No. 14-1150

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

v.

PAUL S. CAMNITZ, MD, in his official capacity as President of the North Carolina Medical Board and his employees, agents and successors; ROY COOPER, in his official capacity as Attorney General of North Carolina and his employees, agents and successors; ALDONA ZOFIA WOS, in her official capacity as secretary of the North Carolina Department of Health and Human Services and her employees, agents and successors; JIM WOODALL, in his official capacity as District Attorney for Prosecutorial District 15B and his employees, agents and successors; LEON STANBACK, in his official capacity as District Attorney for Prosecutorial District 14 and his employees, agents and successors; DOUGLAS HENDERSON, in his official capacity as District Attorney for Prosecutorial District 18 and his employees, agents and successors; BILLY WEST, in his official capacity as District Attorney for Prosecutorial District 12 and his employees, agents and successors; C. COLON WILLOUGHBY, JR., in his official capacity as District Attorney for Prosecutorial District 10 and his employees, agents and successors; BENJAMIN R. DAVID, in his official capacity as District Attorney for Prosecutorial District 5 and his employees, agents and successors; ERNIE LEE, in his official capacity as District Attorney for Prosecutorial District 4 and his employees, agents and successors; JIM O'NEILL, in his official capacity as District Attorney for Prosecutorial District 21 and his employees, agents and successors, **Defendants-Appellants.**

On Appeal from the Middle District of North Carolina
(No. 11-00804, Hon. Catherine E. Eagles)

AMICUS CURIAE BRIEF OF LAW PROFESSORS IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL OF THE LOWER COURT

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CORPORATE DISCLOSURE STATEMENT

According to Fed. R. App. P. 26 and L.R. 26(b), *amici* are not required to submit a disclosure because they are not corporations.

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Dated May 8, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTE

ADDITIONAL RESOURCE

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici curiae are law professors or professors of legal studies who teach and/or write about constitutional issues and Supreme Court jurisprudence, particularly in the areas of the First and Fourteenth Amendments. *Amici* listed below have an interest in ensuring that the Supreme Court's decision in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), in which a plurality of the Supreme Court *rejected* the application of the strict scrutiny standard to abortion laws, is interpreted and applied appropriately in the federal courts.

To that end, *Amici* provide an overview of *Casey* and other federal court decisions demonstrating that, in the context of abortion, a physician's First Amendment claim that an abortion regulation violates his or her right not to speak must be evaluated under the Supreme Court's "undue burden" standard; failing to do so would thwart the balance struck in *Casey* between a woman's "right" to abortion and the state's interests in protecting maternal and fetal health. In light of the clear holdings in *Casey* and its progeny, *Amici* argue that the district court must be reversed.

Amici[2] are:

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[1] *Amici* have authority to file this brief under Fed. R. App. P. 29 because all parties have consented/do not object to its filing. A party's counsel has not authored the brief in whole or in part, nor contributed money that was intended to fund the preparation or submission of the brief. No person outside of *Amici* or their Counsel has contributed money intended to fund preparation of the brief.

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ARGUMENT

The current governing precedent in abortion jurisprudence—both in regard to a woman's right to an abortion and to a physician's First Amendment rights in abortion practice—is found in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). However, the district court's decision in this case runs contrary to the guidance given by the Court in that case, particularly in regard to informed consent before an abortion.

Indeed, a plurality of the Supreme Court rejected the strict scrutiny standard in *Casey*—both as applied to a woman's Fourteenth Amendment "right" to abortion and to a physician's First Amendment rights in abortion practice. Instead, the Court employed an undue burden analysis to determine that informed consent statutes requiring the provision of truthful, non-misleading information are not a substantial obstacle and must be upheld—even in the face of First Amendment "compelled speech" claims. This standard prevents the misuse by abortion providers of the First Amendment as a "trump card" to avoid Fourteenth Amendment undue burden analysis by seeking invalidation of laws through a "back-door," strict scrutiny approach. *See* Part I, *infra*.

This interpretation of *Casey's* First Amendment analysis is echoed by other federal courts considering "compelled speech" claims in the abortion context. *See* Part II, *infra*.

Yet in evaluating N.C. GEN. STAT. § 90-21.85, North Carolina's ultrasound provision, the district court ignored the clear precedent in *Casey* and improperly utilized a strict scrutiny standard, erroneously invalidating requirements that an ultrasound image be displayed and a medical explanation of the image be given. The district court's decision thereby denies North Carolina women medically accurate information that is relevant to truly informed and voluntary abortion decisions. When an undue burden analysis is utilized, it is clear that the North Carolina ultrasound provision should have been upheld, and the district court must be reversed. *See* Part III, *infra*.

I. IN *PLANNED PARENTHOOD V. CASEY*, THE SUPREME COURT REJECTED THE STRICT SCRUTINY APPROACH UTILIZED BY THE DISTRICT COURT

Planned Parenthood v. Casey makes clear that if mandated informed consent information is reasonable (*i.e.*, truthful and non-misleading), and therefore imposes no substantial obstacle to the woman's "right" to abortion, then such mandated information does not infringe on a physician's First Amendment right not to speak.

A. The Court rejected strict scrutiny in the context of a woman's Fourteenth Amendment "right" to abortion

In *Planned Parenthood v. Casey*, the Supreme Court examined a Pennsylvania abortion regulation with several components. Of particular import here is a provision requiring that a woman seeking an abortion give her informed consent prior to the procedure and specifying that she be provided, 24 hours before the abortion, with information on the nature of the procedure, the health risks of the abortion and childbirth, and the "probable gestational age of the unborn child." *Casey*, 505 U.S. at 844, 881. Further, she must be informed that printed materials are available describing the unborn child and providing information about medical assistance for childbirth, child support from the father, and agencies which provide adoption or other services. *Id*. at 881.

Before examining the specific requirements of Pennsylvania's informed consent provision, the Court in *Casey* reexamined its holding in *Roe v. Wade* and provided guidance to lower courts in determining the constitutionality of abortion regulations. It began by reaffirming *Roe's* "essential" holdings that a woman has a "right" to "choose to have an abortion" (before viability) without "undue interference from the State," and that the state has a legitimate interest from the outset of pregnancy in protecting the health of the woman and the life of the unborn child. *Id*. at 846.

The Court elaborated on these "essential" holdings by explaining that the woman's "right" is not so unlimited that it is absolute. *Id*. at 869.[3] In fact, the Court termed it an "overstatement" to describe it as a "right to decide whether to have an abortion 'without interference from the State.'" *Id*. at 875.[4] The state is not prohibited from taking steps to ensure that a woman's choice is thoughtful and informed. *Id*. at 872. From the outset of pregnancy, a state can show concern for maternal health and the life of the unborn child and act to further those interests in protecting life. *Id*. at 853, 869. Indeed, "*Roe v. Wade* was express in its recognition of the State's 'important and legitimate interests in preserving and protecting the health of the pregnant woman [and] in protecting the potentiality of human life.'" *Id*. at 875-76 (quoting *Roe*., 410 U.S. at 162).

The Court noted, however, that the *Roe* decision's affirmation of the states' "important and legitimate interest" in the life of the unborn child had been given "too little acknowledgement and implementation" in subsequent decisions. *Id*. at 871. Some of those subsequent decisions erroneously concluded that any regulation touching upon abortion must survive strict scrutiny. *Id*.

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[3] *See also Casey*, 505 U.S. at 873 ("… not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right.").

[4] The Court later explained that *Roe* protects the "right to decide to terminate a pregnancy free of *undue* interference by the State." *Id*. at 887 (emphasis added). *See also id*. at 875 ("Not all government intrusion is of necessity unwarranted.").

This use of strict scrutiny led to "the striking down of some abortion regulations which in no real sense deprived women of the ultimate decision" and went "too far." *Id*. at 875. The Court concluded that treating all governmental attempts to influence a woman's decision as unwarranted is "incompatible with the recognition that there is a substantial state interest" in the life of the unborn child (as well as in maternal health) throughout pregnancy. *Id*. at 876.[5]

After explicitly rejecting strict scrutiny, the plurality in *Casey* articulated the "undue burden" standard, the standard that the Court would now use in evaluating abortion regulations: only where state regulation imposes an *undue burden* on a woman's ability to choose abortion does the state overreach. *Id*. at 874. The Court elaborated:

> A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.

Id. at 877.[6] "A particular burden is not of necessity a substantial obstacle." *Id*. at 887.

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[5] *See id*. at 876 ("…not all regulations must be deemed unwarranted. Not all burdens on the right to decide whether to terminate a pregnancy will be undue."); *see also id*. at 874 (quoting *Maher v. Roe*, 432 U.S. 464, 473-74 (1977) ("*Roe* did not declare an unqualified 'constitutional right to an abortion,' as the District Court seemed to think. Rather, the right protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy.").

Given that the "undue burden" standard established a new framework for evaluating abortion regulations, the plurality in *Casey* provided some "guiding principles" to help direct the federal courts as to what constitutes a "substantial obstacle":

a) What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so.

b) Regulations which do no more than create a structural mechanism by which the State … may 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.

c) Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal.

d) Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.

Id. at 877-78.

Further underscoring its determination that the use of strict scrutiny is improper and that states may enact abortion regulations aimed at protecting the life of the mother or unborn child, the Court gave yet another "summary" of its undue burden standard:

a) To protect the central right recognized by *Roe v. Wade* while at the same time accommodating the State's profound interest in potential life, we will employ the undue burden analysis…. An undue burden exists… if its purpose or effect is to place a

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[6] The Court reiterated this explanation in *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007).

substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.

b) We reject the rigid trimester [*i.e.*, strict scrutiny] framework of *Roe. v. Wade*…. [T]hroughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.

c) As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion.

Id. at 878.[7]

The Court was clear: strict scrutiny is rejected; the undue burden standard is appropriate for the review of abortion regulations; and regulations which serve a rational purpose and do not place a substantial obstacle in the way of a woman's decision are constitutional.

With this standard in mind, the Court concluded that Pennsylvania's informed consent statute—requiring women to receive information not only about maternal health risks but also on the development of (and, in effect, the consequences to) the unborn child—"cannot be considered a substantial obstacle to obtaining an abortion, and, it follows, there is no undue burden." *Id*. at 882, 883.[8]

[7] The Court also summarized its position on abortion prohibitions in two additional points; however, those points are not applicable here. *See Casey*, 505 U.S. at 879.

[8] *See also id*. at 882 ("In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing

More specifically, if the information required under an informed consent statute is truthful and not misleading, the requirement is permissible. *Id*. at 882.

Importantly, the Court emphasized that the truthful, non-misleading information required under a statute does not necessarily have to relate to the woman's health.[9] The Court held that measures aimed at ensuring that the woman's decision contemplates the consequences for the unborn child do not necessarily interfere with the abortion "right" recognized in *Roe*. *Id*. at 873. In fact, the Court said it cannot be doubted that most women considering abortion would deem the impact on the unborn child relevant, if not dispositive, to the decision. *Id*. at 882.[10]

"Even in the earliest stages of pregnancy," states are free to enact laws that provide a reasonable framework for a woman to make a decision. *Id*. at 872-73. In the context of an informed consent regulation, a regulation "must be calculated to inform the woman's free choice, not hinder it." *Id*. at 877. "In short," the Court

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the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.").

[9] "[A] State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest." *Id*. at 886.

[10] "We also see no reason why the State may not require doctors to inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health." *Id*. at 882.

concluded, "requiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion"—and it does not amount to an undue burden. *Id*. at 883.

Particularly relevant here is the Court's decision to overrule portions of earlier rulings that ran contrary to its decision in *Casey*.[11] The Court first turned to *Akron v. Akron Center for Reproductive Health* (*Akron I*), 462 U.S. 416 (1983). Immediately after explaining that *Akron I* involved claims that the litigated statute included "a rigid requirement that a specific body of information be given in all cases, irrespective of the particular needs of the patient," the Court stated:

> To the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires, as it does here, the ***giving of truthful, nonmisleading information*** about the ***nature of the procedure, the attendant health risks and those of childbirth, and the "probable gestational age" of the fetus***, those cases go too far, are inconsistent with *Roe's* acknowledgment of an important interest in potential life, and are overruled.

Casey, 505 U.S. at 882 (emphasis added). In sum, the Court acknowledged that *Akron I* involved an alleged "one-size-fits-all" informed consent requirement,

[11] "[W]e must overrule those parts of *Thornburgh* and *Akron I* which, in our view, are inconsistent with *Roe's* statement that the State has a legitimate interest in promoting the life or potential life of the unborn…" *Id*. at 870.

requiring specific information to be given in all circumstances, but it overruled *Akron I*'s invalidation of that requirement.

Turning to *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), the Court explained that the statute at issue in that case was alleged to require a "straightjacket" of information that was to be given to each woman by a physician. *Casey*, 505 U.S. at 883. Having already overruled this aspect of its decision in *Thornburgh*, the Court commented that "informed choice need not be defined in such narrow terms that all considerations of the effect on the fetus are made irrelevant." *Id*. Further, as will be explained below, the Court held that the status of the physician-patient relationship is "derivative" of the woman's position (and rights). *Id*. at 884.

Summarizing its overruling of *Akron I* and *Thornburgh*, the Court stated:

> [W]e depart from the holdings of *Akron I* and *Thornburgh* to the extent that we permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion.

Id. at 883. Because informed consent requirements facilitate the "wise exercise" of the "right" to decide to terminate pregnancy, such requirements do not interfere with the right *Roe* protects and must survive an undue burden challenge. *Id*. at 887.

B. The Court rejected strict scrutiny in the context of physicians' First Amendment claims because they are derivative from, and thus no greater than, the woman's Fourteenth Amendment claims

Like the plaintiffs here, the plaintiffs in *Casey* asserted a "First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State." *Casey*, 505 U.S. at 884. Having determined that "a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure," *id*. at 884, the Court disposed of the plaintiffs' First Amendment claims in three sentences.[12]

The Court's intent is clear in its discussion of *Wooley v. Maynard*, 430 U.S. 705 (1977), and *Whalen v. Roe*, 429 U.S. 589 (1977). The *Casey* plurality begins by citing *Wooley* and explaining, "To be sure, the physicians' First Amendment rights not to speak are implicated…" *Casey*, 505 U.S. at 884. However, that phrase is immediately followed by qualifying phrases: "but only" and "subject to."

[12] "All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, see *Wooley v. Maynard*, 430 U.S. 705, 51 L. Ed. 2d 752, 97 S. Ct. 1428 (1977), but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, cf. *Whalen v. Roe*, 429 U.S. 589, 603, 51 L. Ed. 2d 64, 97 S. Ct. 869 (1977). We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here." *Casey*, 505 U.S. at 884.

Id. The physicians' First Amendment rights to speak are implicated, "***but only*** as part of the practice of medicine, ***subject to*** reasonable licensing and regulation." *Id*. (citing *Whalen*, 429 U.S. at 603) (emphasis added). The Court determined, using the undue burden standard, that Pennsylvania's informed consent requirement was reasonable, then it specifically found "no [First Amendment] constitutional infirmity" in the requirement. *Id*.

To be sure, the Court cited *Wooley* to confirm that First Amendment rights are implicated, but it concluded that, under *Whalen* and in the abortion context, the government can require physicians to convey truthful, non-misleading information to ensure that a woman's decision is informed and voluntary. Immediately before evaluating the plaintiffs First Amendment claims in *Casey*, the Court stated:

> Whatever constitutional status the doctor-patient relation may have as a general matter, in the present context it is derivative of the woman's position. The doctor-patient relation does not underlie or override the two more general rights under which the abortion right is justified: the right to make family decisions and the right to physical autonomy. On its own, the doctor-patient relation here is entitled to the same solicitude it receives in other contexts.

Id. at 884. The Court's analysis of the plaintiffs' First Amendment claims was concise because it was a straightforward application of *Whalen's* rational basis analysis in the context of abortion. Like *Casey*, *Whalen* stated that physicians'

claims are derivative from, and thus no greater than, patient claims. *See Whalen*, 429 U.S. at 604.[13]

The Court's subsequent declaration in *Gonzales v. Carhart* that states have a significant role to play in regulating the medical profession underscores the Court's holdings that the State, as a licensing and regulating authority, plays a part in physician speech and actions. Indeed, the "government may use its voice and its regulatory authority to show its profound respect for the life within the woman." *See Gonzales*, 550 U.S. at 157.[14] The Court explicitly stated that the "law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community." *Id*. at 163.[15]

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[13] For more on the interplay between *Wooley* and *Whalen* in the ultrasound context, *see* S.W. Gaylord & T.J. Molony, *Casey and a Woman's Right to Know: Ultrasounds, Informed Consent, and the First Amendment*, 45 CONN. L. REV. 595, 637-38 (2012).

[14] "Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn." *Gonzales*, 550 U.S. at 158.

[15] Although *Gonzales* dealt with a later-term partial-birth abortion prohibition, the role of informed consent in a woman's decision-making process played an integral role in that decision. Writing for the majority, Justice Kennedy noted that the state has "an interest in ensuring so grave a choice is well informed" and that "[t]he State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and

II. *CASEY'S* REJECTION OF STRICT SCRUTINY IS EMPHASIZED IN SUBSEQUENT FEDERAL COURT DECISIONS

Casey's rejection of the strict scrutiny standard in the abortion context—including when the First Amendment is implicated—is echoed by other federal courts.[16]

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society as a whole of the consequences that follow from a decision to elect a late-term abortion." *Id.* at 159, 160. Justice Kennedy further wrote:

> It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming human form.

Id. at 159-60. Given Justice Kennedy's attention to the specific, gruesome details of the partial-birth abortion procedure, *see also id*. at 137-40, it is not a stretch to conclude that, had the federal partial-birth abortion prohibition also included an informed consent element requiring that the nature of the procedure be described to the woman, the Court would have upheld it. With that understood, it becomes all the more apparent that truthful, non-misleading medical information required in an ultrasound provision is constitutional and must be upheld against Fourteenth or First Amendment challenges.

[16] Courts have considered ultrasound provisions in a few other instances as well, but none of the cases are applicable here. For example, in 2009 an abortion provider challenged in state court a North Dakota provision related to fetal heart tone monitoring. The case was dismissed after the state trial court interpreted the law to give women the option to see the image and hear the fetal heart tone. *See generally MKB Management Corp. v. Stenehjem* (N.D. E. Cent. Jud. Dist. 09-09-C-2839). Likewise, in 2010 a stipulation was entered in a federal district court in Louisiana clarifying that a woman is not compelled to get an ultrasound print under that state's law, and that a provision related to printed materials would not be enforceable until the Department of Health had the materials available. *See generally Hope Medical Group for Women v. Caldwell* (M.D. La. 10-00511).

A. Fifth Circuit in *Texas Medical Providers Performing Abortion Services v. Lakey*

In *Texas Medical Providers Performing Abortion Services v. Lakey*, 667 F.3d 570 (5th Cir. 2012), the Fifth Circuit Court of Appeals reviewed an ultrasound statute much like the one challenged here. In Texas, a physician must perform and display an ultrasound of the unborn child, make audible the heart auscultation of the unborn child for the woman to hear, and provide a medical explanation of the results. *Id*. at 573. As here, plaintiffs did not contend that the law inflicted an undue burden on the woman, but instead claimed that the required disclosures were the state's "ideological message" and violated the physicians' First Amendment right not to speak. *Id*. at 574, 577.

The Fifth Circuit noted that the Supreme Court upheld the Pennsylvania informed consent statue over "precisely the same 'compelled speech'" claims launched against the Texas ultrasound statute. *Id*. at 574.

The Fifth Circuit emphasized that the Supreme Court rejected the strict scrutiny approach employed by the district court in this case. In fact, the Fifth Circuit stated that the "three sentences with which the Court disposed of the First

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Finally, in 2012 the state supreme court in Oklahoma invalidated an ultrasound provision in that state. However, the plaintiffs in that case brought claims solely related to state constitutional law and did not specifically claim any federal First Amendment rights, and the court did not specify on what claims it invalidated the law. *See generally Nova Health Systems v. Pruitt* (Okla. No. 110,813), *cert. denied*, 571 U.S. ___ (Nov. 12, 2013).

Amendment claims are, if anything, the antithesis of strict scrutiny." *Id*. at 575.

The Fifth Circuit stated:

> The only reasonable reading of *Casey's* passage is that physicians' rights not to speak are, when 'part of the practice of medicine, subject to reasonable licensing and regulation by the State[.]' This applies to information that is 'truthful,' 'nonmisleading,' and 'relevant … to the decision' to undergo an abortion."

Id. (citing *Casey*, 505 U.S. at 882).

Having dispensed with any claims that strict scrutiny applied to the physicians' First Amendment claims, the Circuit turned to an evaluation of the ultrasound provisions under the undue burden standard. The Fifth Circuit noted that the import of *Casey* and *Gonzales* is clear, which it summarized as follows:

- First, informed consent laws that do not impose an undue burden on the woman's right to have an abortion are permissible if they require truthful, nonmisleading, and relevant disclosures.

- Second, such laws are part of the state's reasonable regulation of medical practice and do not fall under the rubric of compelling "ideological" speech that triggers First Amendment strict scrutiny.

- Third, "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."

- Finally, the possibility that such information "might cause the woman to choose childbirth over abortion" does not render the provisions unconstitutional.

Id. at 576.

The Circuit noted that its reading of *Casey* and *Gonzales* was fortified by the Eighth Circuit which, sitting *en banc*, construed *Casey* and *Gonzales* in the same way. *Id*. Upholding an informed consent provision against a compelled speech attack, the Eighth Circuit stated:

> [W]hile the State cannot compel an individual simply to speak the State's ideological message, it can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion, even if that information might also encourage the patient to choose childbirth over abortion.

Id. at 576-77 (citing *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 530 F.3d 724, 735 (2008)) (*Rounds I*). Under *Casey* and *Gonzales*, a state can regulate medical practice and decide that information about fetal development is "relevant" to a woman's decision-making. *Id*. at 578.

Evaluating the plaintiffs' challenge to Texas' ultrasound provisions under the proper undue burden framework, the Fifth Circuit concluded that the required ultrasound and heartbeat disclosures, along with the medical descriptions, are "the epitome of truthful, non-misleading information." *Id*. at 577-58. Such disclosures are not "ideological,"[17] but are in fact "the purest conceivable expression of 'factual information.'" *Id*. at 577 n.4.

[17] The Fifth Circuit explained that "ideological" speech conveys a "point of view" or relates to ideas or ideology. *Lakey*, 667 F.3d at 577 n.4. A photograph or medical description of an unborn child's features is not "ideological." *Id*.

Directly comparing the ultrasound disclosure and description required under the Texas statute to the Pennsylvania informed consent disclosures upheld in *Casey*—*i.e*., probable gestational age and printed material showing a baby's prenatal development—the Fifth Circuit concluded that the Texas disclosures were not different in kind from those in *Casey*, but were more graphic and scientifically up-to-date. *Id*. at 578.

In other words, the ultrasound disclosures required in Texas were, so to speak, *more* truthful and non-misleading than those upheld under *Casey*. Moreover, the Fifth Circuit concluded that denying a woman such up-to-date medical information is more of an abuse to her ability to decide whether or not to undergo an abortion than providing allegedly unwanted information would be. *Id*. at 579.

The Fifth Circuit found that requiring disclosures is sustainable under *Casey*, is within the state's power to regulate the practice of medicine, and, therefore, does not violate the First Amendment. *Id*. at 580.

B. Eighth Circuit in *Planned Parenthood v. Rounds*

As mentioned by the Fifth Circuit in *Lakey*, the Eighth Circuit also has rejected compelled speech arguments and upheld informed consent provisions under *Casey*'s undue burden analysis. In addition to *Rounds I*, mentioned in *Lakey*, which involved disclosures stating that abortion ends the life of a living

human being, the Eighth Circuit also reviewed, in another *en banc* decision, an informed consent provision requiring abortion providers to disclose to women seeking abortions an "increased risk of suicide ideation and suicide." *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 686 F.3d 889, 892 (2012) (*Rounds II*). As here, providers claimed that the provision violated the free speech rights of physicians. *Id*. at 893.

The Eighth Circuit again held that when government requires (as part of the informed consent process) the giving of truthful, non-misleading information about the nature of a procedure, the health risks involved, and other information broadly relevant to the abortion decision, it does not impose an undue burden. *Id*. Echoing *Casey*, the Circuit held that a physician's First Amendment right not to speak is implicated, but only as a part of the practice of medicine which is subject to reasonable licensing and regulation by the state. *Id*.

With respect to First Amendment concerns, the Eighth Circuit reiterated its conclusion from *Rounds I*:

> [W]hile the State cannot compel an individual simply to speak the State's ideological message, it can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion, even if that information might also encourage the patient to choose childbirth over abortion."

Id.[18] To succeed on its claims in *Rounds II*, the plaintiffs had to show that the suicide disclosure at issue was "either untruthful, misleading or not relevant to the patient's decision to have an abortion." *Id*. The plaintiffs could not do so, and the First Amendment challenge failed.

III. BASED ON *CASEY* AND ITS PROGENY, THE DISTRICT COURT MUST BE REVERSED

The ultrasound provision challenged here is identical in effect to the provision challenged in *Lakey*.[19] At least four hours before an abortion, a physician or qualified technician must perform an ultrasound, display the images, offer to make the heartbeat audible, and provide an explanation of the presence, location, and dimensions of the unborn child within the uterus (and the number of unborn children depicted) as well as a medical description of the dimensions of the embryo or fetus and the presence of external members and internal organs, if present and viewable. N.C. GEN. STAT. § 90-21.85.

As is clear from the plain text of the statute, the required information is medical in nature and includes no ideological or opinion-oriented claims from the

[18] Thus, two *en banc* decisions from the Eighth Circuit have affirmed a state's ability to require physicians to provide truthful, non-misleading information relevant to a woman's abortion decision.

[19] The Texas provision includes exceptions for a small group of women, but because the Court in *Lakey* concluded that the Texas provision would have been constitutional even without those exceptions, it can be concluded that the Texas and North Carolina provisions are identical in effect. *See Lakey*, 667 F.3d at 578.

state. In fact, the explanation is substantially similar to the information on the gestational age and development of the unborn child required under the Pennsylvania statute upheld in *Casey*. *See Casey*, 505 U.S. at 881.

However, rather than evaluating the provision under the undue burden standard, the district court essentially ignored *Casey* and instead applied the strict scrutiny standard. *See Stuart v. Loomis*, 2014 U.S. Dist. LEXIS 6194, *40 (M.D. N.C. Jan. 17, 2014) (stating that it is appropriate to evaluate the ultrasound provision with heightened scrutiny). As such, its entire analysis is flawed.

The district court discussed *Casey*, but it did so in an erroneous manner. For example, in concluding that *Casey* does not reject the strict scrutiny standard in the context of "compelled speech," the district court cited only to the Supreme Court's use of *Wooley v. Maynard*. *See, e.g.*, *id*. at **30, 67-70.

Notably, the district court overemphasized *Wooley* and ignored *Whalen*—meaning it ignored half of the Court's First Amendment analysis in *Casey*. Not once did the district court cite *Whalen*, nor did it even discuss the *Casey* Court's "but only" and "subject to" qualifying language. Consequently, the district court failed to follow *Casey's* holding that reasonable licensing and regulation *includes*

informed consent regulations that require the provision of truthful, non-misleading information. [20]

Instead, the district court attempted to explain its departure from the *Casey* analysis by claiming that *Casey* must not have *really* meant that strict scrutiny does not apply. The Supreme Court's succinct First Amendment analysis in *Casey* was not sufficiently "detailed" due to its "brevity" to satisfy the district court. *See id*. at **68-69. The district court ignored the fact that, like the plaintiffs here, the plaintiffs in *Casey* raised a First Amendment claim in the context of an informed consent statute—and it ignored the fact that the claim was *rejected* by the Court per its discussion and application of *Wooley* and *Whalen*. *See Casey*, 505 U.S. at 884.

Simply, if the Supreme Court had intended for strict scrutiny to be used to evaluate the state-mandated speech required by an informed consent statute, then it would have done so in *Casey*. As the Fifth and Eighth Circuits have correctly

[20] Not only did the district court ignore *Whalen* and the Court's "but only" and "subject to" language, but it actually contradicted the Court's analysis entirely. The district court claimed that strict scrutiny is appropriate "because the state is seeking to compel 'doctor-patient communications *about* medical treatment.'" *Stuart*, 2014 U.S. Dist. LEXIS 6194, at *40 (emphasis in original). Further, the district court claimed that compelled speech in this context is subject to strict scrutiny "even if the disclosure is limited to factual information." *Id*. at *39. However, it is that exact type of communication—truthful physician communication in the context of the state's regulation of the practice of medicine generally and abortion specifically—that is the basis for the Court's "but only" and "subject to" language. Physician speech as a part of the practice of medicine is subject to reasonable regulation by the State. *See Casey*, 505 U.S. at 884.

recognized, the Court did not adopt strict scrutiny as the standard for review of such claims.

The district court also claimed that *Lakey* and *Rounds I* were wrongly decided by conflating Fourteenth and First Amendment standards, but that claim also ignores the clear holding in *Casey* and the balance struck therein between the woman's "right" to abortion and the states' interests. *See Stuart*, 2014 U.S. Dist. LEXIS 6194, at *70.

The district court also claimed that, even under *Casey's* undue burden analysis, the North Carolina ultrasound provision would be invalid—but again, its analysis is flawed. The district court struck the provision because, it claimed, it is a "straightjacket" and one-size-fits-all requirement. *Id.* at **47, 72. Yet it is exactly that type of claim in *Akron I* and *Thornburgh* that was explicitly *overruled* in *Casey*. *See Casey*, 505 U.S. at 882-83. Thus, the district court's departure from the letter and spirit of *Casey* is clear. Rather than accurately applying *Casey*, the district court adopted the *Akron I* and *Thornburgh* terminology explicitly ***overruled*** in *Casey*.

In further contravention of *Casey*, the district court concluded that the ultrasound provision is "non-medical" and not informative for women who choose not to see or listen. *Stuart*, 2014 U.S. Dist. LEXIS 6194, at **38, 49-51. However, the standard in *Casey* is whether informed consent information—here,

an ultrasound display and medical explanation—is truthful and non-misleading. As indicated by the Fifth Circuit in *Lakey*, the display of an ultrasound and an accompanying medical explanation is not ideological, but is instead the epitome of truthful, non-misleading information. *Lakey*, 667 F.3d at 577-78.

Moreover, the district court ignored *Casey's* guidance that truthful information is relevant to the woman's decision even if it has nothing to do with her own health. States are free to require physicians to provide truthful information about the consequences of abortion to the unborn child. *See Casey*, 505 U.S. at 882-83. It is hard to conceive of information clearer or more truthful about the consequences of an abortion to a woman's unborn child than the display of an ultrasound picture with an accompanying medical description of what that picture depicts.

CONCLUSION

In the interests of maternal health and the protection of fetal life, states can enact regulations designed to provide a woman with truthful, non-misleading information in order to ensure that her decision is voluntary and informed, and such regulations are not an undue burden as long as they pose no substantial obstacle to the woman in making an abortion decision.

The North Carolina ultrasound provision is designed to provide women with an ultrasound picture and medical description; the picture and medical description

are truthful and non-misleading. Under Supreme Court jurisprudence, both are considered relevant to the woman's abortion decision. The provision of such information does not circumvent the woman's ability to make the "ultimate decision." *Casey*, 505 U.S. at 877. Moreover, there is nothing in the statute that prevents a physician from commenting on his own opinion of the merits of the required information.

If an abortion provider can use the First Amendment to invoke a strict scrutiny challenge to an informed consent statute, he or she can effectively thwart the balance struck in *Casey* between a woman's "right" to abortion and the state's interests in protecting maternal and fetal health.[21] The First Amendment could be used as a "trump card" in a multitude of challenges to abortion regulations, allowing abortion proponents to provoke a "back-door," strict scrutiny approach to invalidate requirements that the Supreme Court has approved under the undue burden standard. *Casey* does not permit abortion providers to do this.

The North Carolina ultrasound provision is a structural mechanism by which the state has expressed its profound respect for the life of the unborn child and it presents no substantial obstacle or undue burden. As part of its role as the rightful

[21] *See Lakey*, 667 F.3d at 577 ("If the disclosures are truthful and non-misleading, and if they would not violate the woman's privacy right under the *Casey* plurality opinion, then [plaintiffs] would by means of their First Amendment claim, essentially trump the balance *Casey* struck between women's rights and the state's prerogatives. *Casey*, however, rejected any such clash of rights in the informed consent context.").

regulatory authority over the practice of medicine in the state, North Carolina can require physicians to provide this truthful, non-misleading information to women considering abortion. There is no First (or Fourteenth) Amendment infirmity.

The judgment of the Middle District of North Carolina must be reversed.

Respectfully submitted,

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I hereby certify that on May 8, 2014, the foregoing document was served on all parties or their counsel of record through the CM/ECF system. All counsel are registered through the CM/ECF system.

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