


Fall 10-1-2018

Speech-and-Display Laws: Balancing Physicians' Free Speech Rights and States' Interests in the Context of Abortion

Emily Ruppert

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/jlp>

 Part of the [Constitutional Law Commons](#), [First Amendment Commons](#), [Health Law and Policy Commons](#), [Public Law and Legal Theory Commons](#), and the [Sexuality and the Law Commons](#)

Recommended Citation

Emily Ruppert, *Speech-and-Display Laws: Balancing Physicians' Free Speech Rights and States' Interests in the Context of Abortion*, 27 J. L. & Pol'y 291 (2018).

Available at: <https://brooklynworks.brooklaw.edu/jlp/vol27/iss1/8>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Journal of Law and Policy by an authorized editor of BrooklynWorks.

**SPEECH-AND-DISPLAY LAWS: BALANCING
PHYSICIANS' FREE SPEECH RIGHTS AND STATES'
INTERESTS IN THE CONTEXT OF ABORTION**

*Emily Ruppert**

“The question is not pro-abortion or anti-abortion, the question is who makes the decision: a woman and her physician, or the government.” – Gloria Steinem¹

INTRODUCTION

In the United States, 24% of women will obtain an abortion by the age 45.² This statistic means roughly one in four women nationwide will have an abortion at some point during their reproductive age.³ While these figures demonstrate that abortions are not uncommon procedures, as of 2014 57% or “more than half of U.S. women of reproductive age live in states that are hostile or extremely hostile to abortion rights.”⁴ This is evidence that in

* J.D. Candidate, Brooklyn Law School, 2019; B.A., University of Delaware, 2016. Thank you to my family and friends for their continuous support and words of encouragement. Thank you to the Journal of Law and Policy for all of their help and guidance with this Note.

¹ Alanna Vagianos, *Gloria Steinem: Nobody Wakes Up And Says ‘I Think I’ll Have An Abortion’*, HUFF. POST (May 17, 2017), https://www.huffingtonpost.com/entry/gloria-steinem-nobody-wakes-up-and-says-i-think-ill-have-an-abortion_us_591c748be4b0a7458fa4eb0e.

² *Abortion Is a Common Experience for U.S. Women, Despite Dramatic Declines in Rates*, GUTTMACHER INST. (Oct. 19, 2017), <https://www.guttmacher.org/news-release/2017/abortion-common-experience-us-women-despite-dramatic-declines-rates>.

³ *Id.*

⁴ *See More Than Half of U.S. Women of Reproductive Age Live in States that are Hostile or Extremely Hostile to Abortion Rights*, GUTTMACHER INST. (Jan. 5, 2015), <https://www.guttmacher.org/infographic/2015/more-half-us-women-reproductive-age-live-states-are-hostile-or-extremely-hostile>.

today's America, a woman's ability to obtain an abortion is still a controversial and contested matter,⁵ despite the fact that the Supreme Court has consistently affirmed that women have a constitutional right to obtain an abortion.⁶ While states cannot place an outright ban on abortions before a certain gestational period, they attempt to restrict access to abortions through legislation that places restrictions on abortion clinics and how the procedure is performed, and oftentimes create medically unnecessary procedures a patient must undergo beforehand.⁷

State legislation that imposes unnecessary, onerous burdens on abortion providers are known as TRAP laws, or "Targeted Regulation of Abortion Providers."⁸ TRAP laws place requirements on physicians who perform abortions, that are much "different and more burdensome than those imposed on other medical practices."⁹ These laws are often pushed forth under the guise of "protecting women's health and safety, but have a clear ulterior motive of making it more difficult to provide abortion services and thus more difficult for women to obtain such

⁵ See generally *An Overview of Abortion Laws*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws> (highlighting legal regulations and restrictions on abortion across the 50 states) (last visited Jan. 24, 2019).

⁶ See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (ruling that a Texas statute that placed restrictions on the operations of abortion clinics throughout the state was found to be unconstitutional because it violated the Casey undue burden standard, therefore reaffirming the constitutional right to abortion as found in *Roe* and *Casey*); *Gonzales v. Carhart*, 550 U.S. 124 (2007) (holding that while legislation banning a specific type of abortion was found to be constitutional, the principles of *Roe* and *Casey* are still valid); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 846 (1992) (ruling that the basic principles of *Roe* are reaffirmed, and that women have a right to obtain an abortion before viability and to obtain it without undue interference from the State); *Roe v. Wade*, 410 U.S. 113, 153–54 (1973) (holding that the constitutional right of privacy is found to encompass a woman's decision to terminate her pregnancy).

⁷ *An Overview of Abortion Laws*, *supra* note 5.

⁸ *Targeted Regulation of Abortion Providers (TRAP)*, CENTER FOR REPRODUCTIVE RIGHTS (Aug. 28, 2015), <https://www.reproductiverights.org/project/targeted-regulation-of-abortion-providers-trap>.

⁹ *Id.*

services.”¹⁰ From 2011 to 2015, 288 abortion restrictions were enacted nationwide, and in 2018 alone 21 restrictions have been enacted.¹¹ This is clear evidence that the battle between pro-choice and pro-life is not going away anytime soon.¹² TRAP laws have frequently been the subject of judicial scrutiny due to the conflicts they present with Supreme Court abortion jurisprudence; however, in recent cases, state-imposed regulations regarding mandatory ultrasounds have implicated the constitutional rights of the physicians performing abortion procedures.¹³ These regulations often compel physicians to verbally describe the fetus when performing an ultrasound pursuant to an abortion.¹⁴ This is required even if the description is not relevant to the abortion procedure, and even if the physician does not think it is necessary.¹⁵ Physicians have come forth arguing their First Amendment right to refrain from speech is violated by these regulations.¹⁶ Therefore, it is necessary to review these regulations under First Amendment scrutiny because these policies are often

¹⁰ *Id.*

¹¹ *State Policies on Abortion*, GUTTMACHER INST., <https://www.guttmacher.org/united-states/abortion/state-policies-abortion> (last visited Nov. 14, 2018).

¹² *See id.*

¹³ *See* *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014) (holding a North Carolina statute violated First Amendment as “compelled speech” where the Act required description of the fetus during an ultrasound even when the patient refuses to listen); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012) (vacating a preliminary injunction and upholding Texas House Bill 15 that required plaintiff physicians to make audible the heartbeat, explain the sonogram results, and wait 24 hours after disclosures for informed consent); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (en banc) (vacating preliminary injunction and upholding South Dakota House Bill 1166 that required physician to describe the of patient’s relationship to the “unborn human being”); *EMW Women’s Surgical Ctr., P.S.C. v. Beshear*, 283 F. Supp. 3d 629 (W. D. Ky. 2017) (holding Kentucky House Bill 2, Ultrasound Informed Consent Act, violated physician’s First Amendment rights as a speech-and-display ultrasound law).

¹⁴ *Forced Ultrasound*, REWIRE NEWS, <https://rewire.news/legislative-tracker/law-topic/forced-ultrasound/> (last visited Jan. 25, 2019).

¹⁵ *Id.*

¹⁶ *See* *Stuart*, 774 F.3d at 243; *Lakey*, 667 F.3d at 573; *Rounds*, 530 F.3d at 727; *Beshear*, 283 F. Supp. 3d at 635.

the result of “the anti-choice movement’s strategic drafting of laws that cloak abortion legislation under the pretense of promoting women’s health and safety.”¹⁷

This Note will examine content-based ultrasound state regulations that are currently the source of a multi-Circuit split between federal courts.¹⁸ These specific regulations are known as “speech-and-display” laws, which have been put forth by many state legislatures.¹⁹ Speech-and-display laws are regulations regarding what a physician must say and do while performing an ultrasound on a woman seeking an abortion.²⁰ The State can require a physician to relay certain details and characteristics to a pregnant woman regarding the fetus, even if these details are not medically necessary or the woman does not want to see or hear them.²¹ Speech-and-display provisions usually fall under the “informed consent” requirement many states have, meaning a woman must have a certain degree of information given to her before undergoing an abortion procedure.²² Twenty-six states currently regulate ultrasounds given by abortion providers to their patients.²³ The reality of these forced ultrasounds is that while they may be grounded in the idea that women should be making an informed choice regarding abortion, the effect is physicians are compelled “to perform medically unnecessary procedures, raising the costs of abortion care, and imposing additional burdens on the free exercise of women’s rights.”²⁴

Speech-and-display laws may implicate multiple constitutional rights because they require doctors to give patients potentially

¹⁷ Rebecca Bucchieri, *The Court Treads Lightly: Why Mandatory Pre-Abortion Ultrasound Laws Demand A More Concrete Legal Analysis By Courts*, 37 HARV. J.L. & GENDER 1, 4 (Oct. 12, 2014), <http://harvardjlg.com/wp-content/uploads/2014/10/Bucchiei-Complete.pdf>.

¹⁸ See *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293 (11th Cir. 2017); *Stuart*, 774 F.3d 238; *Lakey*, 667 F.3d 570; *Rounds*, 530 F.3d 724; *Beshear*, 283 F. Supp. 3d 629.

¹⁹ See *Beshear*, 283 F. Supp. 3d at 632.

²⁰ *Id.*; *Forced Ultrasound*, *supra* note 14.

²¹ *Forced Ultrasound*, *supra* note 14.

²² *Id.*

²³ *Id.*

²⁴ *Id.*

unnecessary and medically irrelevant information, which may violate physicians' First Amendment right to refrain from speech.²⁵ Additionally, forced ultrasounds with speech-and-display requirements may force women to undergo medical procedures they have not consented to, which may violate a woman's 14th Amendment due process rights.²⁶

These types of regulations have caused a multi-Circuit split due to the tensions between free speech rights of physicians and a State's interests in regulating medical procedures.²⁷ Physicians argue that speech-and-display laws are content-based regulations²⁸ that are ideological in both intent and in kind, which promote an anti-choice message to their patients against their will.²⁹ On the other hand, multiple states have argued, and some courts have acknowledged, that speech-and-display regulations are constitutional due to a State's interest in regulating the medical profession.³⁰ In these cases it is most appropriate to apply a heightened intermediate level of scrutiny to a content-based state regulation which implicates the First Amendment rights of professionals in their professional context, in order to ensure that a

²⁵ *Id.*; see, e.g., N.C. GEN. STAT. § 90–21.85(a), *invalidated* by *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014) (requiring physician's simultaneous explanation of display including presence, location, and dimensions of unborn child within the uterus); TEX. HEALTH & SAFETY CODE § 171.012(a)(4)-(5) (requiring voluntary and informed consent to include physician's verbal description of the sonogram and audible heart auscultation).

²⁶ *Forced Ultrasound*, *supra* note 14.

²⁷ *See id.*

²⁸ The Supreme Court has repeatedly viewed content-based regulations as words and images contained in speech. Eugene Volokh, *Is it 'Content-based for a Speech Restriction to Distinguish 'Political' Signs, 'Ideological' Signs and Event Announcement Signs?*, THE WASH. POST (Jan. 10, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/10/is-it-content-based-for-a-speech-restriction-to-distinguish-political-signs-ideological-signs-and-event-announcement-signs/?utm_term=.0e05a1547e69 (discussing string of First Amendment cases beginning with *Police Dep't of Chicago v. Mosely*, 408 U.S. 92 (1972)).

²⁹ *See Stuart*, 774 F.3d 238.

³⁰ *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1316 (11th Cir. 2017); *Stuart*, 774 F.3d at 254; *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576 (5th Cir. 2012); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 741 (8th Cir. 2008).

State's interests are properly balanced with the constitutional rights of individuals.³¹

Part I of this Note will discuss the relevant abortion jurisprudence in order to provide context on the debate between the Circuits regarding the appropriate standard to be applied when examining a state's ability to regulate the medical profession in light of restricting physicians' free speech. Part II of this Note will examine relevant First Amendment jurisprudence to demonstrate which free speech rights are implicated in this contested split. Part III will briefly examine a 2017 District Court ruling, and then analyze the current split between the various Circuit Courts' rulings regarding speech-and-display laws. Part IV will propose that the standard applied by the United States Court of Appeals for the 4th Circuit, under which courts should apply a heightened intermediate scrutiny standard when examining content-based speech-and-display regulations in the context of an abortion procedure, is a crucial framework in protecting both physicians and patients.³² However, to truly protect a vulnerable patient from a state's anti-choice agenda, the 4th Circuit should have taken their analysis one step further by ruling outright that state regulations will never outweigh physicians' first amendment rights, if the regulation prevents a physician from providing an objective medical opinion in any way. Part IV will also consider the effects these rulings have on abortion providers, as well as women seeking abortions. Part V will briefly conclude by reiterating the importance of protecting the free speech rights of medical professionals in their respective practice, especially when a state's interest is ultimately to push forth an ideological message.

³¹ *Stuart*, 774 F.3d at 250. ("This formulation seeks to 'ensure not only that the State's interests are proportional to the resulting burdens placed on speech but also that the law does not seek to suppress a disfavored message.'") (quoting *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667–68 (2011)).

³² *Id.* at 248.

I. ABORTION JURISPRUDENCE

Over the past half century, the legality of abortion has been hotly contested across the United States.³³ This has resulted in multiple rulings by the Supreme Court which define a woman's constitutional right to obtain an abortion.³⁴ Supreme Court rulings have not stopped the numerous attempts by anti-choice states to erode this right by placing as many obstacles and restrictions in the way of woman attempting to obtain a safe, legal abortion.³⁵

A. Roe v. Wade

The constitutional right to obtain an abortion was first established in the seminal 1973 case *Roe v. Wade*.³⁶ *Roe* involved a woman, Jane Roe, who sought an abortion in the state of Texas.³⁷ At that time, Texas law prohibited a woman from obtaining an abortion except in instances where the mother's life was in danger.³⁸ Roe's life was not in danger, she simply wished to terminate the pregnancy, and brought suit alleging the Texas

³³ See *Timeline of Important Reproductive Freedom Cases Decided by the Supreme Court*, ACLU, <https://www.aclu.org/other/timeline-important-reproductive-freedom-cases-decided-supreme-court> (last visited Sept. 18, 2018).

³⁴ See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (ruling that a Texas statute that placed restrictions on the operations of abortion clinics throughout the state was found to be unconstitutional because it violated the Casey undue burden standard, therefore reaffirming the constitutional right to abortion as found in *Roe* and *Casey*); *Gonzales v. Carhart*, 550 U.S. 124 (2007) (holding that while legislation banning a specific type of abortion was found to be constitutional, the principles of *Roe* and *Casey* are still valid); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 846 (1992) (ruling that the basic principles of *Roe* are reaffirmed, and that the right of a woman to obtain an abortion is a constitutional right); *Roe v. Wade*, 410 U.S. 113, 153–54 (1973) (holding that the constitutional right of privacy is found to encompass a woman's decision to terminate her pregnancy).

³⁵ See Renee Davidson, *State of Emergency: 10 of the worst attacks on women's health*, PLANNED PARENTHOOD (Mar. 16, 2018), <https://www.plannedparenthoodaction.org/blog/states-of-emergency-the-10-latest-state-attacks-on-womens-health>.

³⁶ See generally *Roe v. Wade*, 410 U.S. 113 (1973).

³⁷ *Id.* at 120.

³⁸ *Id.* at 119.

statutes were “unconstitutionally vague and that they abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.”³⁹

The Supreme Court ruled that the right to privacy, as established implicitly in the Constitution,⁴⁰ does “encompass a woman’s decision whether or not to terminate her pregnancy.”⁴¹ The opinion further held that while women had the right to terminate a pregnancy, this right was not absolute, and that it “must be considered against important state interests in regulation.”⁴² The Court explained that abortion regulations are appropriate with regard to interests in “safeguarding health, in maintaining medical standards, and in protecting potential life.”⁴³ The Court also stated that at some point during the length of a pregnancy, the State’s interest in protecting potential life will become compelling,⁴⁴ allowing further, more restrictive regulations on a woman’s right to abortion.⁴⁵ This decision established that during the first trimester of a pregnancy, a State could not regulate abortions; however, once past that time period, regulation may be appropriate.⁴⁶

The *Roe* case was a landmark decision in the realm of reproductive rights for women in the United States. It was the first time the Supreme Court implicitly held that women had a right to procure abortions, protected under the Constitution.⁴⁷ The Court

³⁹ *Id.* at 120.

⁴⁰ *See id.* at 152 (“The Constitution does not explicitly mention any right of privacy. In a line of decisions, however . . . the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.”).

⁴¹ *Roe*, 410 U.S. at 153.

⁴² *Id.* at 154.

⁴³ *Id.*

⁴⁴ *See id.* at 155 (recognizing that “[w]here certain ‘fundamental rights’ are involved, the Court has held that regulation limiting these rights may be justified only by a ‘compelling state interest,’ and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.”).

⁴⁵ *Id.* at 154.

⁴⁶ *See Body Politic – The Supreme Court and Abortion Law, Ch. 1 - Roe v. Wade*, OYEZ, <http://projects.oyez.org/body-politic/ch1#ch1-> (last visited Sept. 18, 2018).

⁴⁷ *Id.*

also emphasized that along with the right to privacy encompassing a woman's right to terminate her pregnancy, the right to procuring abortions is also grounded in the right to privacy of the administering doctor.⁴⁸ Justice Blackmun stated,

The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.⁴⁹

This portion of the decision reaffirmed that abortion rights are grounded both in the right of privacy for a woman, as well as rights of physicians that perform abortions.⁵⁰ This seminal ruling kicked off the next several decades of legal battles between pro-choice and anti-abortion factions.

B. Planned Parenthood of Southeastern Pennsylvania v. Casey

Planned Parenthood v. Casey was the next major abortion rights case argued before the Supreme Court.⁵¹ Since the Court established a woman's right to choose in *Roe*, many states responded by enacting legislation that placed onerous restrictions on the procedures surrounding abortion.⁵² These types of restrictions ultimately limited women's access to obtaining abortions, essentially giving anti-choice state governments a loophole around the principles established in *Roe*.

In *Casey*, Planned Parenthood⁵³ brought suit alleging that a Pennsylvania statute⁵⁴ violated the Court's ruling in *Roe*.⁵⁵ The

⁴⁸ *Id.*

⁴⁹ *Roe*, 410 U.S. at 165–66.

⁵⁰ *See id.*

⁵¹ *Body Politic – The Supreme Court and abortion law, Ch. 2 – Planned Parenthood v. Casey*, OYEZ, <https://projects.oyez.org/body-politic/ch2#ch2-1> (last visited Sept. 18, 2018).

⁵² *Id.*

⁵³ Planned Parenthood is a reproductive healthcare provider, educator, and advocate of reproductive rights. *Who We Are*, PLANNED PARENTHOOD,

Abortion Control Act⁵⁶ provided that a woman seeking an abortion must give informed consent before she may undergo the procedure, and there must be certain information provided to her 24 hours before the procedure to satisfy this informed consent requirement.⁵⁷ If a minor wants to obtain an abortion there must be parental consent, and if a married woman wants to obtain an abortion she must sign a statement certifying she has notified her spouse.⁵⁸ Furthermore, the Act provided a medical emergency provision, and a reporting and record-keeping requirement which abortion facilities must adhere to.⁵⁹

The Court took this opportunity to reaffirm *Roe*, stating three major principles: (1) the Court recognized the right of a woman to have an abortion before viability without interference by the State, (2) after viability the State can regulate abortion so long as there are exceptions for when the mother's life or health is in danger,

<https://www.plannedparenthood.org/about-us/who-we-are> (last visited Sept. 18, 2018).

⁵⁴ 18 PA. CONS. STAT. §§ 3203–3220 (1990).

⁵⁵ Alex McBride, *Supreme Court History, Expanding History, Landmark Cases: Casey v. Planned Parenthood*, THIRTEEN, https://www.thirteen.org/wnet/supremecourt/rights/landmark_casey.html (last visited Sept. 18, 2018).

⁵⁶ 18 PA. CONS. STAT. §§ 3203–3220 (West 1990) The Act requires that a woman seeking an abortion gives her informed consent prior to the abortion procedure, and that she be provided with certain information at least 24 hours before the abortion is performed by her physician. § 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. § 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. § 3209. The Act exempts compliance with these three requirements in the event of a "medical emergency," which is defined in § 3203 of the Act. See §§ 3203, 3205(a), 3206(a), 3209(c). In addition to the above provisions regulating the performance of abortions, the Act imposes certain reporting requirements on facilities that provide abortion services. §§ 3207(b), 3214(a), 3214(f).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

and (3) that the State does have “legitimate interests”⁶⁰ in protecting the health of women and the potential life of a fetus.⁶¹

However, once the Court reiterated the basic principles of *Roe*, the ruling dismantled the “trimester framework”⁶² established in *Roe*.⁶³ The Court held that the trimester framework was too rigid, and created a new “undue burden” standard.⁶⁴ An “undue burden” is “a state regulation [that] has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”⁶⁵ A regulation that is found to place an “undue burden” on women seeking abortions is unconstitutional.⁶⁶ In *Casey*, the Court found only one of the provisions of the Abortion Control Act to place an undue burden on women in Pennsylvania.⁶⁷ After *Casey*, state regulations regarding abortions are scrutinized under the “undue burden” standard.⁶⁸

One provision that was found to not create an undue burden in *Casey* was the informed consent principle in §3205.⁶⁹ Informed

⁶⁰ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 846 (1992).

⁶¹ *Id.*

⁶² *See id.* 872 (describing the trimester framework as established in *Roe* means no regulation is permitted in the first trimester, and that prohibitions are permitted in the second and third trimester, “provided the life or health of the mother is not at stake.”).

⁶³ *Id.* at 876–77.

⁶⁴ *Id.* at 876.

⁶⁵ *Id.* at 877.

⁶⁶ *Id.*

⁶⁷ *Id.* at 880–901 (“[A]s construed by the Court of Appeals, the medical emergency definition imposes no undue burden on a woman’s abortion right,” furthermore the informed consent requirement “cannot be considered a substantial obstacle to obtaining an abortion, and, it follows, there is no undue burden,” the spousal notification requirement is found as an “undue burden, and therefore invalid,” the parental consent requirement for a minor seeking an abortion is found as constitutional, and the recordkeeping and reporting provision is found as constitutional due to it being “a vital element of medical research, and so it cannot be said that the requirements serve no purpose other than to make abortions more difficult. Nor do we find that the requirements impose a substantial obstacle to a woman’s choice.”).

⁶⁸ *Id.* at 877.

⁶⁹ 18 PA. STAT. AND CONS. STAT. ANN. §§ 3205 (West 1990); *Casey*, 505 U.S. at 838.

consent “protects patient autonomy by ensuring that patients receive the necessary information to make their own decisions about medical treatment. Obviously, patients cannot be self-determining if given information biased towards one particular outcome.”⁷⁰ This is where some abortion rights advocates argue *Casey* fails,⁷¹ due to language permitting a State “to further its legitimate goal of protecting the life of the unborn . . . even when in doing so the State expresses a preference for childbirth over abortion.”⁷² This ruling has “permitted states to mandate information biased against abortion under the guise of abortion-specific ‘informed consent’ legislation.”⁷³ This presents a tension between a State’s preference of childbirth over abortion and the privacy and confidence of doctor-patient relationships, as well as free speech issues on behalf of physicians administering abortions.⁷⁴ *Casey* notes that a physician may not have to comply with an informed consent requirement, “If he or she can demonstrate by a preponderance of the evidence, that he or she reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient.” In this respect, the statute does not prevent the physician from exercising his or her medical judgment.⁷⁵

However, the Court does not mention what constitutes a severely adverse effect on the patient, and arguably leaves little room for physicians to exercise personal medical judgment regarding a state-mandated informed consent requirement, if there is not enough evidence a patient would be severely affected.⁷⁶

⁷⁰ Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision Making*, 16 DUKE J. OF GENDER L. & POL’Y 223, 250 (2009), <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1163&context=djglp>.

⁷¹ Bucchieri, *supra* note 17, at 6 (discussing the state’s legitimate interest in the fetus).

⁷² *Casey*, 505 U.S. at 883.

⁷³ Manian, *supra* note 70, at 250.

⁷⁴ *Forced Ultrasound*, *supra* note 14.

⁷⁵ *Casey*, 505 U.S. at 883–84 (quoting 18 PA. STAT. AND CONST. STAT. ANN. § 3205 (West 1990)).

⁷⁶ *See id.*

It is relevant to note that in *Casey*, the plaintiffs brought a First Amendment claim, alleging the Pennsylvania statute requiring informed consent violated a physician's right to free speech.⁷⁷ The statute⁷⁸ required physicians to inform a woman obtaining an abortion of the nature of the procedure at least 24 hours beforehand, as well as health risks of abortion and the probable gestational age of the fetus.⁷⁹ Moreover, the physician had to inform the woman of the availability of printed materials published by the State, which describe the fetus and give further information about medical assistance for childbirth, adoption information, and information regarding child support from the father.⁸⁰ The woman could not get an abortion unless she certified in writing that she had been informed about the availability of these materials, and had been given them if desired.⁸¹

Accordingly, the Supreme Court held that the informed consent requirement did not violate a physician's First Amendment rights because, while a physician's right to refrain from speech was implicated, the informed consent requirement in the statute did not violate that constitutional right.⁸² It is important to highlight that in *Casey* the informed consent requirement only required the physician to inform a patient about the *availability* of printed materials provided by the State; the physician did not actually have to verbally relay the State's preference for childbirth over abortion.⁸³ This is a stark difference from the speech-and-display laws seen today, which compel physicians to actually describe an ultrasound to their patient.⁸⁴ That is easily a much greater burden

⁷⁷ *Id.* at 884.

⁷⁸ 18 PA. STAT. AND CONST. STAT. ANN. § 3205 (West 1990) (requiring that, at least 24 hours before performing an abortion, the physician must inform the woman about the procedure, health risks, gestational age of the unborn child, as well as discuss availability of State-printed materials describing the fetus, medical assistance, and child support from the father, and adoption agencies).

⁷⁹ *Id.*

⁸⁰ *Casey*, 505 U.S. at 884.

⁸¹ *Id.*

⁸² *Id.* at 884–85

⁸³ *Id.* at 881.

⁸⁴ *E.g.*, N.C. GEN. STAT. § 90–21.85(a)(4), *invalidated by* *Stuart v. Camnitz*, 774 F.3d 238; TEX. HEALTH & SAFETY CODE § 171.012(a)(4)(C).

on their right to refrain from speech, with the goal of furthering a state's ideological message.

II. THE FIRST AMENDMENT RIGHT TO FREE SPEECH AND THE RIGHT TO REFRAIN FROM SPEECH

The First Amendment of the U.S. Constitution⁸⁵ guarantees the right to free speech to all individuals without fear of government retaliation.⁸⁶ The constitutional right to free speech also includes, logically, the right of an individual to refrain from speech.⁸⁷ If a state may not police its citizens' actual speech, it also may not force its citizenry to endorse a speech with which they do not agree with.⁸⁸

A. Wooley v. Maynard and Relevant First Amendment Jurisprudence

In *Wooley v. Maynard*, the Supreme Court affirmed this right to refrain from speech in the context of an individual, Maynard, who was protesting the phrase "Live Free or Die" on a New Hampshire state-mandated license plate.⁸⁹ Maynard and his wife asserted the phrase was "repugnant to their moral, religious, and political beliefs,"⁹⁰ and that being forced to have this license plate on their automobiles was a violation of their First Amendment rights.⁹¹ The question before the Supreme Court was "whether the State may constitutionally require an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it

⁸⁵ U.S. CONST. amend. I ("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.").

⁸⁶ *Id.*

⁸⁷ *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

⁸⁸ *Id.*

⁸⁹ *Id.* at 706–07.

⁹⁰ *Id.* at 707.

⁹¹ *Id.*

may be observed and read by the public.”⁹² The Court held that a State may not require this of its citizens because it infringes on an individual’s First Amendment rights, and the State’s countervailing interests were not sufficiently compelling to justify the requirement.⁹³ The opinion further elaborated that under the First Amendment individuals have “both the right to speak freely and the right to refrain from speaking at all.”⁹⁴ This is because both rights are “complementary components of the broader concept of ‘individual freedom of mind.’”⁹⁵ To compel an individual to foster an ideological message with which they disagree is an infringement on free speech by the State.⁹⁶

After affirmatively ruling the First Amendment includes the right to refrain from speech, the Court evaluates the State’s interests in disseminating this particular message.⁹⁷ The Court makes this determination by examining “whether the State’s countervailing interest is sufficiently compelling to justify requiring appellees to display the state motto on their license plates.”⁹⁸ In *Wooley*, the Court held that New Hampshire’s interests were not sufficiently compelling to outweigh Maynard’s First Amendment right to refuse to disseminate an ideology put forth by the state.⁹⁹

Furthermore, *Wooley* sets the stage in the current circuit split which demonstrates that physicians’ First Amendment rights may be implicated when they are compelled by the State to push forth a message onto their patients.¹⁰⁰ Once First Amendment rights to free speech are implicated, the next question is, what level of

⁹² *Id.* at 713.

⁹³ *Id.* at 717.

⁹⁴ *Id.* at 714.

⁹⁵ *Id.* (quoting *Board of Education v. Barnette*, 319 U.S. 624, 637 (1943)).

⁹⁶ *Id.* at 714–15.

⁹⁷ *Id.* at 715–17.

⁹⁸ *Id.* at 716.

⁹⁹ *Id.* at 716–17.

¹⁰⁰ *Id.*; see generally *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (en banc) (describing the difference in standard of review on speech-and-display ultrasound laws in the 4th, 5th, and 8th Circuit).

scrutiny should the Court apply to determine if a state regulation encroaches on these rights unconstitutionally?¹⁰¹

In *Sorrell v. IMS Health Inc.*, the Supreme Court held that when free speech rights are subject to content-based state regulations, a heightened level of scrutiny should be applied to determine if the regulation “directly advances a substantial governmental interest and that the measure is drawn to achieve that interest.”¹⁰² This ruling is relevant to the current circuit split since the differing courts have grappled with determining which level of scrutiny to apply when reviewing a content-based state regulation in the context of an abortion procedure.¹⁰³ Both the Fifth and Eighth Circuit Courts rely heavily on an interpretation of a single paragraph in *Casey*,¹⁰⁴ as well as *Gonzales v. Carhart*,¹⁰⁵ which they argue allows for rational basis review; whereas both the Fourth and Eleventh Circuits rely on cases such as *Wooley* and *Sorrell* to establish a heightened intermediate level of scrutiny.¹⁰⁶ The context of an abortion procedure is so important because of

¹⁰¹ See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2663 (2011).

¹⁰² *Id.* (holding a Vermont statute unconstitutional under heightened scrutiny, where the State argues substantial government interests in physician confidentiality, avoidance of harassment, and integrity of the doctor-patient relationship where the statute restricts the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors).

¹⁰³ See *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1311 (11th Cir. 2017); *Stuart*, 774 F.3d at 248–49; *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012); *Rounds*, 530 F.3d at 733.

¹⁰⁴ *Stuart*, 774 F.3d at 248 (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884 (1992)) (“Insofar as our decision on the applicable standard of review differs from the positions taken by the Fifth and Eighth Circuits in cases examining the constitutionality of abortion regulations under the First Amendment, we respectfully disagree. Both courts relied heavily on a single paragraph in *Casey*.”).

¹⁰⁵ See *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007) (holding that while the right to abortion under *Roe* and *Casey* is still intact, legislation banning a specific type of abortion was found to be constitutional because, “[w]here 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.”).

¹⁰⁶ See *Wollschlaeger*, 848 F.3d 1293; *Stuart*, 774 F.3d 238; *Lakey*, 667 F.3d 570; *Rounds*, 530 F.3d at 724.

how politically charged the debate surrounding abortion already is, with the now added wrinkle of a First Amendment question.¹⁰⁷ A universal standard similar to the Fourth Circuit Court's opinion on content-based state regulations, in the medical context of an abortion procedure, is necessary to ensure that a regulation is grounded in promoting unbiased medically informed decisions, as opposed to forcing the "full weight of the state's moral condemnation"¹⁰⁸ upon a patient's choices. The Fourth Circuit's use of heightened intermediate scrutiny is thus far an excellent framework to protect both patients and physicians from a state's ideological message; however, with a bit more force in language, the opinion could have cemented the idea that a state cannot interfere with a physician's ability to counsel patients with objective medical advice.

III. THE CIRCUIT SPLIT: WHICH STANDARD SHOULD COURTS USE WHEN WEIGHING THE FIRST AMENDMENT RIGHTS OF PHYSICIANS AGAINST STATE INTERESTS?

In recent years, four of the Circuit Courts of Appeals have ruled on the issue of whether content-based regulations of speech may violate First Amendment rights of physicians.¹⁰⁹ A U.S. District Court in Kentucky recently summarized this circuit split when examining the constitutionality of a speech-and-display statute passed by the state legislature.¹¹⁰ The Court noted that the

¹⁰⁷ See Bucchieri, *supra* note 17 ("Arguments in the mandatory ultrasound debate range from positions deeply entrenched in the Constitution to those animated by ideology. These arguments have engendered a largely distorted public and legal discourse concerning the intersection of these laws with the Constitution. In the short time since its legalization, abortion law has been subject to scrupulous and repeated revision. These revisions left exposed various legal questions concerning the extent to which states may regulate abortion before such regulations could constitute encroachments upon a woman's right to terminate her pregnancy.").

¹⁰⁸ *Stuart*, 774 F.3d at 255.

¹⁰⁹ See *Wollschlaeger*, 848 F.3d 1293; *Stuart*, 774 F.3d 238; *Lakey*, 667 F.3d 570; *Rounds*, 530 F.3d 724.

¹¹⁰ *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 283 F. Supp. 3d 629, 632–33 (W.D. Ky. 2017) (applying the Fourth Circuit's reasoning, and intermediate scrutiny, when holding a state statute as unconstitutional that

main reason the Circuits have ruled differently is due to how the various courts interpreted a single paragraph in *Casey*.¹¹¹ This paragraph in *Casey* notes that First Amendment rights of a physician may be implicated when the state mandates specific informed consent laws; however, the Court held these free speech rights are only implicated in the practice of medicine, which is subject to reasonable licensing and regulation by a state, and ultimately the information mandated by the state was not a violation of those rights.¹¹²

Ultimately, “[a]t the heart of the circuit split . . . is the question of whether *Casey* requires rational basis review of all speech restrictions in the physician-patient context.”¹¹³ None of the circuit courts have held that a strict scrutiny standard should be applied to these types of regulations; the split is in regard to applying rational basis review versus a heightened intermediate level of scrutiny.¹¹⁴ It is most appropriate to apply a heightened intermediate level of scrutiny to content-based state regulations that implicate the free speech rights of medical professionals in their professional context, in order to ensure that the State’s interests are properly balanced with the constitutional rights of individuals.¹¹⁵

requires “physicians to perform an ultrasound prior to an abortion procedure; display and describe the ultrasound images; and auscultate, or make audible, the fetal heartbeat . . . even if a woman does not want to receive the information and chooses to avert her eyes and cover her ears.”)

¹¹¹ *Id.* at 632–33.

¹¹² *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884 (1992) (“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.”) (citations omitted); *see also Stuart*, 774 F.3d at 247.

¹¹³ *Beshear*, 283 F. Supp. 3d at 640.

¹¹⁴ *See Wollschlaeger*, 848 F.3d 1293; *Stuart*, 774 F.3d 238; *Lakey*, 667 F.3d 570; *Rounds*, 530 F.3d at 724.

¹¹⁵ *See Stuart*, 774 F.3d at 250 (quoting *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2668 (2011)) (explaining that the purpose of the formulation is to “ensure not only that the State’s interests are proportional to the resulting

A. Eighth Circuit

In *Planned Parenthood Minn., N.D., S.D. v. Rounds* the Eighth Circuit Court of Appeals examined a South Dakota statute, which in part required physicians to “provide certain information to the patient as part of obtaining informed consent prior to an abortion procedure and to certify that he or she believes the patient understands the information.”¹¹⁶ Planned Parenthood brought suit alleging that certain provisions of this statute violate physicians’ free speech rights: a portion of the disclosure requirement and the physician certification requirement, violate physicians’ free speech rights.¹¹⁷ The relevant provisions¹¹⁸ required physicians to provide statements in writing that informed the woman that abortion will terminate the life of a “whole, separate, unique, living human being,”¹¹⁹ and further informed her that she has an existing legal relationship with this unborn child that is protected by the U.S. Constitution, and abortion will terminate that relationship.¹²⁰ The woman must sign a statement that she received this information, and the physician must also sign a statement certifying that they have given this information to the woman.¹²¹

Planned Parenthood argued that these provisions violated physicians’ First Amendment right to refrain from speech in order to deliver the State’s ideological message, as opposed to truthful and non-misleading information relevant to making an informed decision to obtain an abortion.¹²² The Court disagreed, relying on

burdens placed on speech but also that the law does not seek to suppress a disfavored message.”).

¹¹⁶ *Rounds*, 530 F.3d at 726.

¹¹⁷ *Id.* at 727.

¹¹⁸ S.D. CODIFIED LAWS § 34-23A-10.1.

¹¹⁹ § 34-23A-10.1(1)(b).

¹²⁰ § 34-23A-10.1(1)(c).

¹²¹ § 34-23A-10.1

¹²² *Id.* at 727; Ryan J.F. Pulkrabek, *Clear Depictions Promote Clear Decisions: Drafting Abortion Speech-And-Display Statutes That Pass First and Fourteenth Amendment Muster*, 15 MARQ. ELDER’S ADVISOR 1, 17–18 (2013) (“Planned Parenthood challenged that statutory language that required physicians to state that the abortion would ‘terminate the life of a whole, separate, unique, living human being’ as being ideological speech because, they contended, a fetus is not a ‘whole, separate, unique living being’ as a matter of

the Supreme Court's decision in *Casey*, holding that a state "can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion, even if that information might also encourage the patient to choose childbirth over abortion."¹²³ The burden then shifted onto Planned Parenthood to prove that the required disclosures were "untruthful, misleading, or not relevant to the patient's decision to have an abortion,"¹²⁴ in order to be an ideological message under which a physician can disassociate themselves from.¹²⁵

In *Rounds*, the Court held that Planned Parenthood did not satisfy this burden, and therefore held that the required disclosures are not ideological in nature, and consequently do not trigger First Amendment scrutiny.¹²⁶ Ultimately, the regulations are ruled as "part of the practice of medicine, subject to reasonable licensing and regulation by the State,"¹²⁷ and are constitutional under *Casey*.¹²⁸ However in the opinion, the Court uses *Casey* as authority when stating that,

information deemed relevant in *Casey* was not limited to information about the medical risks of the procedure itself; the State also required the physician to inform the patient that the father of her child would be liable for child support and that other agencies and organizations offered alternatives to abortion. Such information was relevant because it "furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating

scientific or medical fact. The statute, however, defined 'human being' as 'an individual living member of the species of *Homo sapiens* . . . during [its] embryonic [or] fetal age.'").

¹²³ *Rounds*, 530 F.3d at 735.

¹²⁴ *Id.*

¹²⁵ *See id.* at 737.

¹²⁶ *Id.*; *see also* *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 283 F. Supp. 3d 629, 637 (W.D. Ky. 2017).

¹²⁷ *Rounds*, 530 F.3d at 738 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 846 (1992)).

¹²⁸ *Id.*

psychological consequences, that her decision was not fully informed.” Furthermore, the fact that the information “might cause the woman to choose childbirth over abortion” did not render the provisions unconstitutional.¹²⁹

One key difference between *Casey* and *Rounds* is that in *Casey*, the information deemed relevant was conveyed to the patient by the physician informing the patient of the *availability* of printed materials published by the State with further information.¹³⁰ In *Rounds*, the physician was required to give the patient materials regardless of a patient’s choice,¹³¹ which places a larger burden on the physician. Although *Rounds* does not deal with a speech-and-display law, the ruling is important because it sets the foundation that the Fifth Circuit relies on: that the state has a significant role in regulating the medical profession,¹³² and that even if required disclosures encourage a patient to choose childbirth over abortion, First Amendment scrutiny is not triggered.¹³³

B. Fifth Circuit

In *Texas Medical Providers Performing Abortion Services v. Lakey*, the Court examined a Texas speech-and-display law¹³⁴

¹²⁹ *Id.* at 734 (citations omitted).

¹³⁰ *See Casey*, 505 U.S. at 881 (involving an informed consent provision requiring physicians to “inform the woman of the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion. An abortion may not be performed unless the woman certifies in writing that she has been informed of the availability of these printed materials and has been provided them if she chooses to view them.”).

¹³¹ *Rounds*, 530 F.3d at 726–27.

¹³² *See EMW Women’s Surgical Ctr., P.S.C. v. Beshear*, 283 F. Supp. 3d 629, 637 (W.D. Ky. 2017).

¹³³ *Id.* at 636–637.

¹³⁴ The statute required “the physician ‘who is to perform an abortion’ to perform and display a sonogram of the fetus, make audible the heart auscultation of the fetus for the woman to hear, and explain to her the results of each procedure and to wait 24 hours, in most cases, between these disclosures and

which required physicians performing abortions to show a sonogram¹³⁵ image to the woman, play out loud the fetal heartbeat for the woman, explain to her the results of both of these procedures, and then there must be a 24-hour waiting period before the abortion.¹³⁶ Plaintiffs, a group of abortion providers, challenged the requirement, claiming it violated their First Amendment rights by compelling them to push the State's ideological message onto a patient.¹³⁷ They argued the provision served no actual medical purpose, and the sole purpose was really to discourage a patient from having an abortion,¹³⁸ and therefore was unconstitutional.¹³⁹ The Court disagreed, and held that "because the state can play a significant role . . . in regulating the medical profession, and the State's informed consent laws are permissible if they do not place an undue burden on the patient and are 'truthful, non[-]misleading, and relevant disclosures' that do not constitute ideological speech,"¹⁴⁰ these requirements are "within the State's power to regulate the practice of medicine, and therefore does not violate the First Amendment."¹⁴¹

performing the abortion." *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 573 (5th Cir. 2012).

¹³⁵ A sonogram is defined as: "an image produced by ultrasound." MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/sonogram> (last visited Sept. 18, 2018). Today, the terms sonogram and ultrasound are often used interchangeably. Christin Perry, *Sonogram v. Ultrasound: What's the Difference?*, THE BUMP, <https://www.thebump.com/a/sonogram-vs-ultrasound> (last visited Sept. 18, 2018).

¹³⁶ *Lakey*, 667 F.3d at 573.

¹³⁷ *Id.* at 574. ("Appellees contend that H.B.15 abridges their First Amendment rights by compelling the physician to take and display to the woman sonogram images of her fetus, make audible its heartbeat, and explain to her the results of both exams. This information, they contend, is the state's 'ideological message' concerning the fetal life that serves no medical purpose, and indeed no other purpose than to discourage the abortion.").

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Pulkrabek, *supra* note 122, at 13.

¹⁴¹ *Lakey*, 667 F.3d at 580.

In reaching this conclusion, the opinion relied on *Rounds'* interpretations of *Casey* and *Gonzales*.¹⁴² The Court refers to the First Amendment analysis in *Casey* and identifies this analysis as “the antithesis of strict scrutiny.”¹⁴³ This opens the door for the Court to apply a lighter level of judicial scrutiny, merely a legitimate state interest standard in order to infringe upon a physician’s right not to speak within the medical profession,¹⁴⁴ which is subjected to the “reasonable licensing and regulation by the State.”¹⁴⁵ After analyzing *Casey* and *Gonzales*, the Court concludes:

The import of these cases is clear. 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.”¹⁴⁶

Once the Court applied a lighter level of scrutiny, the sonogram, heart auscultation, and physician’s description of the results were found to be inherently truthful, non-misleading, and

¹⁴² *Id.* at 575–76. (explaining *Casey*’s “response to the compelled speech claim is clearly not a strict scrutiny analysis,” and that *Gonzalez* shows that a state government “may use its voice and regulatory authority to show its profound respect for the life within the woman.”) (quoting *Gonzalez v. Carhart* 550 U.S. 124, 128 (2007)).

¹⁴³ *Id.* at 575.

¹⁴⁴ Pulkrabek, *supra* note 122, at 14.

¹⁴⁵ *Lakey*, 667 F.3d at 575 (quoting *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 882 (1992)).

¹⁴⁶ *Id.* at 576 (quoting *Casey*, 505 U.S. at 871).

medically necessary.¹⁴⁷ The opinion compared the modes of delivering this information as compared to *Casey* and held that although in the present facts the physician actually must converse with the patient about the sonogram, this “does not make a constitutionally significant difference from the ‘availability’ provision in *Casey*.”¹⁴⁸ Therefore, the required disclosures were within the State’s power to regulate the practice of medicine and are constitutionally permissible.¹⁴⁹

A physician informing a patient of the “availability”¹⁵⁰ of materials published by a State, which promote an ideological message is a very different scenario than a State requiring a physician to converse with a patient about the results of a sonogram exam and a fetal heartbeat exam. The former scenario allows for a patient to make the decision whether or not to seek the printed materials, while the latter forces a patient into a situation which may bring her distress,¹⁵¹ nor is it medically necessary.¹⁵²

¹⁴⁷ *Id.* at 579. (“[T]he provision of sonograms and the fetal heartbeat are routine measures in pregnancy medicine today. They are viewed as ‘medically necessary’ for the mother and fetus. Only if one assumes the conclusion of Appellees’ argument, that pregnancy is a condition to be terminated, can one assume that such information about the fetus is medically irrelevant. 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 up to date medical information is more of an abuse to her ability to decide than providing the information.”).

¹⁴⁸ *Id.*; see also *Casey*, 505 U.S. at 881 (involving an informed consent provision requiring physicians to “inform the woman of the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion. An abortion may not be performed unless the woman certifies in writing that she has been informed of the availability of these printed materials and has been provided them if she chooses to view them.”).

¹⁴⁹ *Lahey*, 667 F.3d at 580.

¹⁵⁰ See *Casey*, 505 U.S. at 881 (involving an informed consent provision that required physicians to discuss the availability of printed materials State-published materials describing the fetus, medical assistance for childbirth, adoption agencies, and other alternatives for abortion).

¹⁵¹ See *EMW Women’s Surgical Ctr., P.S.C. v. Beshear*, 283 F. Supp. 3d 629, 645 (W.D. Ky. 2017) (“The testimony further revealed that H.B. 2 causes

The Fifth Circuit attempted to equate these two methods, when in reality patients are in two very different situations.¹⁵³

C. Fourth Circuit

In 2014, after both the Fifth and Eighth Circuit rulings, the Fourth Circuit Court of Appeals took up the question of whether a North Carolina speech-and-display statute violated physicians' First Amendment rights in *Stuart v. Camnitz*.¹⁵⁴ The statute¹⁵⁵ required physicians to "display and describe the image during the ultrasound, even if the woman actively 'avert[s] her eyes' and 'refuses to hear.'"¹⁵⁶ Physicians brought suit claiming the statute infringed upon their First Amendment rights, and the court agreed and struck down the provision.¹⁵⁷

The Fourth Circuit began its analysis by examining what type of regulation was at issue in order to then determine which level of

patients distress. Most patients choose to look away from the ultrasound image. But although they may attempt to avoid listening to the fetal heartbeat and ultrasound description, it is impossible for patients to entirely drown out the sounds. During the process mandated by H.B. 2, patients are 'very upset,' 'crying,' and even 'sobbing.' For victims of sexual assault, the requirements of H.B. 2 'can be extremely upsetting.' Similarly, for patients diagnosed with a fetal anomaly, who have already had several ultrasounds performed and heard detailed descriptions of the fetus, the requirements of H.B. 2 'can be extremely difficult' and 'emotional.'"); Carolyn Jones, *'We Have No Choice': One Woman's Ordeal with Texas' New Sonogram Law*, TEXAS OBSERVER (Mar. 15, 2012), <https://www.texasobserver.org/we-have-no-choice-one-womans-ordeal-with-texas-new-sonogram-law/> (describing a woman's first-hand account of receiving a mandatory ultrasound for her abortion and exemplifying how these regulations do more harm than good to the patients forced to receive them).

¹⁵² See *Beshear*, 283 F. Supp. 3d at 632–33 (describing the National Abortion Federation and American Congress of Obstetricians and Gynecologists standards of care requiring ultrasounds as a means of dating the pregnancy and checking for abnormalities, but not requiring the patient to view or listen to a detailed description about the fetus and/or fetal heartbeat).

¹⁵³ *Lahey*, 667 F.3d at 579.

¹⁵⁴ *Stuart v. Camnitz*, 774 F.3d 238, 242 (4th Cir. 2014).

¹⁵⁵ N.C. GEN. STAT. § 90-21.85, *invalidated by* *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014).

¹⁵⁶ *Stuart*, 774 F.2d at 242.

¹⁵⁷ *Id.*

judicial scrutiny was appropriate.¹⁵⁸ The Court concluded that the display of the sonogram was “plainly an expressive act entitled to First Amendment protection,”¹⁵⁹ and was quintessential compelled speech because physicians were being forced to make statements that they otherwise would not have, as well as to convey a biased opinion.¹⁶⁰ The Court cites the holding in *Wooley* that the “[T]he First Amendment . . . includes both the right to speak freely and the right to refrain from speaking at all,”¹⁶¹ and articulates that “an individual’s ‘right to tailor [his] speech’ or to not speak at all ‘applies . . . equally to statements of fact the speaker would rather avoid.’”¹⁶²

To determine which level of scrutiny should be applied to this regulation, the Court held that when the rights of professionals are implicated, the level of review “slides ‘along a continuum’ from ‘public dialogue’ on one end to ‘regulation of the professional conduct’ on the other.”¹⁶³ In the facts presented, the Court found that the North Carolina regulation fell in the middle, it is a regulation of medical treatment via physician’s conduct which a government can have a strong interest in regulating, but the interest is weakened in the context of regulating medicine.¹⁶⁴ However, due to the regulation not only policing a physician’s conduct, but also their speech, a heightened level of intermediate scrutiny is appropriate in the contexts of abortion procedures.¹⁶⁵

Under intermediate review, the government must show, at the very least, that the statute in question “directly advances a substantial governmental interest and that the measure is drawn to

¹⁵⁸ *Id.* at 244.

¹⁵⁹ *Id.* at 245.

¹⁶⁰ *Id.* at 246. (“[T]his display of Real-Time View Requirement explicitly promotes a pro-life message by demanding the provision of facts that all fall on one side of the abortion debate—and does so shortly before the time of decision when the intended recipient is most vulnerable.”).

¹⁶¹ *Id.* at 245–46 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)).

¹⁶² *Id.* at 246 (quoting *Hurley v. Irish-American Gay*, 515 U.S. 557, 573 (1995)).

¹⁶³ *Id.* at 248 (quoting *Pickup v. Brown*, 740 F.3d 1208, 1227, 1229 (9th Cir. 2013)).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

achieve that interest.”¹⁶⁶ Here, North Carolina’s articulated interests were protecting fetal life, along with protecting a pregnant woman’s psychological health.¹⁶⁷ The measure drawn to achieve that interest is the speech and display statute.¹⁶⁸ The Court found that the statute was far-reaching and “interferes with the physician’s right to free speech beyond the extent permitted for reasonable regulation of the medical profession, while simultaneously threatening harm to the patient’s psychological health, interfering with the physician’s professional judgment, and compromising the doctor-patient relationship.”¹⁶⁹

The Display of Real Time View Requirement was nothing more than an attempt by North Carolina to use physicians as a “mouth-piece” to push forth their preference for child-birth over abortion.¹⁷⁰ The Court distinguished this statute from the informed consent requirement in *Casey*,¹⁷¹ noting that forcing physicians’ to deliver the state’s preferred message to patients in their own voice is a much heavier burden on free speech rights than informing them of available pamphlet materials.¹⁷² Using a trusted doctor-patient relationship, in the context of a vulnerable situation, to express a preference for childbirth over abortion undermines the trust in those relationships.¹⁷³ Furthermore, this is contrary to the reason patients go to doctors in the first place – an objective medical opinion.¹⁷⁴ The Court succinctly makes this point holding, “[a]bortion may well be a special case because of the undeniable gravity of all that is involved, but it cannot be so special a case that all other professional rights and medical norms go out the window.”¹⁷⁵ States can promote childbirth over abortion through

¹⁶⁶ *Id.* at 250 (quoting *Sorrell v. IMS Health Inc.*, 131 S.Ct. 2653, 2667–68 (2011)).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 253.

¹⁷¹ *See Planned Parenthood of Southeastern Pa v. Casey*, 505 U.S. 833, 881 (1992).

¹⁷² *Stuart*, 774 F.3d at 253.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 255–56.

alternative means, but they “may not coerce doctors into voicing that message on behalf of the state in the particular manner and setting attempted here.”¹⁷⁶ The Fourth Circuit’s opinion created an excellent framework for evaluating these types of regulations moving forward.

D. 11th Circuit

In 2017, the Eleventh Circuit took up the issue of whether a Florida statute regulating speech regarding firearm ownership infringed upon a physician’s free speech rights.¹⁷⁷ While this case was not about abortion, it is relevant because it supports the *Stuart* court’s rejection of a rational basis review as applied to state regulation of professional speech in the context of the physician-patient relationship.¹⁷⁸ In *Wollschlaeger v. Governor of Florida*, provisions of a state regulation, the Florida Firearms Owners’ Privacy Act,¹⁷⁹ (“FOPA”) were under scrutiny for regulating speech by doctors and medical professionals, as well as providing sanctions if the regulations were violated.¹⁸⁰ The Florida Legislature, after learning physicians often questioned patients about various potential health and safety risks including firearms, enacted a statute titled “Medical privacy concerning firearms; prohibitions; penalties; exceptions.”¹⁸¹ The constitutionality of the statute was challenged, specifically the “record-keeping, inquiry, anti-discrimination, and anti-harassment provisions.”¹⁸²

The provisions under review stated that a doctor or medical professional “may not intentionally enter any disclosed information concerning firearm ownership into patient’s medical record” when the medical professional knows that it is not relevant

¹⁷⁶ *Id.* at 256.

¹⁷⁷ *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1300–01 (11th Cir. 2017).

¹⁷⁸ *Id.* at 1311.

¹⁷⁹ FLA. STAT. §790.338 (2011), *invalidated by Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293 (11th Cir. 2017).

¹⁸⁰ *Wollschlaeger*, 848 F.3d at 1300.

¹⁸¹ *Id.* at 1301–02.

¹⁸² *Id.*

to that patient's care and safety or the safety of others.¹⁸³ Furthermore, physicians "should refrain from making a written inquiry or asking questions concerning the ownership of a firearm or ammunition by the patient or by a family member of the patient, or the presence of a firearm in a private home"¹⁸⁴ unless they believe in good faith the information is relevant to the patient's safety or the safety of others.¹⁸⁵ The anti-discrimination provision stated that a doctor or medical professional may not discriminate against patients solely on firearm ownership status.¹⁸⁶ The anti-harassment provision stated that a doctor or medical professional should not "unnecessarily" harass patients about firearm ownership during medical exams.¹⁸⁷ The Eleventh Circuit ultimately struck the record-keeping, inquiry, and anti-harassment provisions down as unconstitutional, and concluded the anti-discrimination provision was not unconstitutional.¹⁸⁸

The Court's analysis affirmed these provisions were "speaker-focused" and "content-based," and therefore triggered First Amendment scrutiny.¹⁸⁹ The Eleventh Circuit cited the Supreme Court, reiterating its prior holding that, "[A] State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights."¹⁹⁰ The FOPA provisions challenged in *Wollschlaeger* clearly targeted speech and conduct by doctors, and furthermore imposed penalties on doctors who violated these regulations.¹⁹¹ The next step was deciding which level of scrutiny to apply. Here, the Court cited to *Stuart*, affirming that the *Casey* "plurality did not hold sweepingly that all regulation of speech in the medical context merely receives rational basis review,"¹⁹² and furthermore it is not "appropriate to subject content-based

¹⁸³ §790.338(1).

¹⁸⁴ §790.338(2).

¹⁸⁵ §790.338(2).

¹⁸⁶ §790.338(5).

¹⁸⁷ §790.338(6).

¹⁸⁸ *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1301 (11th Cir. 2017).

¹⁸⁹ *Id.* at 1307.

¹⁹⁰ *Id.* at 1310 (citing *NAACP v. Button*, 371 U.S. 415, 439 (1963)).

¹⁹¹ *Id.* at 1305.

¹⁹² *Id.* at 1311 (citing *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014)).

restrictions on speech by those engaged in a certain profession to mere rational basis review.”¹⁹³ Once this is established the Court analyzed the provisions at question under a heightened level of scrutiny, and found that they failed because they were not drawn to directly advance a substantial governmental interest.¹⁹⁴

The ruling in *Wollschlaeger* is important because it affirms, like the Fourth Circuit, that a state may not push forth content-based speech restrictions onto physicians and medical professionals who are simply trying to do their jobs.¹⁹⁵ Due to the nature of the fields of medicine and public health, “doctors . . . must be able to speak frankly and openly to patients.”¹⁹⁶ FOIPA was purely a state’s attempt to quiet speech that it did not agree with as a matter of policy.¹⁹⁷ Applying a heightened level of scrutiny in the context of professional speech ensures that State regulations do not violate First Amendment rights, and further that these types of statutes are drawn to directly advance a legitimate substantial governmental interest.¹⁹⁸

IV. SOLUTION

Speech-and-display ultrasound regulations are nothing more than a state’s effort to place guilt on a woman electing to obtain an abortion.¹⁹⁹ While the Supreme Court has ruled several times that women have a constitutional right to abortion,²⁰⁰ anti-choice states

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 1312.

¹⁹⁵ *See id.* at 1313.

¹⁹⁶ *Id.* at 1313 (quoting *Conant v. Walters*, 309 F.3d 629, 636 (9th Cir. 2002)).

¹⁹⁷ *See id.* at 1313–14.

¹⁹⁸ *See* *Stuart v. Camnitz*, 774 F.3d 238, 250 (4th Cir. 2014) (citing *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667–68 (2011)); *Wollschlaeger*, 848 F.3d at 1312.

¹⁹⁹ *Forced Ultrasound Laws*, NARAL PRO-CHOICE AMERICA, <https://www.prochoiceamerica.org/issue/forced-ultrasound-laws> (last visited Sept. 18, 2018).

²⁰⁰ *See* *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2298 (2016) (ruling that a Texas statute that placed restrictions on the operations of abortion clinics throughout the state was found to be unconstitutional because it violated the *Casey* undue burden standard, therefore reaffirming the

create these regulations to condemn, intimidate, and shame women for their choices, and to push forth their anti-choice political viewpoint.²⁰¹ Speech-and-display laws are a sneaky move by legislators to interfere in a woman's personal health decisions, because these regulations, while clearly promoting anti-abortion, may not be found to present an "undue burden" under *Casey*, and therefore might not be struck down as unconstitutional for encroaching on a woman's right to abortion.²⁰²

Using the Fourth Circuit's application of heightened intermediate scrutiny in these contexts will help to ensure that the free speech rights of physicians are not violated under the guise of protecting women's health.²⁰³ However, the Fourth Circuit could have created an even better precedent by firmly articulating that when applying this level of scrutiny, if a state's regulation infringes on a doctor's ability to give an objective medical opinion to their patient, the state's interests will never win. Besides protecting the constitutional rights of doctors and medical professionals, this type of precedent will help eliminate speech-and-display laws that are not medically relevant or necessary, do not actually dissuade women from obtaining abortions,²⁰⁴ and may

constitutional right to abortion as found in *Roe* and *Casey*); *Gonzales v. Carhart*, 550 U.S. 124, 125–130 (2007) (holding that while legislation banning a specific type of abortion was found to be constitutional, the principles of *Roe* and *Casey* are still valid); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 846 (1992) (ruling that the basic principles of *Roe* are reaffirmed, and that the right of a woman to obtain an abortion is a constitutional right); *Roe v. Wade*, 410 U.S. 113, 153–54 (1973) (holding that the constitutional right of privacy is found to encompass a woman's decision to terminate her pregnancy).

²⁰¹ *Forced Ultrasound Laws*, *supra* note 199.

²⁰² Lauren Paulk, *What is an "Undue Burden"? The Casey Standard As Applied To Informed Consent Provisions*, 20 UCLA WOMEN'S L. J. 71, 96 <http://escholarship.org/content/qt14f0z1hr/qt14f0z1hr.pdf> (last visited Sept. 18, 2018).

²⁰³ See Anne Davis, *Requiring Ultrasounds Before an Abortion*, N.Y. TIMES (June 3 2015), https://www.nytimes.com/2015/06/03/opinion/requiring-ultrasounds-before-an-abortion.html?_r=0.

²⁰⁴ See generally Mary Gatter, Katrina Kimport, Diana Greene, Tracy Weitz, & Ushma Upadhyay, *Relationship Between Ultrasound Viewing and Proceeding to Abortion*, 123 OBSTETRICS & GYNECOLOGY 81 (2014), http://journals.lww.com/greenjournal/Fulltext/2014/01000/Relationship_Between_Ultrasound_Viewing_and.13.aspx (analyzing data from medical records for

even bring pain to a patient.²⁰⁵ This type of precedent may also protect patients and physicians from other attempts by states to push forth their anti-choice agenda.

A. Protecting the Constitutional Rights of Physicians is Necessary for Them to Perform Their Jobs Adequately

Patients seek out doctors for an objective medical opinion.²⁰⁶ In the context of an abortion procedure, a personal medical decision for a woman, it is vital she have a doctor she can trust to be objective and honest.²⁰⁷ Laws that regulate a physician's speech and conduct undermine this trusting relationship, in the name of eroding women's rights.²⁰⁸ If a physician is being forced to give irrelevant and unnecessary information to a patient who does not want it to begin with, and this information clearly has the purpose of discouraging abortion, how do patients move forward completely trusting their doctor?²⁰⁹ Furthermore, physicians are highly trained professionals, they are the members of society best equipped to give medical advice, and their objective opinion should not be silenced because the state in which they work is anti-

15, 575 visits by women seeking abortions, where 98.4% of women that viewed ultrasound images continued with the termination of the pregnancy).

²⁰⁵ Davis, *supra* note 203; *Forced Ultrasound Laws*, *supra* note 199.

²⁰⁶ See generally Priya Rajan, *How Abortion Policy Erodes Doctor-patient Trust*, CHICAGO TRIBUNE (May 2, 2017), <http://www.chicagotribune.com/news/opinion/commentary/ct-abortion-laws-doctor-patient-perspec-0502-jm-20170501-story.html> (explaining the importance of the doctor-patient relationship and the patient's expectation that a doctor is providing them with the best medical information available, and how laws that interfere with this relationship are problematic).

²⁰⁷ See *id.* ("Trust is a crucial component. Patients need to believe their physicians are honest and will provide them with the best available medical information.").

²⁰⁸ *Id.*

²⁰⁹ Callie Beusman, *A State-by-State List of the Lies Abortion Doctors Are Forced to Tell Women*, VICE (Aug. 18, 2016), https://broadly.vice.com/en_us/article/nz88gx/a-state-by-state-list-of-the-lies-abortion-doctors-are-forced-to-tell-women.

abortion.²¹⁰ Holding statutes that regulate their speech and conduct to a heightened level of scrutiny ensures their speech is not being restricted for the sole purpose of pushing a political agenda.

B. Speech-and-Display Laws Don't Actually Work to Discourage Abortion

Speech and display laws not only are offensive to the doctor patient relationship, they may also have little to no impact on a woman's choice to proceed with abortion.²¹¹ A study published in the *Journal of Obstetrics & Gynecology* measured the effect viewing an ultrasound has on the final decision to undergo the procedure.²¹² The results showed that 98.4% of women who chose to view an ultrasound still continued to have an abortion afterwards.²¹³ This directly refutes the politicized idea that viewing an ultrasound will change a woman's mind.²¹⁴ The study was sure to note that while the results "cannot be generalized to women's experience of ultrasound viewing in settings where it is mandatory . . . given the very high percentage of women proceeding with abortion after viewing the ultrasound image, it is unlikely that mandatory viewing would substantially affect the number of abortions performed."²¹⁵ These results are not surprising

²¹⁰ Davis, *supra* note 203; Alex Zielinski, *New Utah Law Will Require Abortion Doctors To Lie To Their Patients*, THINK PROGRESS (May 10, 2016), <https://thinkprogress.org/new-utah-law-will-require-abortion-doctors-to-lie-to-their-patients-e33062d947bd/>.

²¹¹ See Gatter et al., *supra* note 204, at 81.

²¹² *Id.*; Elliana Dockterman, *Will Looking at an Ultrasound Before an Abortion Change Your Mind?*, TIME (Jan. 9, 2014), <http://time.com/469/will-looking-at-an-ultrasound-before-an-abortion-change-your-mind/> ("[R]esearchers analyzed 15,575 medical records from an abortion care provider in Los Angeles. Each patient was asked about her choice for an abortion and answers were divided into high, medium and low decision certainty about the procedure, with only 7.4 percent of women falling in the latter two categories. All patients underwent an ultrasound, and 42.5 percent of them opted to see images. Of those who saw the pictures, 98.4 percent went on to terminate the pregnancies.").

²¹³ Gatter et al., *supra* note 204, at 83.

²¹⁴ *Id.*

²¹⁵ *Id.* at 86 ("It may, however, affect patient satisfaction and health outcomes, which research shows are enhanced when patients feel control over

when you juxtapose the findings with research that approximately 60% of women obtaining abortions already have at least one child.²¹⁶ These are women who are making autonomous medical decisions to obtain an abortion, and at the end of the day a mandatory descriptive ultrasound is a hindrance.²¹⁷

C. Speech-and-Display Laws Can Be Harmful to the Psychological Well-Being of the Patient

In addition to violating physicians' rights, being medically unnecessary and overall ineffective, speech-and-display laws may cause psychological trauma to women seeking an abortion.²¹⁸ While regardless of circumstance all patients deserve compassionate, honest care from physicians, some patients seek out abortions due to especially complicated, sensitive circumstances.²¹⁹ These circumstances can include fatal fetal abnormalities and sexual assault.²²⁰ In these situations, a physician may be dealing with a patient who is seeking an abortion out of necessity but not actual desire.²²¹ One woman documented her

decisions related to their care. Mandating that women view their ultrasound images may have negative psychological and physical effects even on women who wish to view.”).

²¹⁶ Moira Weigel, *How Ultrasound Became Political*, THE ATLANTIC (Jan. 24, 2017), <https://www.theatlantic.com/health/archive/2017/01/ultrasound-woman-pregnancy/514109/>; Jenna Jerman, Rachel Jones, & Tsuyoshi Onda, *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008*, GUTTMACHER INST. (May 2016), <https://www.guttmacher.org/report/characteristics-us-abortion-patients-2014>.

²¹⁷ Weigel, *supra* note 216.

²¹⁸ *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 283 F. Supp. 3d 629, 645–46 (W.D. Ky. 2017).

²¹⁹ See Dahlia Lithwick, *North Carolina's Outrageous Abortion Requirement is Struck Down*, SLATE (Dec. 22, 2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/12/north_carolina_abortion_ultrasound_decision_quotes_from_judge_wilkinson.html.

²²⁰ *Beshear*, 283 F. Supp. 3d at 645; Dani Kass, *ACLU Challenges Ky. Law on Abortion Ultrasound Narration*, LAW360 (Jan. 10, 2017), <https://www.law360.com/articles/879094/aclu-challenges-ky-law-on-abortion-ultrasound-narration>; Lithwick, *supra* note 219.

²²¹ See *Beshear*, 283 F. Supp. 3d at 645 (discussing women who abort because of “fetal anomaly” or because it is the result of sexual assault); Jones,

experience with a Texas ultrasound law when obtaining an abortion due to a molecular flaw that would cause her child to suffer greatly from the moment he was born.²²² She describes her pain and anguish listening to a doctor describe the ultrasound as she sobbed to try and drown out his words.²²³ This seems especially cruel, forcing a woman to listen to an ultrasound description of a child she and her family had wanted. Furthermore, victims of sexual assault seeking an abortion should not be punished by these forced ultrasounds. While some speech-and-display laws have included exceptions for victims of sexual assault, not all do.²²⁴ This means in the states that do not have exceptions to this rule, a victim of sexual assault must listen to a physician describe the fetus that represents the rape she was subjected to before she may get an abortion.²²⁵ This can hardly be considered to promote women's health and well-being.

CONCLUSION

Applying a heightened level of intermediate scrutiny to speech-and-display laws will protect not only physicians' first amendment rights, but also a patient's ability to undergo a medical procedure free of ideological messages.²²⁶ This is especially important in the context of abortion procedures because of the intimate nature of the procedure to begin with. Physicians must be able to speak freely and honestly with their patients, and patients must feel safe and secure to make informed medical decisions.²²⁷ States have no

supra note 151 (detailing a Texas woman's experience obtaining an abortion after discovering her baby had a molecular flaw that would cause either death or extreme pain to the fetus and a lifetime of medical care. The laws in her state required she listen to a doctor describe her baby via ultrasound before the abortion).

²²² Jones, *supra* note 151.

²²³ *Id.*

²²⁴ Requirements for Ultrasound, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/requirements-ultrasound> (last visited Jan. 25, 2019).

²²⁵ See Kass, *supra* note 220; Lithwick, *supra* note 219.

²²⁶ See *Stuart v. Camnitz*, 774 F.3d 238, 253 (4th Cir. 2014).

²²⁷ See *id.*

business forcing unnecessary anti-abortion messages onto patients, especially if in the course of doing so, doctors' first amendment rights are violated. For these reasons, looking to a standard similar to that of the *Stuart* application of heightened intermediate scrutiny when examining speech-and-display regulations will ensure physicians' constitutional rights are protected, and will promote healthy relationships between physicians and patients.²²⁸ Moving forward, it is ideal for courts to firmly opine that the analysis will always weigh in favor of physicians and patients if a state regulation places a burden on a physician's objective medical analysis.

²²⁸ See *Stuart*, 774 F.3d at 253; Lithwick, *supra* note 219.