regulations of professionals—such as physicians—cannot be viewed in isolation. Instead, regulations infringing on physician speech must be examined in light of the state’s underlying interest in the well-being of the patient, and the nature of the physician–patient relationship in the medical context.<sup>73</sup>

### C. Professionals and First Amendment Protections—Or Lack Thereof

The Supreme Court has yet to develop a clear professional speech doctrine. But it has hinted toward limited First Amendment protection for professionals.<sup>74</sup> When considering whether robust First Amendment protection ought to exist in a professional setting, it is imperative to understand the nature of the professional–client relationship and the governmental interest in protecting the listener. Professional speech is defined as “speech by a professional in a regu-

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70. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561 (1980) (holding regulations affecting commercial speech do not violate the First Amendment if the regulated speech concerns illegal activity, is misleading or if the government’s interest in restricting the speech is substantial, the regulation in question directly advances the government interest, and the regulation is narrowly tailored to serve the government interest).

71. *Id.*

72. “The categories of unprotected and less protected speech reflect value judgments by the Supreme Court that the justifications for regulating such speech outweigh the value of the expression.” CHEMERINSKY, *supra* note 27, at 1037; *see also* *Parker v. Levy*, 417 U.S. 733, 758 (1974) (“While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections”); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (upholding the suspension of a student who gave a speech filled with a multitude of sexual innuendos and claimed the speech in question was unprotected); *Jones v. N.C. Prisoners’ Labor Union*, 433 U.S. 119, 129 (1977) (“In the prison context, an inmate does not retain those First Amendment rights that are inconsistent with the status of the prisoner or with the legitimate penological objectives of the corrections system”).

73. *Cent. Hudson*, 447 U.S. at 561; *see also* Scott W. Gaylord, Comment: *Casey and the First Amendment: Revisiting an Old Case to Resolve A New Compelled Speech Controversy*, 66 S.C. L. REV. 951, 954 (2015).

74. *See* *Lowe v. S.E.C.*, 472 U.S. 181 (1985) (White, J., concurring); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (discussing physicians enjoy first amendment but subject to reasonable licensing and regulation by the State).

lated profession in which the professional is rendering advice or counsel to a client.”<sup>75</sup> Generally, this includes advice given by medical, psychological, legal, scientific, and financial professionals.<sup>76</sup> Because speech in these institutions occupy a unique sphere of our society, the relationship between professionals and their clients give rise to unique First Amendment implications. Indeed, a professional fulfills a defined role by offering specific knowledge and expertise to an audience directly seeking such professional judgment.<sup>77</sup> And as such, the state has an undoubtedly important interest in the regulation of the professional relationship.

State interests in professional speech include protecting clients from professional overreach, fraud, fostering and facilitating safe professional–client interactions, and ensuring professionals provide accurate and truthful information to their clients.<sup>78</sup> Indeed, states often impose basic licensure and registration requirements for professions—even if such requirements limit expression.<sup>79</sup> And further, the First Amendment does not provide protection for professionals who fail to meet certain standards of care.<sup>80</sup> States may ban the prescription of certain medications, impose professional liability and discipline for bad advice, and protect clients from various harmful treatments or practices.<sup>81</sup> They can impose sanctions and prohibit professionals from revealing confidential information.<sup>82</sup> Even in some circumstances, regulations *mandate* professionals disclose information that could be harmful to their client.<sup>83</sup> Inarguably, such regulations constrain speech in many ways that are not seriously challengeable under the First Amendment.

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75. RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 20:37.40 (3rd ed. 2015).

76. See Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 772 (1999).

77. *Id.* at 772.

78. Timothy Zick, *Professional Rights Speech*, 47 ARIZ. ST. L.J. 1289, 1315 (2015).

79. *Id.* at 1291.

80. See *Moore-King v. Cty. of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013) (upholding fortune-telling licensure regulations under the professional speech doctrine); *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011) (upholding interior-design licensing law under the rational-basis standard); *Accountants Soc. of Va. v. Bowman*, 860 F.2d 602, 604–05 (4th Cir. 1988) (upholding accountants’ licensure requirement).

81. Zick, *supra* note 78, at 1291.

82. Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers’ First Amendment Rights*, 67 FORDHAM L. REV. 569, 569 (1998).

83. See generally MODEL RULES OF PROF’L CONDUCT r. 4.1, 1.6 (requiring a lawyer to reveal information of a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client obtained through representation).



The earliest recognition of the diminished First Amendment protections applicable to professional speech was recognized in *Lowe v. S.E.C.*<sup>84</sup> While the majority decision avoided the first amendment issue, Justice White's concurrence stated:

One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession. Just as offer and acceptance are communications incidental to the regulable transaction called a contract, the professional's speech is incidental to the conduct of the profession . . . . Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech.<sup>85</sup>

The Supreme Court relied on this statement in *Lowe* when it directly invoked notions of professional speech applicable to the medical profession in *Casey* noting:

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, 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>86</sup>

Accordingly, the Supreme Court has only once issued a direct holding with respect to First Amendment protections of professional speech—in *Casey*.<sup>87</sup> While the passage recognizes that professional speech is entitled to some First Amendment protection, it does not precisely define the confines of reasonable regulation. But *Casey* does suggest that the State may coerce a person, whose choice to remain silent would otherwise be protected by the First Amendment, when the communication occurs in the context of a professional relationship—specifically, medical providers.<sup>88</sup>

This application of diminished First Amendment protections to professionals, first in *Lowe* and then specifically within the medical profession in *Casey*, enhances the argument regarding the applicability of the professional speech doctrine when a physician is giving medical information and advice to a patient.<sup>89</sup> Taken together, the

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84. *Lowe v. S.E.C.*, 472 U.S. 181, 232 (1985) (White, J., concurring).

85. *Id.* at 232.

86. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (citations omitted).

87. *Id.*

88. *See Halberstam, supra* note 76, at 774.

89. The creation of a professional speech doctrine is evidenced by the Court's recognition that when a professional is communicating to a client, the speech is awarded diminished First Amendment protection. Professional speech, such as speech from a doctor to a patient, is subject to reasonable state legislation. *Id.*; *Lowe*, 472 U.S. at 233.

decisions in *Roe*, *Lowe*, and *Casey* emphasize the State's legitimate interest in the regulation of abortions—including limiting speech that would normally enjoy first amendment protection—so long as the regulation does not create an undue burden on a woman's right to abortion.<sup>90</sup> Yet, the constitutionality of informed consent legislation continues to be challenged based on First Amendment implications.<sup>91</sup>

**D. Speech and Display Cases—the Circuits' Attempt to Construe *Roe*, *Casey*, and the Professional Speech Doctrine Alluded to in *Lowe***

Both the Fifth and Eighth Circuits have evaluated the constitutionality of informed consent legislation. In *Texas Medical Providers Performing Abortion Services v. Lakey*,<sup>92</sup> the Fifth Circuit considered First Amendment implications on a physician when Texas passed a statute requiring physicians to display a sonogram and describe the fetus to the woman.<sup>93</sup> In finding the legislation constitutional, the court followed the precedent set forth in *Casey*.<sup>94</sup> The court concluded when a physician is operating within the bounds of his or her medical profession, he or she is subject to the regulations of the state—including speech regulations.<sup>95</sup> The Fifth Circuit concluded when analyzing whether such regulations are constitutional, the legislation must merely advance a reasonable state interest in the regulation of the medical profession.<sup>96</sup>

The Eighth Circuit applied similar reasoning in its analysis of an informed consent statute. While *Planned Parenthood Minnesota*,

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90. See *Roe v. Wade*, 410 U.S. 113, 162 (1973); *Casey*, 505 U.S. at 882; *Lowe*, 472 U.S. at 232.

91. See *Stuart v. Camnitz*, 774 F.3d 238, 242 (4th Cir. 2014).

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

93. *Id.*

94. *Id.* at 575. The Fifth Circuit noted the *Casey* plurality concluded “the giving of truthful, nonmisleading information’ which is ‘relevant . . . to the decision,’ did not impose an undue burden on the woman’s right to an abortion . . . .” *Id.* (citing *Casey*, 505 U.S. at 881). The court then held the legislation did not impose an undue burden on the right to an abortion because law compels the physician to provide truthful, nonmisleading, information. *Id.* Second, such legislation is not compelled ideological speech and thus, not subject to strict scrutiny. *Id.* And finally, relevant informed consent may entail not only the physical and psychological risks to the expectant mother facing this “difficult moral decision, but also the state’s legitimate interests in protecting the potential life within her.” *Id.* at 576 (citation omitted).

95. *Id.* at 579–80 (finding ultrasound provisions are medically necessary because they are routine in pregnancy medicine).

96. The court concluded, based on *Casey* and *Gonzales*, the State has a legitimate interest in the regulation of the medical profession and requiring the doctor to display a sonogram does not violate the First Amendment nor does it create an undue burden on the woman’s right to an abortion. *Id.* at 579–80.

*North Dakota and South Dakota v. Rounds*<sup>97</sup> did not involve the display of a sonogram, it did involve the constitutionality of legislation requiring the medical facility provide a statement to the patient informing her the abortion would “terminate the life of a whole, separate, unique, living human being” twenty-four hours prior to performing the abortion, constitutional.<sup>98</sup> The Eighth Circuit rejected the contention by Planned Parenthood that the legislation compelled speech because it advanced the ideological interests of the state.<sup>99</sup> Relying on the holdings in *Casey* and *Gonzales*, the Eighth Circuit held the State could use its regulatory authority to provide truthful, non-misleading information relevant to a patient’s decision to have an abortion—even if the information could deter the patient from having an abortion.<sup>100</sup> Because the information was truthful, non-misleading, and relevant to the patient’s decision to have an abortion, the statute was upheld based on the State’s interest in the protection of fetal life.<sup>101</sup> Both the Fifth and the Eighth Circuits did not find the First Amendment to be an appropriate rationalization for striking down informed consent legislation so long as the regulations advance a legitimate state interest.

The Fourth Circuit itself established professional speech demands that diminish First Amendment protection in *Accountant’s Society of Virginia v. Bowman*,<sup>102</sup> upholding a regulation barring unlicensed accountants from using specific language in reports presented to clients as a valid regulation of the accounting profession.<sup>103</sup> Moreover, in *Moore-King*, the Fourth Circuit explicitly stated the Supreme Court has recognized the regulation of occupational speech.<sup>104</sup> In recogniz-

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97. *Planned Parenthood M.N., N.D., S.D. v. Rounds*, 530 F.3d 724, 726 (8th Cir. 2008) (considering informed consent statute requiring specific disclosures).

98. *Id.* at 728.

99. *Id.*

100. *Id.* at 834.

101. The court refused to implement a higher standard of review stating Planned Parenthood could not claim the legislation “violates a physician’s right not to speak unless it can show that the disclosure is either untruthful, misleading or not relevant to the patient’s decision to have an abortion.” *Id.* at 735.

102. *Accountant’s Soc. of Va. v. Bowman*, 860 F.2d 602, 603 (4th Cir. 1988).

103. “Professional regulation is not invalid, nor is it subject to First Amendment scrutiny merely because it restricts some kinds of speech.” *Id.* at 604.

104. *Moore-King v. Cty. of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013). In *Moore-King*, the court noted that at least since Justice Jackson’s concurrence in *Thomas v. Collins*, 323 U.S. 516 (1945), the Supreme Court has recognized a professional speech doctrine. See *Moore-King*, 708 F.3d at 568. “In describing the relationship between the doctrine of professional speech and protected expression, Justice Jackson observed that a “state may forbid one without its license to practice law as a vocation, but . . . could not stop an unlicensed person from making a speech about the rights of man or the rights of labor, or any other kind of right, including recommending that his hearers organize to support his views.” *Thomas*, 323 U.S. at 544 (Jackson, J., concurring). Similarly, in Justice Jackson’s

ing this, the Court solidified that the First Amendment is not an adequate defense to legitimate state regulation when the speech involves professional-client discourse.<sup>105</sup> But in *Stuart v. Camnitz*, the Fourth Circuit failed to adhere to the confines of its own doctrine limiting professional speech as it distinguished North Carolina's display and speech requirements from the precedent established in *Casey* and *Gonzales* and the analysis of its sister circuits.<sup>106</sup>

### III. *STUART V. CAMNITZ*

#### A. Facts

In *Stuart v. Camnitz*, physicians and abortion providers brought an action following the passage of North Carolina's Woman's Right to Know Act, creating additional steps physicians must follow before a woman consents to an abortion.<sup>107</sup> The complaint asserted one provision of the Act, the Display and Real-Time View Requirement (the Requirement), violated the First Amendment protections afforded to physicians and Fourteenth Amendment due process protections of patients.<sup>108</sup> The Requirement demands doctors perform an ultrasound on a woman prior to the woman receiving an abortion.<sup>109</sup> In addition to performing the ultrasound, the doctor must display the sonogram so the woman can see the display and hear the fetal heartbeat while the doctor describes the location, dimensions, and presence of external members and internal organs.<sup>110</sup> The Requirement allows a woman to avoid viewing the images by closing her eyes and refusing to hear the simultaneous explanation and medical description.<sup>111</sup> The legislation also provides, in the case of medical emergency, the ultrasound and subsequent description of the fetus need not be performed.<sup>112</sup>

The district court applied strict scrutiny to hold that the Requirement violated the First Amendment's right to free speech and thus, granted the physician's motion for summary judgment.<sup>113</sup> The court

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view, the state could prohibit the practice of unlicensed medicine, but could not "make it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought." *Id.*

105. *Moore-King*, 708 F.3d at 567 (determining a the "spiritual counselor" (fortune teller) known as Psychic Sophie, was acting as a professional and thus, is entitled to limited First Amendment protection).

106. *Stuart v. Camnitz*, 774 F.3d 238, 242 (4th Cir. 2014).

107. *Id.*; N.C. GEN. STAT. § 90-21.85(b) (2011).

108. *Stuart*, 774 F.3d at 238.

109. *Id.* at 243-44; N.C. GEN. STAT. § 90-21.85(a)(1) (2011).

110. N.C. GEN. STAT. § 90-21.85(a)(2)-(4) (2011).

111. *Id.* § 90-21.85(b).

112. *Id.* § 90-21.85.

113. *Stuart v. Loomis*, 992 F. Supp. 2d 585, 600-01 (M.D.N.C. 2014).

declined to address the merits of the due process claim—and instead, focused on First Amendment violations.<sup>114</sup>

### B. The Fourth Circuit Weighs In

The Fourth Circuit reviewed the grant of summary judgment *de novo*.<sup>115</sup> The court noted speech regulation based on content must receive the most exacting scrutiny and such restrictions are presumptively invalid.<sup>116</sup> However, when evaluating the proper level of scrutiny, the court acknowledged laws impinging upon speech receive different levels of scrutiny depending on the justifications of the regulation.<sup>117</sup> Some types of speech, the court noted, are “area[s] traditionally subject to government regulation.”<sup>118</sup>

The physicians demanded the regulation receive strict scrutiny because the Requirement is content-based and ideological.<sup>119</sup> The State, however, urged the Requirement receive rational-basis review.<sup>120</sup> In refusing to adhere to the level of scrutiny deemed appropriate by either side,<sup>121</sup> the Fourth Circuit settled on an intermediate level of scrutiny after declaring the regulation to be content-based and ideological.<sup>122</sup>

In reaching its conclusion, the Fourth Circuit departed from the reasoning applied by its sister circuits—the Fifth and Eighth Cir-

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114. *Id.*

115. *Stuart v. Camnitz*, 774 F.3d 238, 242 (4th Cir. 2014).

116. *Id.*

117. *Id.*

118. *Id.* at 243 (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 577, 562–63 (1980); see also *CHEMERINSKY*, *supra* note 27, at 1158 (describing commercial speech, nude dancing, gambling, and tobacco are areas forms of expression and speech that are typically subject to government regulation).

119. *Stuart*, 774 F.3d at 243. Strict scrutiny is the most intensive form of judicial review which requires a government regulation only be upheld if it is necessary to achieve a compelling governmental purpose. *CHEMERINSKY*, *supra* note 27, at 567. If strict scrutiny is used, the government has the burden of proof and the law will generally be struck down. *Id.*

120. *CHEMERINSKY*, *supra* note 27, at 566. Under rational-basis review, the law will be upheld unless the law does not serve any conceivable legitimate purpose or it is unreasonable to advance that purpose. *Id.* Rational-basis review is extremely deferential to the government. *Id.* The undue-burden test established in *Casey* closely resembles the rational-basis standard of review. See *Planned Parenthood v. Se. Pa. v. Casey*, 505 U.S. 833, 840 (1992).

121. *Stuart*, 774 F.3d at 245 (“The physicians urge us to find that the regulation must receive strict scrutiny because it is content-based and ideological. The State counters that the Requirement must be treated as a regulation of the medical profession in the context of abortion and thus subject only to rational basis review.” (internal citations omitted)).

122. *Id.* at 246. Under an intermediate standard of scrutiny, the state bears the burden of demonstrating “at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest.” *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 572 (2011).

cuits—who applied a rational-basis review to similar pre-abortion requirements.<sup>123</sup> The Fourth Circuit distinguished its reasoning from that of the Fifth and Eighth Circuits by criticizing their analysis as reading too deeply into *Casey* and *Gonzales*.<sup>124</sup> The Fourth Circuit determined that *Casey* does not announce an overarching standard requiring all medical speech regulation receive rational-basis review.<sup>125</sup> Further, the court held while *Gonzales* provides valuable insight into the government's ability to regulate the medical profession, it says nothing about the proper level of scrutiny courts should apply in reviewing regulations.<sup>126</sup> To balance the ability of states to regulate the medical profession with First Amendment protections afforded to physicians, the court determined that an intermediate level of scrutiny was appropriate.<sup>127</sup> Due to the erroneous weight given to *Casey* and *Gonzales* by the Fifth and Eighth Circuits, the Fourth Circuit deemed the intermediate level of scrutiny to be consistent with prior Supreme Court precedent.<sup>128</sup>

After settling on an intermediate level of scrutiny, the court determined the regulation did not directly advance a substantial governmental interest.<sup>129</sup> The Fourth Circuit recognized the State's legitimate interest in the life of the fetus and the health of the mother, but held the regulation interfered with First Amendment protection of physicians beyond what is permitted for the regulation of the medical profession.<sup>130</sup> The court further emphasized the regulation simultaneously threatened the patient's psychological health and compromised the doctor-patient relationship.<sup>131</sup>

#### IV. ANALYSIS

This Part demonstrates the Fourth Circuit's rejection of a rational-basis standard of review with respect to the mandatory ultrasound provisions implemented by the North Carolina legislation was erroneous. Because speech by a professional within the professional context categorically does not receive robust First Amendment protections, the legislation need only survive a rational-basis standard of review.<sup>132</sup> To this end, the government has a legitimate interest in the

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123. *See, e.g.*, *Planned Parenthood M.N., N.D., S.D. v. Rounds*, 530 F.3d 724, 730 (8th Cir. 2008); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576 (5th Cir. 2012).

124. *Stuart*, 774 F.3d at 246.

125. *Id.* at 249.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 250.

130. *Id.*

131. *Id.* at 246.

132. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 881 (1992).

facilitation of truthful, non-misleading speech between physicians and patients to promote informed decision by the patient. And as such, mandatory ultrasound provisions are rationally related to the advancement of this legitimate state interest and do not place an undue burden on a woman's right to an abortion. But the Fourth Circuit blatantly ignored Supreme Court precedent established in *Casey* and its own precedent established in *Bowman* with respect to the limited First Amendment protections afforded to professionals—including physicians. Had the Fourth Circuit properly adhered to precedent and focused on the promotion of truthful, non-misleading, non-ideological, medically necessary information, the court would have found North Carolina's ultrasound requirement to be constitutional.

**A. The North Carolina Statute Is a Permissible Exercise of State Police Powers Even Though It Implicates the First Amendment**

Because the mandatory ultrasound provision requires the physician to display the sonogram so the woman can see the display and hear the fetal heartbeat while the doctor describes the location, dimensions, and presence of external members and internal organs, the regulation certainly implicates the First Amendment.<sup>133</sup> But simply implicating the First Amendment does not render the regulation unconstitutional. The determination as to whether state regulatory authority extends to legislation incidentally impacting typical First Amendment protections the court must look to see that the regulation is content-neutral based on the context of the regulation.

With respect to content-neutrality, the Requirement survives constitutional review. As established in *Renton v. Playtime Theaters, Inc.*, to be content-neutral, the justification for the regulation must be based on something other than the content of the regulated speech.<sup>134</sup> Because North Carolina's motivation behind the Requirement stems from its interest in the protection of the health of the mother and the unborn fetus—not simply compelling a certain message—the North Carolina statute survives content-based constitutional challenges.<sup>135</sup>

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133. The display of the sonogram is expressive conduct protected by the First Amendment. Conduct is expressive when the actor intends to communicate a particular message by his or her actions and that message will be understood by those who observe it because of the surrounding circumstances. See *Texas v. Johnson*, 491 U.S. 397, 404 (1989). N.C. GEN. STAT. § 90-21.85(a)(2)–(4) (2011).

134. While content-neutral regulations certainly still impact typical First Amendment protections, the government has determined that by regulating said speech, society is better off overall. See *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 48 (1986) (holding because the law was motivated by the desire to control secondary effects of adult movie theaters, the regulation did not restrict speech).

135. The legitimate interest in the health of the mother and the health of the unborn fetus is well-established. See *supra* section II.A; *Planned Parenthood of Se. Pa. v.*

Moreover, the state has an important interest in the regulation of the physician-patient communication. The notion that a state may regulate the medical profession by mandating specific information be given to the patient while simultaneously showing images to the patient is derived from the idea that a patient is best served when he or she receives all relevant information to make an informed medical decision.<sup>136</sup> This discussion between physician and patient facilitates the patient's ability to access truthful information regarding the medical condition and treatment.<sup>137</sup>

Indeed, "[t]here are few decisions as intimate, personal and life-defining as one about how to cope with a medical condition." High quality medical information (usually obtained through consultation with a medical professional) "is the patient's only shield against fear and uncertainty . . . . Through candid discussions with their physicians, patients are able to maintain autonomy and control over their lives and their bodies."<sup>138</sup> The ability of patients to be exposed to medically necessary and non-misleading information, allowing them to make informed decisions whether to proceed with or refrain from undergoing the medical treatment is a proper alternative justification for the regulation of physician speech through informed consent legislation.<sup>139</sup>

The *Stuart* court concedes this much. Specifically, *Stuart* recognizes there are certain areas and industries in our society where strong governmental interests in the supervision of procedures and policies are accepted as a legitimate exercise of the government's obli-

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Casey, 505 U.S. 833, 834 (1992) (holding the State has a legitimate interest in the life of the mother and fetus inside her); *Gonzales v. Carhart*, 550 U.S. 124, 133 (2007) (reiterating the government has a legitimate interest in the life of the mother as well as the fetus inside her).

136. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 579 (5th Cir. 2012) ("The point of informed consent laws is to allow the patient to evaluate her condition and render her best decision under difficult circumstances. Denying her [a woman] up to date medical information is more of an abuse to her ability to decide than providing the information.").

137. There are two primary focuses when evaluating doctor-patient discourse. Paula Berg, *Toward A First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice*, 74 B.U. L. REV. 201, 235-36 (1994). The primary purpose of speech between a doctor and a patient is to promote the patient's ability to discover the best type of treatment. *Id.* at 235. The patient relies on the physician to discover the nature of the medical problem, the likely cause of that condition, risks, possible treatments, and factors that could impact the success or failure of the treatment. *Id.* The second purpose is to advance medical truth. *Id.* at 236. The physician gathers information through speech to evaluate the best method to diagnose and treat the condition. *Id.*

138. *Id.* at 237-38.

139. *See Casey*, 505 U.S. at 844.



gation to protect the American people and facilitate accountability.<sup>140</sup> Regulation with respect to the safety of an abortion facility is certainly one of these areas of society.

Even in *Women's Health v. Hellerstedt*<sup>141</sup>—arguably the most limiting Supreme Court case with respect to the State's regulation of abortion facilities—the holding was not that a state does not have an interest in ensuring the safety of those receiving abortions, nor that abortion facilities can escape all means of government regulation.<sup>142</sup> But the state has frequently exercised its regulatory authority pursuant to its interest in the safety of abortion patients—even where such regulations infringed on the First Amendment rights of anti-abortion protestors.<sup>143</sup>

For example, in *Hill v. Colorado*, the Supreme Court held legislation prohibiting protestors within 100 feet of healthcare facilities to protect patients entering the establishment was appropriate.<sup>144</sup> In doing so, the Court focused on the protection of the right to an abortion and the protection of the patient as proper justifications behind the regulation.<sup>145</sup> Again, in *McCullen v. Coakley*, the Court acknowledged the importance of the protection of patients entering a reproductive healthcare facility even if the regulations may

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140. *Stuart v. Camnitz*, 774 F.3d 238, 243 (4th Cir. 2014); Michael Holt, *Five Areas of Government Regulation of Business*, CHRON (Oct. 4, 2015, 4:18 PM), <http://smallbusiness.chron.com/five-areas-government-regulation-business-701.html> [https://perma.unl.edu/H5SU-RF5P].

141. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2314 (2016) (holding abortion facilities are not subject to the exact same regulations and requirements as surgical center was premised on the conclusion undue burden on a woman's right to an abortion). Specifically, *Hellerstedt*, recognized that the justification for the regulations were not sufficiently supported by the facts in the record. *Id.*

142. In fact, the court emphasized that the surgical-center requirement at issue in *Hellerstedt* would be constitutional if imposed only on the abortions that take place during the second trimester. *Id.* at 2320. The issue here was the regulation applied to all abortions at anytime. *Id.* The *Hellerstedt* Court also focused on the fact that many other procedures, are not subject to the surgical requirements, but have higher mortality rates than that of abortions. For example, a colonoscopy is typically done outside of a hospital or surgical center and has a mortality rate 10 times higher than that of abortion. *Id.* at 2315. Additionally, the mortality rate for liposuction is 28 times higher than that of abortion. *Id.* Ultimately, the Court concluded these regulations were too burdensome on a women's right to an abortion. *Id.* at 1220.

143. Speech with a clear informational and persuasive component is generally the most protective form of speech. *See City of Houston v. Hill*, 482 U.S. 451, 461–62 (1987) (emphasizing that the First Amendment protects political speech, including communications made to only one person, unless the speech falls within one of the narrow First Amendment exceptions that the U.S. Supreme Court has recognized). Accordingly, anti-abortion activists outside of an abortion clinic would generally have vast First Amendment protection. *See id.*

144. *Hill v. Colo.*, 530 U.S. 703, 715 (2000) (emphasizing the state has a legitimate interest in the protection of the listeners).

145. *Id.*

disproportionally affect the communication of certain categories of speech.<sup>146</sup> In each situation, the Court emphasized the importance of the listener—specifically the patient—and the government’s interest in the health and safety of those who visit such institutions, even if that means the First Amendment becomes less absolute.<sup>147</sup>

In both *Hill* and *McCullen*, the Court was quick to allow diminished First Amendment protections to those opposing abortions outside reproductive facilities by citing the need to protect the women choosing to have an abortion.<sup>148</sup> The court must be equally deferential to diminished First Amendment protections as a result of regulations impacting speech *inside* the reproductive facility. And even more so when the person speaking inside the reproductive facility—the physician—has fewer First Amendment protections than the anti-abortion protesters outside.<sup>149</sup>

Yet, the *Stuart* court struck down the mandatory ultrasound provisions by claiming the regulations are an impermissible exercise of state regulatory authority and unduly burden physicians’ First Amendment protections.<sup>150</sup> This is, undoubtedly, a faulty conclusion. First, there is a long history of reasonable governmental regulations on abortion facilities—including informed consent regulations compelling physician speech.<sup>151</sup> Second, even if there was no such history, the Supreme Court itself has suggested that the protection of the patient transcends traditional First Amendment protections.<sup>152</sup> And because the North Carolina statute is precisely within the confines of the state’s power to create reasonable regulation of an abortion facility—even if it infringes on typical First Amendment protections—the regulation survives questions of constitutionality.

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146. *McCullen v. Coakley*, 134 S.Ct. 2518, 2532 (2014).

147. “While members of the military are not excluded from the protections granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections.” *Parker v. Levy*, 417 U.S. 733, 758 (1974). Similarly, “[i]n a prison context, an inmate does not retain those First Amendment rights that are inconsistent with his status as prisoner or with the legitimate penological objectives of the corrections system.” *Jones v. N.C. Prisoners’ Labor Union*, 433 U.S. 119, 129 (1977).

148. *Hill*, 530 U.S. at 714; *McCullen*, 134 S.Ct. at 2532.

149. *See infra* section III.B.

150. *Stuart v. Camnitz*, 774 F.3d 238, 246 (2014).

151. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012); *Planned Parenthood M.N., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir. 2008).

152. *Hill*, 530 U.S. at 716; *McCullen*, 134 S. Ct. at 2537.

### B. The Fourth Circuit Inappropriately Ignores Its Own Professional Speech Doctrine

The government undoubtedly has the authority to impose reasonable regulations—including mandatory ultrasound provision—on abortion facilities, yet this regulation cannot impede on constitutionally guaranteed protections, such as the First Amendment, absent appropriate review. The Fourth Circuit considered the level of review appropriate and established that professional speech spoken in the professional context demands a rational-basis standard of review—the least rigorous of First Amendment protection.<sup>153</sup>

In *Accountant's Society of Virginia v. Bowman*, the Fourth Circuit determined regulations imposed on professionals—which chill professional speech—are permissible so long as the regulations are directed at the services being provided by the professional.<sup>154</sup> More recently, in *Moore-King v. County of Chesterfield*, the Fourth Circuit relied on its decision in *Bowman* holding that state law requiring the licensing of a fortune teller did not improperly infringe on the First Amendment. Indeed, the Fourth Circuit stated “[u]nder the professional speech doctrine, the government can license and regulate those who would provide services to their clients for compensation without running afoul of the First Amendment.”<sup>155</sup>

Yet, the *Stuart* court did not place physician speech spoken to a patient within the perimeters of professional speech.<sup>156</sup> Rather than applying the rational-basis standard of review applicable to professional speech, the *Stuart* court applied a heightened standard of review—intermediate scrutiny. Specifically, the court stated informed consent regulation must survive an intermediate level of review so as to not intrude on physicians’ First Amendment protections.<sup>157</sup> Ex-

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153. “Under the professional speech doctrine, the government can license and regulate those who would provide services to their clients for compensation without running afoul of the First Amendment.” *Moore-King v. Cty. of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013) (“[W]e cannot say the County’s regulatory scheme lacks any rational relationship to a legitimate governmental interest[.]”); *see also Bowman*, 860 F.2d 602, 604 (4th Cir. 1988) (holding the regulation of accountants was constitutional because it was rationally related to the government’s regulation of the profession).

154. *Bowman*, 860 F.2d at 604.

155. *Moore-King*, 708 F.3d at 569; *see also* ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM* 24 (2012) (“Within public discourse, the First Amendment requires law to respect the autonomy of speakers rather than to protect the targets of speech; outside public discourse, the First Amendment permits the state to control the autonomy of speakers in order to protect the dignity of the targets of speech.”).

156. *Stuart v. Camnitz*, 774 F.3d 238, 249 (4th Cir. 2014).

157. Typically, compelled ideological speech demands strict scrutiny. *See Post*, *supra* note 47, at 946–49. Yet, the *Stuart* court settled on an intermediate level of scrutiny, even though the court deemed the regulation to compel ideological speech,

actly how the Fourth Circuit circumvents the professional speech doctrine established in *Bowman* is perplexing.

In *Bowman*, the court concluded because the unlicensed accountants were exercising their professional judgment in making individualized assessment reports directed at clients' individual financial situations, their speech was indistinguishable from their obligations as professionals.<sup>158</sup> The court stated that when a professional "takes the affairs of a [patient] personally in hand and purports to exercise judgment on behalf of the patient and in light of individual needs and circumstances," such speech is indistinguishable for the obligations as a professional.<sup>159</sup> Again in *Moore-King*, the court quoted this very same language from *Bowman* in holding that Moore-King's activities included personalized readings to a paying client—and thus, amounted to a professional relationship.<sup>160</sup> And given the exercise of judgment based on the client's individual circumstances, regulation of the profession cannot be said to violate the First Amendment.<sup>161</sup>

Similar to *Bowman* and *Moore-King*, the physicians in *Stuart* performing abortions spoke in a way that provided individualized medical advice to their patients. And such advice falls precisely within the confines of the professional speech doctrine. Indeed, if the Fourth Circuit is willing to hold that accountants and fortune tellers cannot escape legitimate state legislation by claiming such regulations infringe on the First Amendment Protections, it must be true that a medical professional cannot use the First Amendment as a shield from reasonable state regulation. In fact, the individualized medical advice given to patients within the confines of the physician-patient relationship is quite literally a matter of life and death.

But the *Stuart* court simply glosses over both *Bowman* and *Moore-King*,<sup>162</sup> a perplexing conclusion given that the physician provides

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due to the government's legitimate interest in the regulation of the medical profession. *Stuart*, 774 F.3d at 251.

158. "The key to distinguishing between occupational regulation and abridgement of First Amendment liberties is finding a personal nexus between professional and client." *Bowman*, 860 F.2d at 604 (quoting *Lowe v. S.E.C.*, 472 U.S. 181, 232 (1982) (White, J., concurring)).

159. *Id.* at 604 (quoting *Lowe*, 472 U.S. at 232).

160. "Moore-King's activities fit comfortably within the confines of professional speech analysis. As Moore-King describes and as we have recounted, her psychic activities and spiritual counseling generally involve a personalized reading for a paying client. And as the record makes clear, Moore-King 'takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances.'" *Moore-King*, 708 F.3d at 569 (citing *Bowman*, 860 F.2d at 604).

161. *Id.*

162. The only mention to professional speech is in one sentence: "The government's regulatory interest is less potent in the context of a self-regulating profession like medicine." *Stuart v. Camnitz*, 774 F.3d 238, 248 (4th Cir. 2014) (citing *Moore-King v. Cty. of Chesterfield*, 708 F.3d 560, 570 (4th Cir. 2013)). But the court's

specific and individualized guidance to the patient.<sup>163</sup> Requiring a physician to deliver truthful, non-misleading information, including the display of an ultrasound, is simply an example of a professional—the physician—purporting to provide a service to his or her client—the patient—and does not run afoul of the First Amendment. Instead, such speech is directly within the confines of the professional speech doctrine because, as one commentator stated, “when a physician speaks to a patient in the course of medical treatment, his opinions are normally regulated on the theory that they are inseparable from the practice of medicine.”<sup>164</sup> And consequently, the regulation curtail professional speech must only be rationally related to a legitimate government interest.<sup>165</sup>

In failing to apply the professional speech doctrine, and thus limiting physician First Amendment protection to medical professionals performing abortions, the Fourth Circuit inappropriately applies robust First Amendment protections in these instances. Based on this erroneous application of the professional speech doctrine, the Fourth Circuit not only mistakenly concludes the Requirement imposes unacceptable burdens on physician free speech, the court also departs from *Casey*’s claim that regulating physician speech is allowable so long as the regulations are reasonable.<sup>166</sup>

### C. The Information Required Is Spoken in the Physician’s Professional Context and Is Not Ideological Speech

Despite the Fourth Circuit’s disregard of its own professional speech doctrine, the *Stuart* court also departed from Supreme Court precedent in *Lowe* and *Casey*.<sup>167</sup> Justice White’s concurrence in *Lowe*

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citation of *Moore-King* is misguided. Instead, *Moore-King* simply identifies there are many regulatory requirements before one can publicly practice a profession. See *Moore-King*, 708 F.3d at 570 (“Indeed, although the steps may differ, the basic paradigm of regulatory requirements before one can publicly practice a profession also applies to law, medicine, taxi-driving, counseling, and many other occupations.”). Moreover, the court fails to distinguish *Moore-King* from *Bowman*—a case involving public accountants, another self-regulating profession. See *Bowman*, 680 F.2d at 604.

163. See *Lowe*, 472 U.S. at 231 (White, J., concurring); see also Gaylord, *supra* note 73, at 969 (emphasizing when a physician is speaking to a patient in his or her professional capacity, the First Amendment protections are at a minimum).

164. Post, *supra* note 47, at 949.

165. Under the professional speech doctrine, the government can license and regulate those who would provide services to their clients for compensation without running afoul of the First Amendment. See *Bowman*, 860 F.2d at 604 (holding the regulation of accountants was constitutional because it was rationally related to the government’s regulation of the profession); see also *Moore-King*, 708 F.3d at 573 (4th Cir. 2013) (“we cannot say the County’s regulatory scheme lacks any rational relationship to a legitimate governmental interest”).

166. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992).

167. *Stuart v. Camnitz*, 774 F.3d 238, 247 (4th Cir. 2014).

emphasized the regulation of professional speech must only have a rational connection to the state's legitimate interest in the profession.<sup>168</sup> In *Casey*, the Supreme Court recognized the state's interest in requiring the woman's decision to have an abortion is informed—so long as it does not unduly burden her constitutional right to choose to have an abortion.<sup>169</sup> When taken together, the two cases establish physicians are subject to limited First Amendment protection when acting within their professional capacity. Because the government has a legitimate interest in the facilitation of medically necessary information and the health and well-being of both mother and fetus, the professional speech doctrine must apply to physicians.

The basis for the Fourth Circuit's departure from Supreme Court precedent is that the Requirement compels ideological speech and, as such, demands the application of strict scrutiny—irrespective of diminished First Amendment protections.<sup>170</sup> In reaching this conclusion, the *Stuart* court emphasized a physician typically must determine, based on his or her own medical judgment, what information equates to sufficient information a reasonable physician would convey and what an individual patient would subjectively wish to know given the patient's needs and treatment circumstances—not what the state requires.<sup>171</sup> The *Stuart* court declared requiring physicians to perform ultrasounds and give a medical explanation of the fetus “to a woman who has through ear and eye covering rendered herself temporarily deaf and blind” is beyond the bounds of what any reasonable physician or patient would expect.<sup>172</sup> In fact, the court

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168. *See supra* section II.A.

169. The author derives this information from the Supreme Court's decision in *Casey*:

Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed. Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself. “[T]he Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth.”

*Casey*, 505 U.S. at 872 (quoting *Poelker v. Doe*, 432 U.S. 519, 531 (1977)).

170. The abortion debate hinges on the dispute between whether the fetus is or is not a human being. Lauren R. Robbins, Comment, *Open Your Mouth and Say 'Ideology': Physicians and the First Amendment*, 12 U. PA. J. CONST. L. 155, 192 (2009). The argument for the viewpoint that requiring a physician to show a sonogram of the fetus while simultaneously describing characteristics of the fetus is an example of the State using a physician as a medium to its own viewpoint that the fetus is in fact a human being. *Id.* at 193.

171. *Stuart*, 774 F.3d at 252.

172. *Id.*

goes as far as to say providing said information to the patient commandeers the doctor–patient relationship as a mouthpiece for the State’s preference for childbirth over abortion and is thus, compelled, ideological speech.<sup>173</sup> Exactly how the court came to this conclusion, however, is disconcerting.

Ideological speech is defined as speech that conveys a point of view.<sup>174</sup> To establish the speech is not ideological, one needs to look no further than the language of the statute itself.<sup>175</sup> The Requirement demands the physician to do—show the sonogram—and say—provide relevant information to the image being shown.<sup>176</sup> There is no language in the statute demanding that the physician declare the State would prefer she carry her baby to term. There is also an absence of language prohibiting the doctor from expressing his or her own personal opinion on the topic of abortion. To the contrary, the statute simply informs the patient of medical information relevant to the procedure to be undergone. There is no expression of the State’s particular view on abortion.

Critics who insist that this legislation imparts the State’s ideological preference for childbirth over abortion reach such a conclusion by emphasizing the fact that the statute specifically calls the fetus an unborn child.<sup>177</sup> Yet, these critics fail to address that the statutes do not dictate the physician must refer to the fetus as an unborn child.

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173. *Id.* at 254; *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (defining ideological speech as speech that communicates the state’s point of view on a particular topic).

174. *Robbins*, *supra* note 170, at 193; *see also Wooley*, 430 U.S. at 717 (describing ideological speech as speech that communicates a point of view).

175. *See* N.C. GEN. STAT. § 90-21.85(a)(2)–(3) (2011).

176. The North Carolina statute provides in relevant part:

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

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

*Id.* § 90-21.85(a)(2)–(3).

177. In referring to the fetus as an unborn child, the State declared life begins at conception and thus, any statutes regulating what a physician must say with respect to that unborn child compels ideological speech. *See Robbins*, *supra* note 170, at 182; *Keighley*, *supra* note 42, at 2389 (“When the government seeks to commandeer physicians into spreading the message that the fetus is a “child” that should be carried to term, the government is no longer seeking to compel doctors to engage in speech that ensures informed medical decision-making and is instead, compelling doctors to speak the State’s ideological anti-abortion message.”); *see also Acuna v. Turkish*, 930 A.2d 416, 425–26 (N.J. 2007) (emphasizing there is no medical consensus to support the plaintiff’s position that a six- to eight-week-old embryo is a human being).

Instead, such legislation mandates the description of the presence, location, and dimensions of the unborn child.<sup>178</sup> At eight weeks the fetus is approximately one inch long, the fetus has fingers and toes, the heartbeat is likely steady, and the eyes, ears, and internal organs are beginning to form.<sup>179</sup> These dimensions are the same regardless of whether the statute refers to a fetus as a “fetus” or as an “unborn child.”

In fact, whether the State refers to the being inside the woman as a life, a child, or a fetus, the physician must still provide the patient with adequate information to make an informed decision—including information that may be difficult to hear.<sup>180</sup> A woman’s decision-making ability is not compromised simply because she is fully informed as to what the procedure entails.<sup>181</sup> Yet, the *Stuart* court emphasizes the immorality and unconstitutional nature of subjecting a patient to information she does not want to hear.<sup>182</sup> But the emotional nature of an abortion is precisely the reason the State must ensure the decision is well-informed. As the Court noted in *Gonzalez*:

[i]n a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails. From one standpoint this ought not to be surprising. Any number of patients facing imminent surgical procedures would prefer not to hear all details, lest the usual anxiety preceding invasive medical procedures become the more intense. This is likely the case with the abortion procedures here in issue. It is, however, precisely this lack of information. . . .that is of legitimate concern to the State. The State has an interest in ensuring so grave a choice is well informed.

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178. N.C. GEN. STAT. § 90-21.85(a)(2)–(3) (2011).

179. See *Fetal Development*, SUTTER HEALTH CPMC, [http://www.cpmc.org/services/pregnancy/information/fetal\\_development.html](http://www.cpmc.org/services/pregnancy/information/fetal_development.html) [https://perma.unl.edu/G4FX-9G4Y].

180. Undoubtedly, if a woman is choosing to terminate the being inside her, it might be difficult to hear the heartbeat the woman is choosing to stop. Natalie P. Mota et al., *Associations Between Abortion, Mental Disorders, and Suicidal Behaviour in a Nationally Representative Sample*, 4 CANADIAN J. PSYCHIATRY 55, 239–46 (2010). Yet, the physiological implications of failing to hear the heartbeat and realizing later the being inside the woman, which she just terminated, in fact, had a heartbeat—outweigh the temporary feeling of guilt or embarrassment a woman is subject to while hearing the heartbeat of the “thing” inside her. *Id.* at 240.

181. Pro-choice activists argue women are already informed and it is not the obligation of the state to impart wisdom upon them—yet these activists fail to consider that it is generally poor policy to convey truth differently based on the assumption the audience already knows said information. See Ryan J.F. Pulkrabek, Comment, *Clear Depictions Promote Clear Decisions: Drafting Abortion Speech-and-Display Statutes That Pass First and Fourteenth Amendment Muster*, 15 MARQ. ELDER’S ADVISOR 1, 32 (2013); Mike Adams, *A Reply to Kristan Hawkins*, TOWNHALL (Sept. 25, 2015), <https://townhall.com/columnists/mikeadams/2015/09/25/a-reply-to-kristan-hawkins-n2056504> [https://perma.unl.edu/AUK7-B9KR].

182. *Stuart v. Camnitz*, 774 F.3d 238, 256 (4th Cir. 2014).



Indeed, it does not require any stretch of the imagination to visualize a scenario where a patient may not want to hear the information the doctor must deliver—yet, the physician must relay that information irrespective of the patient’s individual desires.<sup>183</sup> For example, undoubtedly it is emotionally traumatizing to disclose to a patient that he or she has tested positive for the human immunodeficiency virus (HIV)—the human body cannot rid itself of the virus, and for the rest of the patient’s life he or she will be subject to an intense HIV regimen with the hope the virus does not evolve into Acquired Immunodeficiency Syndrome (AIDS).<sup>184</sup> Yet, the sanctity of the patient–doctor communication and simultaneously the origins of traditional informed consent legislation stem from the state’s interest in facilitating such discussions so the patient possesses adequate information to make an informed decision going forward.<sup>185</sup> Here, that’s precisely what the sonogram is intended to do.<sup>186</sup>

Moreover, in some instances knowing the stage and development of a fetus may ultimately reassure women that she made the right decision. For example, if the abortion occurs at the early stages of pregnancy, a woman may feel less guilt because they will not feel as though they killed a child.<sup>187</sup> While in other cases, consciously knowing about the advanced development of the fetus may create negative

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183. Doctors are required to impart scientific and experimental information about disease and the benefits and risks of available treatments regardless of how traumatizing it is for the patient to become aware that they have been diagnosed with said disease. See Berg, *supra* note 137, at 235.

184. *What is HIV/AIDS?*, AIDS.GOV (Oct. 3, 2015, 9:15 PM), <https://www.aids.gov/hiv-aids-basics/hiv-aids-101/what-is-hiv-aids/> [<https://perma.unl.edu/Z3Q9-WAY8>]; see also MICHAEL CALLEN, *SURVIVING AIDS* 45 (1990) (discussing a study concluding that survivors tend to have “extraordinary relationships” with their health care provider).

185. See Berg, *supra* note 137, at 235.

186. The sonogram is intended to inform the patient of the status of the fetus inside her. And such a disclosure is promulgated only to insure the patient possesses adequate information to make an informed decision about terminating the pregnancy.

187. As one South African study found, women reflecting upon their abortion may desire more information. See Ursula R. McCulloch, *Women’s Experiences of Abortion in South Africa: An Exploratory Study* (February 1996) [https://open.uct.ac.za/bitstream/item/14524/thesis\\_hum\\_1996\\_mcculloch\\_ur.pdf?sequence=1](https://open.uct.ac.za/bitstream/item/14524/thesis_hum_1996_mcculloch_ur.pdf?sequence=1) [<https://perma.unl.edu/6RDC-FKPR>].

One participant, Susan, would have liked to see a picture of what the fetus looks like. Susan emphasized:

That’s what pisses me off about abortion posters is that I know that the pictures that they [pro-life activists] show are of babies at sort of five months and that’s not what you abort. You don’t abort after three months. You don’t, that’s murder. I’m not pro-choice down the line. I have my own parameters. It really pisses me off when they show pictures of babies. You don’t kill babies, I know that. It’s before the brain and the heart and everything’s connected.

Another participant, Beki, stated:

feelings regarding the abortion or even change the woman's mind, this information is still imperative for the decision-making process.<sup>188</sup> Although a sonogram is more visual than original speech requirements upheld in *Casey* and may subject a woman to momentary feelings of guilt or embarrassment if the pregnancy is in the second or third trimester, the risks of regretting an abortion without imparting facts the woman had not yet thought about does not connote the state's coercion of its own preference for childbirth on the woman.<sup>189</sup> Instead, the sonogram further exemplifies the legitimate state interest in advancing the psychological health of the mother by ensuring she is equipped with all relevant information to make a decision of fundamental importance.

**D. North Carolina's Ultrasound Provision Truthful, Non-Misleading, Non-Ideological, and Medically Necessary Information and Must be Upheld**

Because the First Amendment does not provide additional constitutional protections for informed consent regulation, the regulation must only survive rational-basis review. That is, so long as the government regulation is reasonable in its advancement of a governmental interest, the legislation is constitutional.<sup>190</sup> According to Supreme Court precedent, it is inarguable that the state has a legitimate interest in both the health of the mother and the life of the fetus inside her.<sup>191</sup> Thus, so long as the regulation provides truthful, non-misleading, non-ideological, and medically necessary information under *Casey* and does not create an undue burden on the woman's right to an abortion, the statute is subject only to a rational-basis standard of review—a low bar it is likely to survive.<sup>192</sup> To establish that the North Carolina statute is constitutional because it requires only truthful, non-misleading information to be shared with the patient, we must

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You must know how big the fetus will be and what developments it would have had. That is very important . . . I realized that I had an abortion on my seventh week, never mind that the fetus already had the heart. It wasn't something that you could see like a child. Some people are scared to see that it has grown so much and they feel guilty afterwards that they have killed a full person.

188. *Id.* at 51–57.

189. Some women regret and suffer because of their abortions, and studies suggest that women who have undergone abortions carry a significantly higher risk of future psychiatric problems, substance abuse, and suicide. See CHRISTOPHER KACZOR, *THE ETHICS OF ABORTION: WOMEN'S RIGHTS, HUMAN LIFE, AND THE QUESTION OF JUSTICE* 173–75 (2011).

190. See CHEMERINSKY, *supra* note 27, at 706.

191. See *supra* section II.A; *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992); *Gonzales v. Carhart*, 550 U.S. 124, 133 (2007).

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

look no further than the Fourth Circuit's own admission that the information conveyed by the Requirement is strictly factual.<sup>193</sup>

Moreover, the *Casey* plurality placed considerable emphasis on the inference that the regulation must not have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion or impose an undue burden on the right to have an abortion.<sup>194</sup> In essence, this imposes an additional requirement that the regulation not only be truthful, non-misleading, and non-ideological, but must also be medically necessary.<sup>195</sup> Pre-abortion sonograms provide a patient with information pivotal in her autonomous decision process.<sup>196</sup>

As articulated by *Casey*, it is entirely proper for legislation to require a physician to inform a patient seeking an abortion of the "nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus," as long as the information required is "truthful and non-misleading."<sup>197</sup> It is not unreasonable to assume a woman considering an abortion would consider the impact of the decision on the fetus within her.<sup>198</sup> For the woman to properly be equipped with the necessary information to make this monumental decision, it is not only medically necessary, but likely dispositive she receive information regarding the fetus.<sup>199</sup>

Further, it is generally accepted in the medical community that having an abortion may put women at risk for not only physical side effects but also emotional side effects.<sup>200</sup> The psychological side effects of an abortion may only be exacerbated when the woman comes

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193. See *supra* section II.A; *Stuart v. Camnitz*, 774 F.3d 238, 255 (4th Cir. 2014).

194. *Casey*, 505 U.S. at 879.

195. Pulkrabek, *supra* note 181, at 45.

196. See *McCulloch*, *supra* note 187; see also *Tex. Med. Providers Performing Abortion Servs. v. Lakey* 667 F.3d 570, 579 (5th Cir. 2012) ("The point of informed consent laws is to allow the patient to evaluate her condition and render her best decision under difficult circumstances. Denying her [a woman] up to date medical information is more of an abuse to her ability to decide than providing the information.").

197. *Casey*, 505 U.S. at 882; see also Pulkrabek, *supra* note 181, at 46 (explaining statutes which require truthful and non-misleading information survive a rational-basis review as well as intermediate scrutiny).

198. David C. Reardon, THE AFTER EFFECTS OF ABORTION, <http://www.abortionfacts.com/reardon/the-after-effects-of-abortion> [<https://perma.unl.edu/NSN5-UXEY>].

199. "Nor can it be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision. In attempting to ensure that a woman apprehends the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed." *Casey*, 505 U.S. at 882. Finally, the possibility that such information "might cause the woman to choose childbirth over abortion" does not render the provisions unconstitutional." *Id.*

200. *Id.* Significant risks associated with abortions hemorrhaging, uterine perforation, infection, infertility, subsequent ectopic pregnancy, premature delivery, and death. *Id.*

to regret having the abortion. At least one study has suggested that women having abortions may be at a greater risk of suicide, mood disorders, social anxiety disorders, and substance abuse.<sup>201</sup> Choosing to have an abortion prior to knowing the fetus has a heartbeat, without knowing how many fingers or toes the fetus has formed, or seeing a visual of the being inside her before choosing an abortion, only compounds the likelihood the woman will suffer from psychological improprieties. Prior to the abortion, arguably the state not only has the ability to convey medically necessary information, but perhaps even the obligation to ensure the decision is thoughtful and informed.

Under the *Casey* analysis described above, the North Carolina statute at issue in *Stuart* must be found constitutional. The Requirement compels factual, non-misleading, non-ideological, medically necessary information that rationally relates to the State's interest in the protection of the woman and the life of the fetus.<sup>202</sup> Simply because the information could dissuade a woman from having an abortion does not imply the Requirement imposes the State's ideological preference for childbirth or an undue burden on a woman's ability to choose to have an abortion.<sup>203</sup>

## V. CONCLUSION

The decision in *Stuart*—albeit incorrectly decided—highlights the non-conformity in the interpretation of abortion informed consent statutes that implement speech and display requirements. The discrepancies between the Fourth, Fifth, and Eighth Circuits highlight the need for the Supreme Court to provide a coherent standard of review applicable to speech within the medical profession while subsequently balancing the legitimate State interest in the regulation of the medical profession. The Court's failure in defining the precise bounds of professional speech allowed the circuits to create paradoxical decisions and conflicting law.

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201. Mota et al., *supra* note 180, at 239–46 (finding approximately six percent of suicidal ideation cases among women nationwide and twenty-five percent of cases of drug use could be related to abortion); Priscilla K. Coleman, Catherine T. Coyle, Martha Shuping & Vincent M. Rue, *Induced Abortion and Anxiety, Mood, and Substance Abuse Disorders: Isolating the Effects of Abortion in the National Comorbidity Survey*, 43 J. PSYCHIATRIC RES. 770, 775 (2009) (finding abortion was related to an increased risk for substance abuse disorders after statistical controls were instituted); Priscilla K. Coleman, David C. Reardon, Vincent M. Rue & Jesse Cogle, *History of Induced Abortion in Relation to Substance Use During Subsequent Pregnancies Carried to Term*, 187 AM. J. OBSTETRICS & GYNECOLOGY 1673, 1674–75, 1677 (2002) (finding women who aborted were significantly more likely to use marijuana, various illicit drugs, and alcohol during their next pregnancy compared with women who had previously given birth).

202. See *supra* sections II.D–E.

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

While the Supreme Court denied certiorari in *Stuart*, it is feasible to remain optimistic that the Supreme Court will seize the next opportunity to eradicate this confusion surrounding informed consent legislation. By declaring professional speech spoken in the professional's capacity—such as when a physician is communicating truthful, non-misleading, and medically necessary information to a patient while simultaneously displaying an ultrasound—to be the subject of reasonable state regulation, the confusion among courts would be eliminated. In refusing to uphold the mandatory ultrasound provision, the *Stuart* court has not only failed women, but also forsaken the fetuses inside the women—those absolutely incapable of protecting themselves.