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## ***Casey, Camnitz, and Compelled Speech: Why the Fourth Circuit's Interpretation of Casey Sets the Right Standard for Speech-and-Display Provisions\****

### INTRODUCTION

In 2014, the Fourth Circuit decided *Stuart v. Camnitz*,<sup>1</sup> striking down a provision of the North Carolina Woman's Right to Know Act that required physicians to display and describe ultrasound images to women seeking abortions.<sup>2</sup> The court agreed with the plaintiffs—several North Carolina physicians—who challenged the requirement as a violation of their First Amendment right to be free from compelled speech.<sup>3</sup> Although North Carolina defended the provision as necessary to ensure that women give informed consent to abortions, the court found the provision unconstitutional under the First Amendment.<sup>4</sup> By doing so, the Fourth Circuit split with recent decisions by the Fifth and Eighth Circuits, which upheld similar informed consent requirements in the face of First Amendment challenges.<sup>5</sup> The precise nature of the circuit split arose out of differing interpretations of the leading Supreme Court case on state regulation of abortion: *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>6</sup> In *Casey*, the Court upheld an informed consent provision in the face of a First Amendment challenge by physicians.<sup>7</sup> But where the Fifth and Eighth Circuits held that *Casey* required application of the undue burden test to state informed consent requirements, the Fourth Circuit held that *Casey* did not

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1. 774 F.3d 238 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 2838 (2015).

2. *Id.* at 242; *see also* Woman's Right to Know Act, 2011 N.C. Sess. Laws 2105, 2109–10 (codified at N.C. GEN. STAT. § 90-21.85 (2015)).

3. *Camnitz*, 774 F.3d at 243. Several political action groups joined the suit challenging the North Carolina law. *See ACLU, Planned Parenthood Sue over NC Abortion Law*, WRAL (Sept. 29, 2011), <http://www.wral.com/news/state/nccapitol/story/10199739/> [<https://perma.cc/Q5MD-3V4A>] (listing the American Civil Liberties Union, Planned Parenthood, and the Center for Reproductive Rights as among those challenging the law).

4. *Camnitz*, 744 F.3d at 245 (explaining that the display of the sonogram is plainly an expressive act that implicates the First Amendment).

5. *See, e.g.,* *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012); *Planned Parenthood of Minn. v. Rounds*, 653 F.3d 662 (8th Cir.), *vacated in part*, 662 F.3d 1072 (8th Cir. 2011).

6. 505 U.S. 833 (1992).

7. *Id.* at 881–87 (plurality opinion).

preclude the application of a First Amendment analysis when such requirements compelled physician speech.<sup>8</sup>

This Recent Development argues that the Fourth Circuit's approach is the correct application of *Casey*: laws that mandate physician speech in the context of informed consent for abortions should be subject to a First Amendment analysis. The Fourth Circuit's decision not only falls within the bounds of Supreme Court precedent, but its approach also conforms to the overall intent of *Casey* and is necessary to ensure the long-term survival of the Supreme Court's existing abortion jurisprudence. Although the Supreme Court upheld the informed consent provision at issue in *Casey*, the North Carolina informed consent provision differed in several significant respects from the Pennsylvania statute and could thus be struck down without contravening *Casey*. First, the North Carolina provision included no therapeutic exception, denying physicians the discretion to withhold the state's message if they believed the information would put an individual woman's health at risk.<sup>9</sup> The Pennsylvania statute upheld in *Casey* contained such an exception.<sup>10</sup> Second, the ideological nature of North Carolina's mandated message also distinguished it from the provision at issue in *Casey*.<sup>11</sup> Finally, the disutility of abortion exceptionalism<sup>12</sup> jurisprudence buttresses the Fourth Circuit's decision to strike down

8. See, e.g., *Camnitz*, 744 F.3d at 249 (“The fact that a regulation does not impose an undue burden on a woman under the due process clause does not answer the question of whether it imposes an impermissible burden on the physician under the First Amendment.”); *Lakey*, 667 F.3d at 576 (“The import of [*Casey*] is clear . . . [I]nformed consent laws that do not impose an undue burden on the woman's right to have an abortion are permissible if they require truthful, non-misleading, and relevant disclosures.”); *Rounds*, 653 F.3d at 669 (“[A] party bringing a facial challenge to an abortion statute must show that the law presents an undue burden . . .”).

9. See N.C. GEN. STAT. § 90-21.82 (2015) (describing the lone exception for a “medical emergency”).

10. See *Casey*, 505 U.S. at 883–84 (plurality opinion) (“[T]he statute now before us does not require a physician to comply with the informed consent provisions ‘if he or she can demonstrate by a preponderance of the evidence, that he or she reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient.’”).

11. See *Camnitz*, 744 F.3d at 242 (“This compelled speech, even though it is a regulation of the medical profession, is ideological in intent and in kind.”).

12. Abortion exceptionalism is the theory that speech claims in the abortion context must be analyzed under a separate standard of review from all other speech claims. See Caitlin Borgmann, *Fourth and Fifth Circuits Confront Abortion Exceptionalism*, JURIST (Jan. 15, 2015), <http://jurist.org/forum/2015/01/caitlin-borgmann-abortion-exceptionalism.php> [<https://perma.cc/A332-K3V7>]. The theory suggests that the Supreme Court's analysis of the physicians' First Amendment challenge in *Casey* was intended to set the standard for all future speech challenges to informed consent provisions applicable to abortion providers. *Id.*

the North Carolina informed consent provision as a violation of the First Amendment. The *Camnitz* decision thus stands firmly within the bounds of the *Casey* decision and is sound legal policy. More importantly, *Camnitz* ensures the continued survival of *Casey*'s underlying goal, which was largely to uphold *Roe v. Wade*<sup>13</sup> and to ensure continuing access to abortion for women without undue hardship.<sup>14</sup>

This Recent Development proceeds in four parts. Part I provides background to the Supreme Court's introduction of the undue burden test in *Casey* and discusses the rise of informed consent provisions as a form of state regulation of abortion procedures. This Part also introduces North Carolina's informed consent requirement, with particular focus on the speech-and-display provision and the lawsuit it provoked. Part II expands on the Supreme Court's decision in *Casey* and the subsequent uncertainty about the appropriate standard of review for challenges to state abortion regulations. Part II goes on to contrast the Fifth Circuit's<sup>15</sup> interpretation of *Casey* precedent with the Fourth Circuit's approach in *Stuart v. Camnitz*. Part III explains why the Fourth Circuit's holding is a superior interpretation of the loose guidelines the Supreme Court provided in *Casey*, both in light of key differences between the Pennsylvania and North Carolina statutes and the need to ensure the integrity of the Supreme Court's abortion jurisprudence. Finally, Part IV addresses the Supreme Court's recent denial of certiorari on this issue and explores possible motivations for the Court's refusal to resolve the circuit split.

#### I. INFORMED CONSENT PROVISIONS AND ENSUING LITIGATION

Two of the Supreme Court's most high-profile decisions of the twentieth century centered on abortion and the extent of permissible state regulation of abortion procedures. Although *Planned Parenthood of Southeastern Pennsylvania v. Casey* nominally affirmed *Roe v. Wade*, the decision was widely received as weakening *Roe*'s standard for determining the validity of laws restricting access to abortion.<sup>16</sup> *Casey* departed from the trimester framework set out in

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13. 410 U.S. 113 (1973).

14. See *Casey*, 505 U.S. at 860 (“[N]o change in *Roe*'s factual underpinning has left its central holding obsolete, and none supports an argument for overruling it.”).

15. Due to space considerations, this Recent Development will focus only on the Fifth Circuit's recent decision in *Lakey* as a contrast to the Fourth Circuit's decision in *Camnitz*. The *Lakey* decision represents the approach taken by both the Fifth and Eighth Circuits.

16. See, e.g., Linda J. Wharton, *Roe at Thirty-Six and Beyond: Enhancing Protection for Abortion Rights Through State Constitutions*, 15 WM. & MARY J. WOMEN & L. 469, 471 (2009) (arguing that in the decades since *Roe*, the Supreme Court has “seriously

*Roe* and imposed a new test: a state law would be held invalid if it imposed an “undue burden” on a woman’s access to an abortion.<sup>17</sup> The Court described the standard as follows: “An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”<sup>18</sup> The outcome in *Casey* indicated that the new test would be easy for future state regulations to pass; after applying the undue burden test to the provisions under review in *Casey*, the Court upheld all but one.<sup>19</sup> But certain language in the *Casey* opinion<sup>20</sup> has resulted in debate as to whether the Court intended for the undue burden test to be the exclusive standard for judging state regulations of abortion.<sup>21</sup> Specifically, there is lingering

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undermined” the protections *Roe* provided for women’s access to abortion); *Landmark Cases: Casey v. Planned Parenthood (1992)*, PBS, [http://www.pbs.org/wnet/supremecourt/rights/landmark\\_casey.html](http://www.pbs.org/wnet/supremecourt/rights/landmark_casey.html) [<https://perma.cc/DR6R-L7QG>] (“The Court also rejected parts of *Roe*, holding that the state can legally pass laws protecting the life and health of the fetus or mother in far broader circumstances. For example, while in *Roe* the Court had held that the state could not regulate any aspect of abortions performed during the first trimester, the Court now held that states could pass such regulations affecting the first trimester, but only to safeguard a woman’s health, not to limit a woman’s access to abortions.”); Alex Markels, *Supreme Court’s Evolving Rulings on Abortion*, NPR (Nov. 30, 2005), <http://www.npr.org/templates/story/story.php?storyId=5029934> [<https://perma.cc/6EPE-DPYT> (dark archive)] (describing *Casey* as “effectively [setting] a lower standard for state involvement in abortion decisions,” and stating that “*Casey* significantly weakened *Roe*”); Jane S. Schacter, *At the Supreme Court: Clarifying the Scope of Abortion Rights*, STAN. L. SCH.: LEGAL AGGREGATE (Nov. 17, 2015), <https://law.stanford.edu/2015/11/17/at-the-supreme-court-clarifying-the-scope-of-abortion-rights/> [<https://perma.cc/3AA9-AJNS>] (“*Casey* explicitly weakened *Roe*’s constitutional protection. In a joint opinion written by Justices Kennedy, O’Connor and Souter, *Casey* imposed a new, less demanding standard in lieu of the strict scrutiny *Roe* had applied to the core right.”); see also *Casey*, 505 U.S. at 869 (“It is therefore imperative to adhere to the essence of *Roe*’s original decision, and we do so today.”).

17. *Casey*, 505 U.S. at 874 (plurality opinion).

18. *Id.* at 878.

19. See *id.* at 901 (striking down the spousal notification requirement).

20. *Id.* at 884 (“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.” (emphasis added) (internal citations omitted)).

21. See Lauren Paulk, Article, *What Is an “Undue Burden”? The Casey Standard as Applied to Informed Consent Provisions*, 20 UCLA WOMEN’S L.J. 71, 97 (2013) (noting that “courts differ in their manner of addressing First Amendment challenges in the context of abortion regulations, leaving a split in the [c]ircuits on how to address informed consent provisions”); Lauren R. Robbins, Comment, *Open Your Mouth and Say ‘Ideology’: Physicians and the First Amendment*, 12 U. PA. J. CONST. L. 155, 173–74 (2009) (concluding that “the attention the [*Casey*] Court gave to the First Amendment argument as a whole was fairly fleeting” and explaining that “[s]peech restrictions regulated solely as ‘part of the practice of medicine’ place them in the context of a world that most people assume is characterized by scientific facts. Even in medicine, however, there are fuzzy lines between facts and ideas”). As one constitutional law professor said, “[i]n 1992, the *Casey*

uncertainty as to whether the Court intended the undue burden test to apply even in the face of a First Amendment challenge.<sup>22</sup>

Although the Court's holding in *Casey* left some questions unanswered, one takeaway remains undisputed: states have the power to enact some regulations on abortion procedures within their borders.<sup>23</sup> This power to regulate abortion stems from the general power of states to ensure informed consent to surgery; the Court has held that the state has the right to ensure a patient understands the ramifications of, and alternatives to, a surgical procedure.<sup>24</sup> Many states have exercised this power by passing statutes mandating that women receive certain information prior to undergoing an abortion.<sup>25</sup> Known as "informed consent" provisions, these rules mirror the requirements in other medical settings designed to ensure that the patient has full information about the risks and alternatives accompanying a given medical procedure.<sup>26</sup>

In the years since *Casey*, many states have enacted demanding informed consent requirements in the abortion context.<sup>27</sup> The requirements of informed consent provisions for abortions often go

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plurality began its opinion this way: 'Liberty finds no refuge in a jurisprudence of doubt.' Nearly a quarter century later, I read those words and don't know whether to laugh or cry." Garrett Epps, *Will the U.S. Supreme Court Give a Clear Answer on Abortion?*, THE ATLANTIC (Nov. 15, 2015), <http://www.theatlantic.com/politics/archive/2015/11/supreme-court-hears-new-abortion-case/416055/> [<https://perma.cc/FNU2-TBHS>] (quoting *Casey*, 505 U.S. at 844).

22. See *supra* note 21.

23. *Casey*, 505 U.S. at 869–70 (plurality opinion).

24. *Id.* at 882–83 ("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. An example illustrates the point. We would think it constitutional for the State to require that in order for there to be informed consent to a kidney transplant operation the recipient must be supplied with information about risks to the donor as well as risks to himself or herself.").

25. See, e.g., GUTTMACHER INST., STATE POLICIES IN BRIEF: REQUIREMENTS FOR ULTRASOUND 1–2 (2016), [http://www.guttmacher.org/statecenter/spibs/spib\\_RFU.pdf](http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf) [<https://perma.cc/Z4KQ-GUD8>] (noting that twenty-five states require abortion providers to perform or offer to perform an ultrasound on women seeking abortions); Scott W. Gaylord & Thomas J. Molony, *Casey and a Woman's Right to Know: Ultrasounds, Informed Consent, and the First Amendment*, 45 CONN. L. REV. 595, 603–05, tbls.1 & 2 (2012) (describing the increasing number of state statutes that require oral explanation and description of ultrasound images as part of their informed consent requirements and providing a table outlining the requirements in each state).

26. See DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 308 (2d ed. 2011) (explaining that the informed consent principle arises from the courts' recognition of the patient's right to important information about the nature of the medical procedure proposed, including risks and alternative procedures).

27. See Gaylord & Molony, *supra* note 25, at 603.

well beyond the requirements of informed consent for other types of medical procedures.<sup>28</sup> One of the most controversial of these requirements are “speech-and-display” provisions. Such provisions go beyond requiring that physicians perform ultrasounds on women seeking abortions<sup>29</sup> by compelling the physician to *display and describe* the ultrasound image to women. This is required even if a woman expressly states that she does not want to receive the information.<sup>30</sup> Physicians who fail to comply face severe repercussions, including loss of licensure.<sup>31</sup>

In 2011, North Carolina enacted its own “speech-and-display” provision as part of the Woman’s Right to Know Act (“WRKA”).<sup>32</sup> The provision required physicians to display ultrasound images to women seeking abortions, and to describe “the presence, location, and dimensions” of a fetus, specifically the “presence of external members and internal organs, if present and viewable.”<sup>33</sup> Under the WRKA, the description must be presented in conjunction with information about the availability of state assistance for childbirth

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28. For example, the North Carolina statute required physicians to communicate certain information to women seeking abortions, removing the discretion that was available in the statutes at issue in *Casey*. Compare N.C. GEN. STAT. § 90-21.85(a) (2015), with *Casey*, 505 U.S. at 883–84 (plurality opinion) (quoting 18 PA. CONS. STAT. § 3205 (1990)).

29. North Carolina has required physicians to perform preabortion ultrasounds since 1994. Prior to the speech-and-display laws, however, there was no requirement that physicians show the ultrasound to women, or discuss the image with them. See *Federal Court Strikes Ultrasound Requirement—New Pro-life Rankings Show NC Most Improved*, NC VALUES COALITION (Jan. 2014), <http://ncvalues.org/2014/01/federal-court-strikes-ultrasound-requirement-new-pro-life-rankings-show-nc-most-improved/> [<https://perma.cc/QB7J-7AUB>] (noting that North Carolina has required a preabortion ultrasound since 1994, but that doctors do not usually show or describe the images to women).

30. See N.C. GEN. STAT. § 90-21.85(a); TEX. HEALTH & SAFETY CODE ANN. § 171.0124 (West, Westlaw through 2015 Reg. Sess.); Act of Apr. 27, 2010, ch. 173, 2010 Okla. Sess. Law 598, 599, *invalidated* by *Nova Health Sys. v. Pruitt*, 292 P.3d 28 (Okla. 2012), *cert. denied*, 134 S. Ct. 617 (2013). The language “shall” within these statutes removes physician discretion and means that physicians are required to communicate the information even if the woman does not want to receive it. N.C. GEN. STAT. § 90-21.85(a); see also § 90-21.85(b) (“Nothing in this section shall be construed to prevent a pregnant woman from averting her eyes from the displayed images or from refusing to hear the simultaneous explanation and medical description.”).

31. See Dahlia Lithwick, *North Carolina’s Outrageous Abortion Requirement Is Struck Down*, SLATE (Dec. 22, 2015, 3:11 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/12/north\\_carolina\\_abortion\\_ultrasound\\_decision\\_quotes\\_from\\_judge\\_wilkinson.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/12/north_carolina_abortion_ultrasound_decision_quotes_from_judge_wilkinson.html) [<https://perma.cc/Z8YR-ZNGR>] (noting that physicians who violate the act are liable for damages and may lose their licenses to practice medicine in North Carolina).

32. Woman’s Right to Know Act, 2011 N.C. Sess. Laws 2105 (codified at N.C. GEN. STAT. §§ 90-21.80 to -21.92).

33. N.C. GEN. STAT. § 90-21.85(a)(2), (4).

and childcare, and the possibility of suing for parental support.<sup>34</sup> Finally, the physician must offer women the opportunity to hear a fetal heart tone, and must obtain “written certification from [a] woman, before the abortion, that the requirements of this section have been complied with[.]”<sup>35</sup>

The constitutionality of the North Carolina speech-and-display provision is arguable. Proponents point to the Supreme Court’s decision in *Casey*, which upheld a provision of a Pennsylvania statute that required physicians to provide certain information to women before physicians could perform abortions.<sup>36</sup> In *Casey*, the Court held that a state may require women to receive information about fetal development and childcare assistance, and that “[t]his requirement cannot be considered a substantial obstacle to obtaining an abortion, and, it follows, there is no undue burden.”<sup>37</sup> Supporters of speech-and-display laws argue that this statement from the Supreme Court sets a clear standard for review of informed consent provisions: so long as they do not impose an undue burden, all state efforts to provide women with information preabortion must be upheld.<sup>38</sup>

Pro-choice activists, on the other hand, argue that *Casey* did not intend to supplant traditional First Amendment analysis of speech claims by creating the undue burden test. They distinguish the new informed consent requirements by pointing out that the recent speech-and-display provisions are a greater infringement on physicians’ First Amendment rights; the new laws provide no exception if the physician believes that receipt of the message would harm a woman’s health, and they contain more explicitly ideological content than the provision at issue in *Casey*.<sup>39</sup> These differences, plaintiffs argue, meant that the mere fact that the Supreme Court upheld the informed consent provision at issue in *Casey* does not

34. § 90-21.82(a).

35. § 90-21.85(a)(5).

36. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 881 (1992) (plurality opinion).

37. *Id.* at 883.

38. *See* Reply Brief of Appellants at 21, *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014) (No. 14-1150), 2014 WL 3107872, at \*21 (pointing to *Casey* as support for its conclusion that “if there is any kind of ‘heightened scrutiny,’ [to be applied to this provision] it should be whether the regulation places an undue burden on the patient’s right to abortion—which it does not”).

39. *See* Plaintiffs’ Supplemental Reply Brief in Support of Their Motion for Summary Judgment at 2–3, *Stuart v. Loomis*, 992 F. Supp. 2d 585 (M.D.N.C. 2014) (No. 1:11-cv-00804), 2013 WL 4028992 (“As Plaintiffs have repeatedly explained, the Requirement is a content-based regulation that compels physicians to parrot the State’s message against their will.”).



mean that *Casey* permanently separated abortion regulations from First Amendment jurisprudence.<sup>40</sup>

In 2014, North Carolina physicians and health care providers brought suit in federal court to resolve the debate: they challenged the WRKA's speech-and-display provision as a violation of their First Amendment right to be free from compelled speech.<sup>41</sup> The district court agreed with the plaintiffs that the provision violated the First Amendment rights of physicians by requiring them to deliver the state's ideological message.<sup>42</sup> Following North Carolina's appeal, the Fourth Circuit heard the case and affirmed the district court's decision.<sup>43</sup> Notably, instead of reading *Casey* as requiring informed consent provisions to be reviewed under the undue burden standard, the Fourth Circuit found that the district court correctly applied a First Amendment analysis to the speech-and-display provision.<sup>44</sup> In so holding, the Fourth Circuit deviated from two sister circuits: both the Fifth and Eighth Circuits had previously interpreted *Casey* as requiring an undue burden standard for review of state abortion regulations and upheld speech-and-display provisions on those grounds.<sup>45</sup> The Fourth Circuit decision in *Stuart v. Camnitz* thus created a circuit split over what standard the courts should apply to speech-and-display provisions in the abortion context.

## II. A CIRCUIT SPLIT: CONTRASTING APPROACHES TO *CASEY* PRECEDENT

The crux of the circuit courts' disagreement is whether *Casey*'s undue burden test is the exclusive standard under which state regulations of abortion should be assessed. The Fifth Circuit found that *Casey* dictated review of informed consent requirements under the undue burden test and upheld Texas's speech-and-display

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40. *See id.* at 2 (“As this Court has already held, *Casey*'s First Amendment discussion does not control the outcome here—and traditional strict scrutiny applies—because unlike the Pennsylvania law upheld in *Casey*, the Display of Real-Time View Requirement (the “Requirement”) is not a reasonable regulation of medical practice.”).

41. *See Stuart v. Loomis*, 992 F. Supp. 2d 585, 588 (M.D.N.C. 2014), *aff'd sub nom. Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 2838 (2015).

42. *See id.*

43. *Stuart v. Camnitz*, 774 F.3d 238, 256 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 2838 (2015).

44. *Id.* at 245.

45. *See Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576 (5th Cir. 2012); *Planned Parenthood Minn. v. Rounds*, 653 F.3d 662, 669 (8th Cir.), *vacated in part*, 662 F.3d 1072 (8th Cir. 2011).

provision under that standard.<sup>46</sup> The Fourth Circuit, in contrast, found that *Casey* did not preclude First Amendment analysis.<sup>47</sup> Rather, restrictions on physician speech in this context should be assessed under intermediate scrutiny—a standard the North Carolina speech-and-display provision did not survive.<sup>48</sup> To fully understand this circuit split, it is necessary to briefly examine the Supreme Court’s analysis of the informed consent provision in *Casey*.

A. *The Murky Precedent of Planned Parenthood of Southeastern Pennsylvania v. Casey*

In *Casey*, nearly twenty years after its seminal decision in *Roe*, the Supreme Court considered the validity of several provisions of a Pennsylvania statute that imposed a variety of restrictions on access to abortion. The restrictions included a twenty-four hour waiting period, parental consent requirements for minors, spousal notification requirements, reporting standards for abortion providers, and informed consent provisions.<sup>49</sup> Although the *Casey* Court nominally affirmed the right to an abortion first recognized in *Roe v. Wade*,<sup>50</sup> it introduced a new test for assessing state regulations on access to abortion: the undue burden test.<sup>51</sup> The Court held that “[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose

46. See *Lakey*, 667 F.3d at 576 (“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.”).

47. See *Camnitz*, 774 F.3d at 249 (“With respect, our sister circuits read too much into *Casey* and *Gonzales*. The single paragraph in *Casey* does not assert that physicians forfeit their First Amendment rights in the procedures surrounding abortions, nor does it announce the proper level of scrutiny to be applied to abortion regulations that compel speech to the extraordinary extent present here.”).

48. See *id.* (“A heightened intermediate level of scrutiny is thus consistent with Supreme Court precedent and appropriately recognizes the intersection here of regulation of speech and regulation of the medical profession in the context of an abortion procedure.”).

49. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992) (listing the five provisions of the Pennsylvania Abortion Control Act of 1982 being reviewed by the Court).

50. See *id.* at 869 (plurality opinion) (“It is therefore imperative to adhere to the essence of *Roe*’s original decision, and we do so today.”); *id.* at 871 (“The woman’s right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce.”). But see *id.* at 873 (rejecting *Roe*’s trimester framework as “rigid” and flawed for its undervaluation of the state’s interest in potential life).

51. See *id.* at 874 (“Only where state regulation imposes an undue burden on a woman’s ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.”).

or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.”<sup>52</sup> Therefore, under the new test, so long as a state regulation did not create a “substantial obstacle” to women receiving abortions, the regulation would not be deemed to impose an “undue burden” and would be upheld.<sup>53</sup>

The current circuit split arises from uncertainty about whether the Supreme Court applied the undue burden test to *all* of the provisions under consideration in *Casey*. It is clear that the Supreme Court applied the undue burden test to the twenty-four hour waiting period, reporting requirements, and spousal notification provision.<sup>54</sup> The Court explicitly held that the waiting period did not amount to an undue burden,<sup>55</sup> and used the language of the undue burden test when it held that the reporting requirements did not impose a “substantial obstacle.”<sup>56</sup> Similarly, the Court found that a spousal notification requirement would impose a “substantial obstacle” to women seeking abortions.<sup>57</sup>

But the language of the holding leaves room to question whether the Court also applied the undue burden standard to the statute’s informed consent requirements. Confusion arises from the language with which the plurality upheld the informed consent provision in *Casey*. First, in the paragraph referencing the physicians’ First Amendment challenge, the Court did not use the language of the undue burden test, referencing neither “undue burden” nor “substantial obstacle.”<sup>58</sup> Second, the Court limited its holding language in rejecting the physicians’ First Amendment challenge to the Pennsylvania provision.<sup>59</sup>

In noting that the physicians’ First Amendment rights were implicated, but were not sufficiently infringed to overcome the

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52. *Id.* at 878.

53. *Id.* at 877 (“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.”).

54. *Id.* at 878.

55. *Id.* at 885.

56. *Id.* at 883.

57. *Id.* at 893–94 (O’Connor, Kennedy & Souter, JJ., opinion of the Court). The Court upheld the parental consent provision on alternate grounds, pointing to case law supporting a state’s right to require a minor seeking an abortion to obtain the consent of a parent or physician. *Id.* at 899 (plurality opinion).

58. *Id.* at 884.

59. *Id.*

Pennsylvania informed consent provision,<sup>60</sup> the Court held that “[w]e see no constitutional infirmity in the requirement that the physician provide the information mandated by the State *here*.”<sup>61</sup> Further, the plurality stated, “if the information the State requires to be made available to the woman is truthful and not misleading, the requirement *may* be permissible.”<sup>62</sup> Use of the word “may” as opposed to “will” or “must” or “is always” suggests both that the “truthful and non-misleading” factor may not have been intended as a magic token by which all compliant statutes would be made constitutional and that other factors may be considered in assessing constitutionality. By using precise language and words of limitation, the Court may have indicated an unwillingness to create a sweeping rule to apply in all future informed consent cases.<sup>63</sup>

The linguistic muddle continued with the Court’s discussion of the extent of state power over abortion regulation, which can be read to narrow the scope of its holding on this issue. *Casey* indisputably established that the state has an interest in protecting fetal life<sup>64</sup> and can promote that interest: “[A] State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest.”<sup>65</sup> But on the question of informed consent, the Court held that “requiring that [a] woman be informed of the *availability* of information relating to fetal development . . . is a reasonable measure to ensure an informed choice[.]”<sup>66</sup> The difference

60. *Id.* (“[T]he 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.” (citation omitted)).

61. *Id.* (emphasis added).

62. *Id.* at 882 (emphasis added).

63. *See* *Stuart v. Camnitz*, 774 F.3d 238, 249 (4th Cir. 2014) (“But the plurality did not hold sweepingly that all regulation of speech in the medical context merely receives rational basis review. Rather, having noted the physicians’ First Amendment rights and the state’s countervailing interest in regulating the medical profession, the plurality simply stated that it saw ‘no constitutional infirmity in the requirement that the physician provide the information mandated by the State *here*.’ That particularized finding hardly announces a guiding standard of scrutiny for use in every subsequent compelled speech case involving abortion.” (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion))), *cert. denied*, 135 S. Ct. 2838 (2015).

64. The validity of a state’s interest in promoting fetal life was reiterated in *Gonzales v. Carhart*, 550 U.S. 124 (2007). In *Carhart*, the Court described the premise that “the government has a legitimate and substantial interest in preserving and promoting fetal life” as “central” to *Casey*. *Carhart*, 550 U.S. at 145. Although *Carhart* serves as an example of the Court’s continued application of the undue burden standard to abortion restrictions in the decades following *Casey*, that case did not include a First Amendment challenge and therefore will not be discussed further in this Recent Development.

65. *Casey*, 505 U.S. at 886 (plurality opinion).

66. *Id.* at 883 (emphasis added).

between informing a woman that information is available and mandating that she receive the information even against her express wishes is clear. Less clear is whether the Supreme Court would consider the distinction important.

The determination of whether the undue burden test or a First Amendment analysis applies to a given provision has a critical impact on any challenge's chance of success. Under the undue burden test, the state must merely show that a law does not in purpose or effect create a substantial obstacle to women's access to abortion. Under a First Amendment approach, a state law must survive heightened scrutiny (either intermediate or strict scrutiny).<sup>67</sup> To defend a law reviewed under intermediate scrutiny, the government carries a greater burden: it must show that the law directly advances a substantial government interest, and that the law is narrowly tailored to serve that government interest.<sup>68</sup>

Pro-choice activists claim there is doubt as to whether the *Casey* Court relied on the undue burden standard. They point to the free speech implications of the speech-and-display provisions, and argue that independent of whether the provisions are an undue burden on women seeking abortions, the question remains whether the requirements infringe the free speech rights of physicians.<sup>69</sup> Scholars argue that the *Casey* Court could not have intended all First Amendment jurisprudence to be supplanted by the undue burden standard simply because the First Amendment challenge arises in the abortion context.<sup>70</sup> Proponents of speech-and-display laws, on the other hand, claim that the attempt to bring a First Amendment component back into the state abortion regulation debate is a "deliberate and strategically motivated attempt to boost the level of scrutiny given the law at issue here and to blur the focus of that

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67. See generally 16B C.J.S. *Constitutional Law* § 1041, Westlaw (database updated Dec. 2015) (explaining the levels of scrutiny applied under various First Amendment analyses).

68. *Stuart v. Loomis*, 992 F. Supp. 2d 585, 593 (M.D.N.C. 2014) (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980)), *aff'd sub nom. Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 2838 (2015).

69. See Borgmann, *supra* note 12.

70. See *id.*; see also Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 989 (arguing that *Casey's* undue burden standard "is concerned with protecting a woman's 'personal liberty[.]'" but that "[t]he First Amendment, by contrast, is not primarily concerned to protect the autonomy of those trying to decide whether to seek an abortion, but instead to preserve the integrity of physician-patient communications as a channel for the dissemination of expert knowledge").

scrutiny.”<sup>71</sup> This uncertainty about the standard set in *Casey* thus set the stage for a circuit split.

*B. The Fifth Circuit’s Interpretation of Casey*

In 2012, the Fifth Circuit upheld a Texas speech-and-display law as a valid exercise of the state’s right to regulate abortion.<sup>72</sup> In *Texas Medical Providers Performing Abortion Services v. Lakey*,<sup>73</sup> the court reviewed a statute that was in many respects similar to North Carolina’s WRKA: physicians were required to display ultrasound images to women seeking abortions and to describe the “dimensions of the embryo or fetus, the presence of cardiac activity, and the presence of external members and internal organs[.]”<sup>74</sup> The Fifth Circuit concluded that speech-and-display provisions were part of the state’s reasonable regulation of medical practice and did not trigger First Amendment scrutiny,<sup>75</sup> finding that “[t]he mode of compelled expression is not by itself constitutionally relevant, although the context is.”<sup>76</sup> Thus, the Fifth Circuit found that because there was no First Amendment analysis in the Supreme Court’s assessment of the informed consent provision in *Casey*, the provision was a permissible state regulation so long as it satisfied the undue burden standard.

To support this interpretation, the Fifth Circuit highlighted the noticeable absence of any familiar phrases indicating a First Amendment analysis in *Casey* and even called *Casey*’s analysis of the physicians’ First Amendment claims “the antithesis of strict scrutiny.”<sup>77</sup> Although the *Casey* plurality discussed the importance of the state’s interest in promoting fetal life, it did not analyze whether Pennsylvania had a “compelling interest,” nor did it discuss whether the informed consent provision was “narrowly tailored” to the state’s interest.<sup>78</sup> In fact, the Court cursorily declared that the informed consent requirement fell within the state’s power to regulate the practice of medicine and thus posed no “constitutional infirmity.”<sup>79</sup>

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71. See Reply Brief of Appellants, *supra* note 38, at 16.

72. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 572 (5th Cir. 2012).

73. 667 F.3d 570 (5th Cir. 2012).

74. TEX. HEALTH & SAFETY CODE ANN. § 171.012 (West, Westlaw through 2015 Reg. Sess.).

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

76. *Id.* at 580.

77. *Id.* at 575.

78. See Gaylord & Molony, *supra* note 25, at 619.

79. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion).

When considering the argument that the statute went too far because it required physicians, and not qualified assistants, to deliver the relevant information to women, the Court stated that “[t]here is no evidence on this record that requiring a doctor to give the information as provided by the statute would amount in practical terms to a substantial obstacle to a woman seeking an abortion, [and so] we conclude that it is not an undue burden.”<sup>80</sup> This language suggests that the Court did apply an undue burden analysis to the informed consent provisions and that the Court upheld the Pennsylvania informed consent requirements on those grounds.

The Fifth Circuit thus applied an undue burden analysis and held that “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, non-misleading, and relevant disclosures.”<sup>81</sup> The *Lakey* court considered “the required disclosures of a sonogram, the fetal heartbeat, and their medical descriptions [to be] the epitome of truthful, non-misleading information[,]”<sup>82</sup> and rejected the contention that the message compelled by the state was ideological. Focusing only on the literal words required by the speech-and-display provisions, the court stated: “a photograph and description of [the fetus’s] features constitute the purest conceivable expression of ‘factual information.’”<sup>83</sup>

The Fifth Circuit was equally unconvinced by the argument that compelling the physician to orally deliver the state’s message creates the impression that the physician endorsed the message. The court stated that “[the] statute’s method of delivering this information is direct and powerful, but the mode of delivery does not make a constitutionally significant difference from the [provisions at issue in *Casey*] which required physicians to make certain information available to women.”<sup>84</sup> The court elaborated: “The mode of compelled expression is not by itself constitutionally relevant, although the context is. Here, the context is the regulation of informed consent to a medical procedure.”<sup>85</sup> The court rejected the notion that the facts of *Casey* “represent a constitutional ceiling for regulation of informed consent to abortion”<sup>86</sup>—just because the Texas

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80. *Id.* at 884–85.

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

82. *Id.* at 577–78.

83. *Id.* at 577 n.4.

84. *Id.* at 579.

85. *Id.* at 580.

86. *Id.* at 579.

provisions were more demanding than the regulations at issue in *Casey* did not mean they could not stand. Ultimately, the court concluded in *Lakey* that *Casey* required application of the undue burden standard for compelled physician speech in the context of abortion regulations and held that the Texas speech-and-display provision was permissible under that standard.<sup>87</sup> In contrast, the Fourth Circuit interpreted *Casey* more narrowly.

C. *The Fourth Circuit's Holding in Stuart v. Camnitz*

Unlike the Fifth Circuit, the Fourth Circuit was less confident that *Casey* intended to “hold sweepingly that all regulation of speech in the medical context” receives a lower level of review.<sup>88</sup> The Fourth Circuit focused on the lack of any clear declaration by the *Casey* Court that the undue burden standard should displace First Amendment analysis for speech challenges in the abortion context and rejected the notion that *Casey* instituted a regime of abortion exceptionalism.<sup>89</sup> The court emphasized the narrow language of *Casey*'s informed consent discussion, and asserted that “our sister circuits read too much into *Casey*.”<sup>90</sup> As a result, the Fourth Circuit upheld the district court's conclusion that it was “unlikely that the Supreme Court decided by implication that long-established First Amendment law was irrelevant when speech about abortion is at issue.”<sup>91</sup>

After concluding that *Casey* did not mandate application of the undue burden standard as the test for all challenges to informed consent provisions, the Fourth Circuit turned to the question of where on the free speech spectrum the physician speech mandated by the North Carolina provision fell. The extent to which a state can lawfully regulate professional speech depends on how that speech is categorized.<sup>92</sup> Here, the Fourth Circuit determined that the speech-

87. *Id.*

88. *Stuart v. Camnitz*, 774 F.3d 238, 249 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 2838 (2015).

89. *See id.*

90. *Id.*

91. *Gaylord & Molony*, *supra* note 25, at 615 (quoting *Stuart v. Huff*, 834 F. Supp. 2d 424, 430 (M.D.N.C. 2011)).

92. Supreme Court precedent establishes that states may regulate professions as part of the exercise of their police power. *See, e.g.*, *Hawker v. New York*, 170 U.S. 189, 191 (1898) (upholding the state's right to regulate the practice of medicine). At least some circuits agree that the extent to which government can regulate such professional speech varies “‘along a continuum’ from ‘public dialogue’ on one end to ‘regulation of professional conduct[.]’ ”). *Camnitz*, 774 F.3d at 248 (quoting *Pickup v. Brown*, 740 F.3d 1208, 1227, 1229 (9th Cir. 2013)). When speaking outside of the doctor-patient relationship,



and-display provisions fell in the middle of the professional regulation spectrum.<sup>93</sup> On this spectrum, state power is at its height in regulation of professional conduct, even if the regulation has an incidental impact on speech.<sup>94</sup> State power to regulate speech is weakest when the regulation impacts public dialogue; as a result, state regulation of public speech is reviewed under a strict scrutiny standard.<sup>95</sup> The court noted that although the state does have broad power to regulate professions, the fact that medicine is a self-regulating profession limits the control the state can exert over medical practice.<sup>96</sup> The court also considered that the speech-and-display requirement both compelled speech (a factor supporting a higher level of scrutiny) and was part of a valid state regulation of the medical profession (a factor supporting a lower level of scrutiny).<sup>97</sup> In light of these competing factors, the court concluded that intermediate scrutiny provided the appropriate balance.<sup>98</sup> To defend a law reviewed under intermediate scrutiny, “the government must prove that the restriction directly advances and is narrowly tailored to serve a substantial government interest.”<sup>99</sup>

Turning to the merits of the physicians’ First Amendment challenge, the Fourth Circuit concluded that the speech-and-display

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physicians are constitutionally equivalent to “soapbox orators[.]” and their speech is fully protected; a strict scrutiny standard of review applies to any state restrictions on such speech. *See Pickup v. Brown*, 740 F.3d 1208, 1227–28 (9th Cir. 2013) (explaining that at the far end of the spectrum, speech is entitled to “robust” First Amendment protection and that “communicating to the *public* on matters of *public concern* lies at the core of First Amendment values”). In the middle of the continuum, there is a lesser, although not completely diminished, level of First Amendment protection. *See id.* at 1228. Finally, at the other end of the continuum, the state’s power is at its greatest when regulation concerns professional conduct. *Id.* at 1229. Here, speech is considered to be “incidental” to the regulated behavior, and it may not be protected by the First Amendment at all. *Id.*

93. *Camnitz*, 774 F.3d at 248. Some have argued that the lack of explicit guidance in *Casey* should have dictated the Fourth Circuit’s opinion and that *Camnitz* was an unfortunate example of judicial activism. *See* Michael Ramsey, *Judge Wilkinson and Judicial Restraint Revisited*, ORIGINALISM BLOG (Dec. 29, 2014), <http://originalismblog.typepad.com/the-originalism-blog/2014/12/judge-wilkinson-and-judicial-restraint-revisitedmichael-ramsey.html> [<https://perma.cc/NA3E-M29B>] (“If judicial restraint means strong judicial deference to legislative judgments . . . one would think it indicates the opposite result in *Stuart*—there’s no obvious Supreme Court case on point, the Constitution’s text has nothing specific to say on the matter, and other courts have upheld similar statutes.”).

94. *See Pickup*, 740 F.3d at 1229.

95. *See id.* at 1227–28.

96. *Camnitz*, 774 F.3d at 248.

97. *Id.*

98. *Id.*

99. *Stuart v. Loomis*, 992 F. Supp. 2d 585, 593 (M.D.N.C. 2014), *aff’d sub nom. Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 2838 (2015).

provisions of the WRKA failed to withstand intermediate scrutiny.<sup>100</sup> It noted that compelled speech is “particularly suspect” because “[l]isteners may have difficulty discerning that the message is the state’s, not the speaker’s . . . .”<sup>101</sup> The North Carolina statute created this exact risk; it required physicians to present all of the information to women in physicians’ own voices,<sup>102</sup> thus creating the possibility that a woman might understand the state’s message as the physician’s message. The Fourth Circuit found this fact particularly convincing in this instance because the court considered the state’s message to be “explicitly . . . pro-life” in its “provision of facts that all fall on one side of the abortion debate . . . .”<sup>103</sup>

In contrast, although the informed consent provision in *Casey* required physicians to orally inform women of the nature, risks, and alternatives to the procedures, as well as the probable gestational age of the fetus and the medical risks associated with carrying a child to term,<sup>104</sup> there were less stringent requirements for information not directly tied to women’s health. The provision required that a woman seeking an abortion be told that printed materials containing information about state benefits and the potential liability of the father were available to her if she wished to view them.<sup>105</sup> Significantly, the information came in the form of printed materials, which did not necessarily have to be delivered by the physician so long as the woman received them.<sup>106</sup> The Fourth Circuit marked the importance of this distinction by noting, “[t]he information conveyed here in the examining room [under the North Carolina statute] more closely resembles the materials that in *Casey* were provided by the state in a pamphlet.”<sup>107</sup>

The Fourth Circuit also considered the absence of a therapeutic exception as a sign that the provisions interfered with the medical judgment of abortion providers: “Furthermore, by failing to include a therapeutic privilege exception, the Display of Real-Time View Requirement interferes with the physician’s professional judgment

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100. *Camnitz*, 774 F.3d at 250.

101. *Id.* at 246.

102. *Id.* at 245.

103. *Id.* at 246.

104. 18 PA. CONS. STAT. § 3205(a)(i)–(iii) (1990).

105. *Id.*

106. *Id.*; see also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 881 (1992) (plurality opinion).

107. *Camnitz*, 774 F.3d at 253.

and ethical obligations.”<sup>108</sup> The North Carolina informed consent provision *requires* the physician to transmit the state’s message even if a woman states that she does not want to receive the information.<sup>109</sup> In such a scenario, the law provides that “[n]othing in this section shall be construed to prevent a pregnant woman from averting her eyes from the displayed images or from refusing to hear the simultaneous explanation and medical description.”<sup>110</sup> While the North Carolina statute does include an exception in the case of a medical emergency,<sup>111</sup> there is no “therapeutic exception” through which a physician can determine by the exercise of his or her medical judgment that the patient’s health would be better served by not providing the information.<sup>112</sup> This is unlike the provision at issue in *Casey*, where the Supreme Court noted that

the statute now before us does not require a physician to comply with the informed consent provisions “if he or she can demonstrate by a preponderance of the evidence, that he or she reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient.”<sup>113</sup>

One final factor convinced the Fourth Circuit that the requirements of the North Carolina speech-and-display provisions were too extreme to satisfy intermediate scrutiny. The provision required not only that the physician communicate information to a woman when she was in a position of vulnerability (“half-naked or disrobed on her back on an examination table, with an ultrasound probe either on her belly or inserted into her vagina”),<sup>114</sup> but also that

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108. *Id.* at 254 (“Requiring the physician to provide the information regardless of the psychological or emotional wellbeing of the patient can hardly be considered closely drawn to those state interests the provision is supposed to promote.” (citation omitted)).

109. *Id.* at 252 (“The challenged Display of Real-Time View Requirement, however, reaches beyond the modified form of informed consent that the Court approved in *Casey* . . . [I]t imposes a virtually unprecedented burden on the right of professional speech that operates to the detriment of both speaker and listener . . . . The most serious deviation from standard practice is requiring the physician to display an image and provide an explanation and medical description to a woman who has through ear and eye covering rendered herself temporarily deaf and blind.” (citation omitted)).

110. N.C. GEN. STAT. § 90-21.85(b) (2015).

111. § 90-21.85(a).

112. See *Stuart v. Loomis*, 992 F. Supp. 2d 585, 603–04 (M.D.N.C. 2014), *aff’d sub nom. Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 2838 (2015).

113. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 883–84 (1992) (plurality opinion) (quoting 18 PA. CONS. STAT. § 3205(c) (1990)).

114. *Camnitz*, 774 F.3d at 255 (“[I]nformed consent has not generally been thought to require a patient to view images from his or her own body . . . much less in a setting in which personal judgment may be altered or impaired.” (citation omitted)).

the physician display the image and provide an explanation “to a woman who has through ear and eye covering rendered herself temporarily deaf and blind.”<sup>115</sup> That the statute required the information to be delivered *even if the woman did not receive it* indicated to the court that the state’s intent was not the achievement of informed consent but rather communication of an ideological message.<sup>116</sup> In contrast, the provisions under consideration in *Casey* merely required that “[t]he physician or a qualified nonphysician . . . inform the woman of the availability of printed materials . . .”<sup>117</sup> There was no requirement that the information be delivered to a woman while her ultrasound was in progress.

Ultimately, the Fourth Circuit found the setting in which the message must be delivered, the absence of a therapeutic exception, and the clear ideological intent of the statute to constitute impermissible interference with physicians’ professional judgment and to “impos[e] a virtually unprecedented burden on the right of professional speech that operates to the detriment of both speaker and listener.”<sup>118</sup> The state’s interest in advancing its ideological message was insufficient to outweigh the burden on physicians’ rights to be free from the compelled speech imposed by the informed consent provision; thus, the provision could not withstand intermediate scrutiny.<sup>119</sup> Rejecting the undue burden standard as the exclusive test for analysis of abortion regulations and applying a First Amendment standard of intermediate scrutiny to the provision, the Fourth Circuit struck down the WRKA’s speech-and-display requirement.<sup>120</sup> Although this decision was a departure from the approach of other circuit courts, it was the correct result in terms of following *Casey* and of broader legal policy.

### III. WHY THE FOURTH CIRCUIT’S APPROACH IS THE SUPERIOR INTERPRETATION

The Fourth Circuit’s reading of *Casey*’s stance on informed consent provisions is the better interpretation of Supreme Court precedent. Three main reasons support the superiority of the Fourth

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115. *Id.* at 252.

116. *Id.* (“This is starkly compelled speech that impedes on the physician’s First Amendment rights with no counterbalancing promotion of state interests. The woman does not receive the information, so it cannot inform her decision.”); *see also* N.C. GEN. STAT. § 90-21.85(b).

117. *Casey*, 505 U.S. at 881 (plurality opinion).

118. *Camnitz*, 774 F.3d at 252.

119. *Id.* at 255.

120. *Id.* at 255–56.

Circuit's narrow approach over the more expansive construction suggested by the Fifth Circuit. First, the lack of therapeutic exceptions in recent speech-and-display provisions puts women's health at risk and impermissibly interferes with the patient-physician relationship in a manner not contemplated by *Casey*. Second, the inclusion of an allowance for women to cover their eyes and ears reveals the lack of connection between the compelled speech and the state's alleged goal of ensuring women's informed consent, removing it from the class of restrictions permitted in *Casey*. Third, the Fourth Circuit's rejection of abortion exceptionalism ensures the continued integrity of the Supreme Court's jurisprudence. Each reason will be addressed in turn.

A. *The Speech-and-Display Provision Eliminates Physician Discretion and Interferes with the Patient-Physician Relationship*

The lack of a therapeutic exception in the North Carolina speech-and-display provision distinguishes it from the Pennsylvania provision upheld in *Casey*. In its evaluation of the provision, the *Casey* Court indicated that the impact of the informed consent requirements on the mental health of women should be a consideration in assessing the requirements' validity.<sup>121</sup> The Court noted that the Pennsylvania requirement contained an exception if the physician believed that furnishing the information would cause a "severely adverse effect on the physical or mental health of the patient."<sup>122</sup> By emphasizing that "the statute does not prevent the physician from exercising his or her medical judgment[.]"<sup>123</sup> the Court suggested that the existence of a therapeutic exception was at least a factor in its decision to uphold Pennsylvania's informed consent requirements.

The North Carolina provision, however, removes the ability of the physician to alter the message based on his or her professional assessment of what is best for the patient's health. Supporters of this provision explain the denial of physician discretion by claiming that women who do not receive full information prior to having an abortion may suffer psychological harm due to regret.<sup>124</sup> But such

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121. *Casey*, 505 U.S. at 883 (plurality opinion).

122. *Id.* (quoting 18 PA. CONS. STAT. § 3205(c) (1990)).

123. *Id.* at 883–84.

124. See Steven Ertelt, *North Carolina Holds Hearing on Pro-Life Abortion Info Bill*, LIFENEWS (May 6, 2011), <http://www.lifenews.com/2011/05/06/north-carolina-holds-hearing-on-pro-life-abortion-info-bill/> [<http://perma.cc/R5ZV-4Q8A>] (telling the story of a woman who reported that she received an abortion without being given full information

arguments miss a key distinction: those opposed to the provision do not question the importance of providing women seeking abortions with full information, nor do they challenge the state's right to ensure such information is communicated. They only note that there are certain situations, such as when a woman is ending a pregnancy due to medical complications with the fetus, when a *mandatory* display and description of the fetus's dimensions could put the woman's mental health at risk.<sup>125</sup> Indeed, the Supreme Court acknowledged in *Casey* the importance of women's mental health: "It cannot be questioned that psychological well-being is a facet of health."<sup>126</sup> This risk to women's health created by the mandatory nature of the North Carolina speech-and-display provision is exacerbated by the fact that it requires the state's message to be delivered to a woman during an ultrasound while she is in a state of undress and vulnerability.<sup>127</sup>

Not only does the statute create the possibility that physicians in some instances will be required to make statements that could harm their patients' mental health, the very compulsion of speech compromises the physician-patient relationship. The U.S. District Court for the Middle District of North Carolina noted that the mandatory transmission of information required by the WRKA forced physicians to deviate from their normal practice of respecting a patient's choice not to receive information.<sup>128</sup> The court pointed to the position of the American College of Obstetricians and Gynecologists, which "advised physicians that a patient's refusal of information is 'itself an exercise of choice, and its acceptance can be part of respect for the patient's autonomy' and '[i]mplicit in the ethical concept of informed consent is the goal of maximizing a patient's freedoms.'"<sup>129</sup>

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prior to the procedure and quoting her as saying, "[t]he only words that [the doctor] said to me—while he was doing the procedure—was: 'You're further along than we thought.' Those words haunt me to this day").

125. One Texas woman found herself in this exact position. After doctors informed Carolyn Jones that her fetus had a "molecular flaw" incompatible with proper brain development, she was forced to observe an ultrasound visual and hear a description including the phrase, "Here I see a well-developed diaphragm and here I see four healthy chambers of the heart . . ." Carolyn Jones, *We Have No Choice: One Woman's Ordeal with Texas' New Sonogram Law*, TEX. OBSERVER (Mar. 15, 2012), <http://www.texasobserver.org/we-have-no-choice-one-womans-ordeal-with-texas-new-sonogram-law/> [https://perma.cc/49PU-SW3B].

126. *Casey*, 505 U.S. at 882 (plurality opinion).

127. See *Stuart v. Loomis*, 992 F. Supp. 2d 585, 609 (M.D.N.C. 2014), *aff'd sub nom. Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 2838 (2015).

128. *Id.* at 591.

129. *Id.* (citing COMM. ON ETHICS, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, ACOG COMMITTEE OPINION NO. 439, INFORMED CONSENT 7 (2009), <https://www.acog.org>).

Worse, the statute's rigidity—which requires the physician to deliver the information even if a woman expressly states that she does not want to hear it—could put physicians in the position of *inflicting* harm on their patients:

[F]ar from promoting the psychological health of women, this requirement risks the infliction of psychological harm on the woman who chooses not to receive this information. She must endure the embarrassing spectacle of averting her eyes and covering her ears while her physician—a person to whom she should be encouraged to listen—recites information to her.<sup>130</sup>

Thus, by eliminating physician discretion, the WRKA created a risk of real psychological harm for women<sup>131</sup> and violated the sanctity of the physician-patient relationship.

Proponents of speech-and-display laws reply that because the *Casey* Court upheld Pennsylvania's twenty-four hour waiting period<sup>132</sup> even after expressly concluding that the waiting period "limited a physician's discretion," the mere limitation of physician discretion is insufficient to strike down an otherwise valid state abortion regulation.<sup>133</sup> Further, they argue that any focus on the experience of women (both as it relates to mental health and to the patient-physician relationship) is irrelevant to the physician's First Amendment argument.<sup>134</sup>

There is, however, a distinction between the limitation and outright elimination of physician discretion. Where the Pennsylvania statute *limited* a physician's discretion by mandating a twenty-four hour waiting period,<sup>135</sup> the North Carolina statute *removes* a physician's discretion by requiring the physician to deliver information to all women even if the physician believes the information could harm an individual woman's mental or physical health.<sup>136</sup> Further, a focus on the listener is relevant in this particular

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[.org/-/media/Committee-Opinions/Committee-on-Ethics/co439.pdf?dmc=1&ts=20160208T0354217522](https://www.ncsl.org/-/media/Committee-Opinions/Committee-on-Ethics/co439.pdf?dmc=1&ts=20160208T0354217522) [https://perma.cc/E6B8-2Q9Q]).

130. *Stuart v. Camnitz*, 774 F.3d 238, 253 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 2838 (2015).

131. *Id.* at 250.

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

133. *Id.* at 886 ("[W]hile the waiting period does limit a physician's discretion, that is not, standing alone, a reason to invalidate it.").

134. *See* Reply Brief of Appellants, *supra* note 38, at 10 (critiquing the extent to which plaintiffs' First Amendment claim is based on allegations of potential harm to patients).

135. *Casey*, 505 U.S. at 886 (plurality opinion).

136. *Camnitz*, 774 F.3d at 253.

context because the state's right to compel the physician to deliver any message at all is rooted in its power to regulate the medical profession.<sup>137</sup> Thus, any state law that goes beyond regulation of medical practice and interferes with professional practice goes too far. As one scholar explained, if a state required a physician to praise George W. Bush during medical examinations, the state could argue that it was regulating speech in the course of the physician's professional practice.<sup>138</sup> But such a regulation could not be constitutionally considered a regulation of professional speech because the content of the message "is not understood as included within the practice of medicine."<sup>139</sup> Such a regulation would therefore interfere with the physician's professional practice. Similarly, state regulation of information presented during discussions surrounding abortion procedures is only appropriate if it does not interfere with the physician's ability to provide professional medical services.<sup>140</sup> To ensure that state-mandated speech does not interfere with their practice, physicians must retain the discretion to determine when it would be detrimental to a woman's health to receive certain information and to withhold information in those circumstances.<sup>141</sup> Accordingly, the lack of a therapeutic exception in the WRKA's informed consent provision distinguishes it from the Pennsylvania provision upheld in *Casey*.<sup>142</sup> Similarly, the ideological nature of North Carolina's required message sets it apart from *Casey*.

*B. The Speech-and-Display Provisions Are Not Aimed at Informed Consent and Seek Only to Communicate an Ideological Message*

Beyond interfering in the doctor-patient relationship, the WRKA's speech-and-display provision attempt to push a state-sponsored ideological message on women seeking abortions—thus, the North Carolina law is distinguishable from the informed consent

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137. See *Stuart v. Loomis*, 992 F. Supp. 2d 585, 594–95, 597 (M.D.N.C. 2014) (stating that the Supreme Court has repeatedly acknowledged the state's "interest in protecting the integrity and ethics of the medical profession" and declaring that the "state's regulation of professional speech must be consistent with the goals and duties of the profession" (citing *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997))), *aff'd sub nom. Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 2838 (2015).

138. Post, *supra* note 70, at 952.

139. *Id.*

140. See *Loomis*, 992 F. Supp. 2d at 597 (observing that the Supreme Court has expressed concern over statutes that interfere with professional relationships).

141. See *Camnitz*, 774 F.3d at 254 (noting that the North Carolina statute's lack of a "therapeutic privilege exception" means that physicians could be required to deliver information that is detrimental to their patients' health).

142. *Id.*



requirements upheld in *Casey*. In the Pennsylvania case, the information provided by the state, while decidedly pro-life, was at least aimed at ensuring that women were fully informed before receiving abortion procedures. The North Carolina statute, however, explicitly provides that physicians must verbalize the state's message even when a woman has taken steps to avoid receiving the information.<sup>143</sup> As one scholar noted, "this tacit permission to not hear the information that the physician provides is fundamentally at odds with the process of informed consent, which requires two engaged parties."<sup>144</sup> Indeed, North Carolina even acknowledged that the purpose of the speech-and-display provision was not to provide a woman with full information for her medical benefit but rather to influence her to change her mind about the abortion procedure.<sup>145</sup>

Supporters of the WRKA's stringent informed consent requirements note the Court's assertion in *Casey* that "[w]hat 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."<sup>146</sup> They point to *Casey*'s clear holding that the state may communicate a pro-life stance to women seeking abortions, even if the state's information is not related to women's health.<sup>147</sup> Specifically, the Court held that "under the undue burden standard, a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest."<sup>148</sup> Read in context, this passage suggests that a state message can make a woman aware of measures that favor life over abortion, but that the state should not encroach on a woman's right to make a "thoughtful" choice on her own.<sup>149</sup>

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143. *Id.* at 253.

144. Ryan Bakelaar, *The North Carolina Woman's Right to Know Act: An Unconstitutional Infringement on a Physician's First Amendment Right to Free Speech*, 20 MICH. J. GENDER & L. 187, 214 (2013).

145. As the Fourth Circuit noted, "[t]he state freely admits that the purpose and anticipated effect of the [speech-and-display provision was] to convince women seeking abortions to change their minds or reassess their decisions." *Camnitz*, 774 F.3d at 246.

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

147. *Id.* at 886.

148. *Id.*

149. *Id.* at 872 ("Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed. Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself."). The plurality was less clear

Although the Court does not clearly draw a line between an informative and an ideological message, the North Carolina statute clearly crosses that line by specifically stating that the physician must articulate the state's message even when a woman is not actually informed by the message.

The ideological bent of the state's message is further shown by the statute's use of what can be described as "loaded" language.<sup>150</sup> The statute refers not to a "fetus" or an "embryo," but to a "child," despite the fact that "child" is not the medically appropriate term for a fetus too young to survive outside the womb.<sup>151</sup> While one might argue that this is mere semantics, it is fair to say that much of the political debate surrounding abortion access is fought over semantics—that "the morality of abortion [turns on] whether a fetus is a person . . ."<sup>152</sup> Because of the critical nature of the language involved, requiring physicians to use language such as "child" is meaningful. Describing the use of similar language in a South Dakota speech-and-display provision, one scholar argued, "[the language] deliberately and provocatively incorporates the language of ideological controversy and forces physicians to affirm the side of those who oppose abortion."<sup>153</sup> This is particularly inappropriate because the patients are "blind to the source of the information they receive. When a doctor asks the patient if she wants to view the fetus or hear the heartbeat, . . . [the patient] may begin to feel that *the*

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than it could have been, and uncertainty remains as to how the Court would identify a state message that went too far. This fact was noted by the dissenters, who concluded that "despite flowery rhetoric about the State's 'substantial' and 'profound' interest in 'potential human life,' and criticism of *Roe* for undervaluing that interest, the joint opinion permits the State to pursue that interest only so long as it is not too successful." *Id.* at 992 (Scalia, J., concurring in the judgment in part and dissenting in part).

150. Meredith Clark, *Perdue Vetoes Changes to Abortion Law*, REESE NEWS LAB (June 27, 2011), <http://reesenews.org/2011/06/27/changes-coming-to-n-c-abortion-laws/16611/> [<https://perma.cc/VXX3-KZX6>] (including an explanation from physician David Grimes that "[a] baby is not what's in the uterus. A fetus is not capable of surviving outside of the uterus, and to use this kind of language is an intentional misuse for emotional purpose").

151. N.C. GEN. STAT. § 90-21.85(a) (2015); see Clark, *supra* note 150.

152. Post, *supra* note 70, at 955 (noting that "[t]he abortion controversy presently turns on a debate whether the fetus enjoys the moral status of 'a human person who is not yet a baby but still a fully human person,' or instead 'there is a vast moral gulf between a fetus and a child'").

153. *Id.* at 956. Indeed, even *Casey*, the very decision proponents rely on to support the constitutionality of the provision, used the terminology "fetus" as opposed to "unborn child." *Casey*, 505 U.S. at 881 (plurality opinion) (describing the informed consent requirement and explaining that the physician was required to provide materials describing "the fetus").

*doctor* wants her to continue the pregnancy . . . .”<sup>154</sup> This is especially true because “a patient can give great weight to a physician’s statements, not necessarily because the message itself is persuasive but because the message comes from the trusted medical authority.”<sup>155</sup>

When considered in conjunction with North Carolina’s acknowledgment that the purpose of the speech-and-display provision is to persuade women to change their minds about abortions,<sup>156</sup> the language of the statute, and the situations it creates, strongly support the argument that the compelled state message is ideological. Identifying the message as ideological is a critical step in challenging the provision’s constitutionality because courts engaging in a First Amendment analysis give much less weight to a state’s interest in conveying an ideological viewpoint, as opposed to a state’s interest in protecting the health of its citizens.<sup>157</sup> As the Fourth Circuit explained:

[W]hile having to choose between blindfolding and earmuffing herself or watching and listening to unwanted information may in some remote way influence a woman in favor of carrying the child to term, forced speech to unwilling or incapacitated listeners does not bear the constitutionally necessary connection to the protection of fetal life.<sup>158</sup>

Therefore, while acknowledging that *Casey* allows states to require the transmission of information promoting pro-life choices, the Fourth Circuit agreed with the district court’s assessment that the scenario created by the North Carolina speech-and-display provision went too far: “[b]y requiring providers to deliver this information to a woman who takes steps not to hear it or would be harmed by hearing it, the state has . . . moved from ‘encouraging’ to lecturing, using health care providers as its mouthpiece.”<sup>159</sup> The requirement

154. Ellen Camburn, *Doctor-Patient-State Relationship: The Problem with Informed Consent and State Mandated Ultrasounds Prior to Abortions*, 10 RUTGERS J. L. & PUB. POL’Y 301, 337 (2013) (emphasis added).

155. Robbins, *supra* note 21, at 164.

156. *Stuart v. Camnitz*, 774 F.3d 238, 246 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 2838 (2015).

157. *See* *Stuart v. Loomis*, 992 F. Supp. 2d 585, 593 (M.D.N.C. 2014) (“Typically, laws restricting or prohibiting non-misleading commercial speech are subject to intermediate scrutiny, under which the government must prove that the restriction directly advances and is narrowly tailored to serve a substantial government interest.”), *aff’d sub nom. Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 2838 (2015).

158. *Camnitz*, 774 F.3d at 253.

159. *Id.* (quoting *Loomis*, 992 F. Supp. 2d at 609).

therefore infringed the physicians' First Amendment rights by compelling them to communicate the state's ideological message, with no counterbalancing advancement of the state's alleged interest in ensuring that women seeking abortions are fully informed of the risks and alternatives of the procedure.<sup>160</sup> The lack of a therapeutic exception and the fundamentally ideological nature of the state's interest in the North Carolina informed consent provision distinguish it from the Pennsylvania provision upheld in *Casey* and justify the Fourth Circuit's decision to invalidate the law. But beyond the need to comply with precedent, there is a strong policy reason supporting the Fourth Circuit's narrow interpretation of the Supreme Court's decision in *Casey*: the unworkability of a regime of abortion exceptionalism.

*C. Abortion Exceptionalism Is an Unworkable Doctrine*

The Fourth Circuit's narrow reading of *Casey* is superior to the Fifth Circuit's reading because it avoids giving states the power to dismantle existing Supreme Court jurisprudence through a series of increasingly restrictive regulations of abortion procedures. The Fifth Circuit construes *Casey* to mean that the undue burden standard must apply to state regulation of abortion, even when other rights are implicated.<sup>161</sup> Under this reading of *Casey*, First Amendment protections simply would not apply to challenges within the abortion context, meaning that informed consent provisions could only be struck down as unconstitutional if they impose an undue burden on a woman's right to receive an abortion.<sup>162</sup> As explained above, the undue burden standard is often an easy one for state regulations to meet—most provisions reviewed under this test are likely to be upheld.<sup>163</sup> Eschewing strict or intermediate scrutiny would mean that

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160. *Id.* at 252 (“The woman does not receive the information, so it cannot inform her decision.”); *see also id.* at 253 (“We can perceive no benefit to state interests from walling off patients and physicians in a manner antithetical to the very communication that lies at the heart of the informed consent process.”).

161. *See Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576 (5th Cir. 2012) (“[I]nformed 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.”).

162. *See id.*

163. Recall that nearly all the provisions at issue in *Casey* were upheld when reviewed under the undue burden standard. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 893–94 (1992) (plurality opinion). Only the spousal requirement was invalidated as an undue burden. *Id.* at 895, 898. Despite *Casey*'s apparent leniency, lower courts have struck

nearly all state informed consent provisions would pass constitutional muster, as state regulations would only have to satisfy the much lower undue burden standard. Proponents of abortion exceptionalism argue that “[a]bortion is a unique act, fraught with consequences for others, including both the fetus (or embryo) and society at large[,]”<sup>164</sup> and assert that in recognition of abortion’s uniqueness, the *Casey* Court intended the undue burden standard to “occup[y] the field of constitutional claims whenever an abortion restriction is challenged.”<sup>165</sup>

As explained above,<sup>166</sup> however, the language of *Casey*’s analysis of the informed consent provision appears to be narrowly cabined to the specifics of the Pennsylvania statute. Moreover, such a deliberately narrow holding would be in line with the Court’s approach to abortion laws. As a rule, the Court has generally employed an incremental approach to abortion in its post-*Roe* decisions.<sup>167</sup> By avoiding sweeping declarations on controversial topics such as abortion, the Court generally leaves open issues for democratic deliberation and avoids handing one side a total victory.<sup>168</sup> This is but one practical explanation supporting the Fourth Circuit’s interpretation of *Casey* precedent.

Furthermore, reading *Casey* as setting such a sweeping standard through its brief consideration of the Pennsylvania informed consent provisions creates an unworkable jurisprudence. Should *Casey* be read as mandating abortion exceptionalism, states would be able to enact any informed consent requirement, so long as the requirements

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down some state abortion regulations. *E.g.*, *Planned Parenthood of Wis. v. Schmiel*, 806 F.3d 908, 916 (7th Cir. 2015) (invalidating a Wisconsin statute requiring abortion providers to have admitting privileges at a local hospital as an undue burden); *McCormack v. Herzog*, 788 F.3d 1017, 1029 (9th Cir. 2015) (striking down an Idaho law requiring that all abortions take place in a hospital and prohibiting abortions occurring more than twenty weeks postfertilization).

164. Reply Brief of Appellants, *supra* note 38, at 5 (citing *Casey*, 505 U.S. at 852).

165. See Borgmann, *supra* note 12 (describing the displacement of other forms of analysis in the abortion context as “undue burden preemption”).

166. See *supra* Section II.A.

167. See, e.g., Markels, *supra* note 16 (describing the Court’s “still-evolving thinking on abortion” and noting a “string of Supreme Court rulings that have served to limit [*Roe*’s] scope”); cf. Robert Barnes, *Supreme Court Lets Stand State Rulings Allowing Same-Sex Marriages*, WASH. POST (Oct. 6, 2014), [https://www.washingtonpost.com/politics/courts\\_law/supreme-court-lets-stand-state-rulings-allowing-same-sex-marriage/2014/10/06/9991bbb6-4d89-11e4-aa5e-7153e466a02d\\_story.html](https://www.washingtonpost.com/politics/courts_law/supreme-court-lets-stand-state-rulings-allowing-same-sex-marriage/2014/10/06/9991bbb6-4d89-11e4-aa5e-7153e466a02d_story.html) [<https://perma.cc/JF9K-JE8X>] (noting that the Supreme Court has a “natural inclination for incremental steps” and explaining that “the court likes to move slowly when endorsing momentous societal change”).

168. See Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 7 (1996).

did not constitute an undue burden. Under this approach, there would be no bright-line stopping point to what a state could require. As one scholar queried, “will North Carolina deem it necessary for a physician to read all one thousand six hundred and sixty-eight pages of *Williams Obstetrics*, a premier text in the field, to a patient 24 hours before an abortion? After all, doing so would provide truthful, non-misleading information to patients.”<sup>169</sup>

Indeed, in the decades following *Casey*, state legislatures have capitalized on the weakness of the undue burden test to enact a host of new regulations restricting access to abortion.<sup>170</sup> Scholars point to a “renaissance”<sup>171</sup> of anti-abortion restrictions: from 2011–2014 alone, state legislatures passed more than two hundred abortion restrictions.<sup>172</sup> The new wave of restrictions includes an increasing number of informed consent provisions similar to the speech-and-display requirement of North Carolina’s WRKA.<sup>173</sup> The rise of speech-and-display provisions<sup>174</sup> is part of a strategic shift by pro-life activists, who have largely departed from the “right to life” arguments<sup>175</sup> familiar from the *Roe* era and now focus on a woman’s “right to know” the full implications of her decision to end the pregnancy. These increasingly prevalent laws have chipped away<sup>176</sup> at the protections to abortion access established in *Roe* and *Casey*; the informed consent provisions impose an increasingly heavy burden on women seeking abortions and the physicians who perform them. These laws threaten *Casey*’s long-standing guarantee that American women would continue to have access to abortion procedures. Until

169. Bakelaar, *supra* note 144, at 217.

170. See Mary Ziegler, *Redefining Roe: Informed Consent and the Abortion Debate*, JURIST (Jan. 24, 2012), <http://jurist.org/forum/2012/01/mary-ziegler-informed-consent.php> [<https://perma.cc/6LG9-VRL9>].

171. *Id.*

172. Phil Milford, *North Carolina Abortion Law Ruled Unconstitutional*, BLOOMBERG POL. (Dec. 23, 2014), <http://www.bloomberg.com/politics/articles/2014-12-23/north-carolina-abortion-law-struck-down-as-unconstitutional> [<https://perma.cc/SF6X-LE3L>].

173. Three other states, Louisiana, Oklahoma, and Texas, have passed mandatory speech-and-display laws. LA. STAT. ANN. § 40:1061.17 (West, Westlaw through the 2015 Reg. Sess.); OKLA. STAT. ANN. tit. 63, § 1-738.2 (West, Westlaw through 1st Sess. of 2015); TEX. HEALTH & SAFETY CODE ANN. § 171.0122 (West, Westlaw through 2015 Reg. Sess.). Other states have passed less demanding, but still stringent, informed consent laws. GUTTMACHER INST., *supra* note 25, at 1–2; Bakelaar, *supra* note 144, at 193.

174. In 2013, twenty-seven state legislatures introduced informed consent bills. See Ziegler, *supra* note 170.

175. Such arguments focus on abortion’s impact on the fetus, or “the unborn child.” See, e.g., *Discover the Facts*, NAT’L RIGHT TO LIFE, <http://www.nrlc.org/education> [<https://perma.cc/4MJZ-W3TM>] (teaching about the development of the unborn child, including “a baby’s first months”).

176. See Ziegler, *supra* note 170.

the Supreme Court addresses the lingering uncertainty surrounding *Casey*, states will continue to capitalize on the loose language of the Supreme Court's holding and will pass ever more restrictive informed consent provisions.

The Fourth Circuit's holding in *Stuart v. Camnitz* sets a higher bar for the constitutionality of informed consent provisions. This higher bar ensures that only those informed consent provisions that truly aim at informing women will stand, and thereby prevents pro-life state legislatures from imposing onerous restrictions on women's access to abortions through implementation of increasingly demanding informed consent provisions. Thus, unlike the Fifth and Eighth Circuits—which would apply an undue burden standard that would allow nearly all state informed consent requirements to stand—the Fourth Circuit prevents the holdings of *Roe* and *Casey* from being dismantled by state legislatures.

#### IV. THE NATION REQUIRES GREATER CLARITY ON THE STANDARD OF REVIEW FOR INFORMED CONSENT PROVISIONS

The foregoing discussion reveals the lingering confusion about whether the Supreme Court applied an undue burden test to the informed consent provisions at issue in *Casey*. Interestingly, despite the clear circuit split, the Court has repeatedly declined recent opportunities to review the issue. In 2013, the Court declined to review an Oklahoma Supreme Court decision striking down an abortion statute similar to the North Carolina speech-and-display provision.<sup>177</sup> Further, in June 2015 the Court denied certiorari on North Carolina Attorney General Roy Cooper's petition for review of the Fourth Circuit's decision on the WRKA.<sup>178</sup> Considering the intensity of the abortion debate and the high importance of the question of women's access to abortion, the Court's approach is curious. One possible explanation is that the Court is waiting for a better fact pattern on which to clarify its stance on state regulation of abortion.<sup>179</sup>

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177. *Pruitt v. Nova Health Sys.*, 134 S. Ct. 617 (2013); see Nicholas Tomsho, *Supreme Court Declines to Hear Oklahoma Abortion Ultrasound Case*, JURIST (Nov. 12, 2013), <http://jurist.org/paperchase/2013/11/supreme-court-declines-to-hear-oklahoma-abortion-ultrasound-case.php> [<https://perma.cc/4QS8-R2PF>].

178. *Walker-McGill v. Stuart*, 135 S. Ct. 2838, 2838 (2015) (denying review of *Stuart v. Camnitz*).

179. See Casey C. Sullivan, *SCOTUS Passes on North Carolina's Abortion Ultrasound Law*, FINDLAW (June 17, 2015, 12:54 PM), [http://blogs.findlaw.com/supreme\\_court/2015/06/scotus-passes-on-north-carolinas-abortion-ultrasound-law.html](http://blogs.findlaw.com/supreme_court/2015/06/scotus-passes-on-north-carolinas-abortion-ultrasound-law.html) [<https://perma.cc/8XX7>].

Notably, only Justice Scalia indicated that he would be willing to hear the case, suggesting to some observers that the more liberal members of the Court preferred to wait before addressing the abortion issue.<sup>180</sup> The fact that the two cases which the Court has refused to review were ones in which the state regulation of abortion was struck down, as opposed to upheld, may also be encouraging to pro-choice advocates.<sup>181</sup> Whatever the reason for this reluctance to tackle the question of the permissible scope of state regulation of abortion issue,<sup>182</sup> the Court should act soon to address the confusion surrounding *Casey*. The question of access to abortion is a critical one, and uncertainty among the lower courts exposes citizens not only to widely disparate experiences depending on their state of residence, but also to the danger that state regulation may go too far, trampling constitutional rights. When the Court does address the issue, it should follow the Fourth Circuit's analysis and make clear that challenges to informed consent provisions are reviewable under a First Amendment analysis. Such a ruling would place much-needed limits on the extent to which states can compel physician speech in the abortion context, and would ensure the continued viability of the Supreme Court's abortion jurisprudence.

#### CONCLUSION

In *Casey*, the plurality opinion began with the pronouncement, “[l]iberty finds no refuge in a jurisprudence of doubt.”<sup>183</sup> Ironically, the ensuing holding failed to create a clear standard for abortion laws, thereby guaranteeing decades of continued doubt about how stringently states may regulate before crossing the “undue burden” line. In the decades following *Casey*, states have aggressively pushed back against abortion rights by passing a host of ever more restrictive statutes. With the new focus on women’s “right to know” as opposed to the fetus’s “right to life,” anti-abortion activists have found

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-SGS6] (noting the risks of reading too much into the Court’s denial of certiorari, but suggesting that it might be “about finding the right vehicle to make an eventual ruling”).

180. See *Walker-McGill*, 135 S. Ct. at 2838 (noting Justice Scalia as the lone dissenter).

181. See Lyle Denniston, *A Gesture in Favor of a Woman’s Abortion Choice*, SCOTUSBLOG (June 15, 2015, 1:29 PM), <http://www.scotusblog.com/2015/06/a-gesture-in-favor-of-a-womans-abortion-choice/> [<https://perma.cc/MBD7-MM6S>] (describing the denial of certiorari as having “the practical effect of leaving undisturbed a lower-court ruling striking down [the law requiring ultrasound displays] on the premise that it was ‘ideological in intent and in kind’ and thus not a valid form of state regulation of medical practice”).

182. See Barnes, *supra* note 167.

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



increased success in the battleground over abortion access. By holding that there must be *some* limit on what the state can demand from physicians in the area of informed consent, the Fourth Circuit ensures the continuing integrity of *Casey* and takes a stand in favor of the Supreme Court's abortion jurisprudence. Although the Court has indicated an unwillingness to reopen the abortion issue, it should take the next opportunity to resolve this circuit split and settle the lingering uncertainty about how *Casey* applies in the context of informed consent requirements. By upholding the Fourth Circuit's approach in *Stuart v. Camnitz*, the Court would provide much-needed clarity and prevent its abortion jurisprudence from being incrementally diminished by the continued expansion of informed consent laws.

CLAIRE O'BRIEN\*\*

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