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CASEY AND THE FIRST AMENDMENT: REVISITING AN OLD CASE TO RESOLVE
A NEW COMPELLED SPEECH CONTROVERSY

Scott W. Gaylord

I. INTRODUCTION

In Planned Parenthood of Southeastern Pennsylvania v. Casey, a plurality of the United States Supreme Court upheld a state statute that required “the giving of truthful, nonmisleading information about the nature of [an abortion] procedure, the attendant health risks and those of childbirth, and the ‘probable gestational age’ of the fetus.” In the wake of Casey, several states began to require physicians to offer to perform, or even to perform, an ultrasound prior

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4 Thirteen states, including North Carolina, require a woman to have an ultrasound prior to having an abortion. Id.; see, e.g., N.C. GEN. STAT. § 90-21.85 (2013), invalidated by Stuart v. Camnitz, 774 F.3d 238, 250 (4th Cir. 2014). Presumably because ultrasounds are routinely conducted prior to an abortion to determine the gestational age and location of the fetus, these mandatory ultrasound laws have not been challenged on Fourteenth Amendment due process grounds.
to an abortion to provide additional “truthful, nonmisleading” information “to ensure that a woman apprehend the full consequences of her decision.”

Three states—North Carolina, Oklahoma, and Texas—went even further and adopted legislation—frequently called speech-and-display laws—requiring that (i) a woman who seeks an abortion undergo an ultrasound, (ii) the sonogram images be displayed so that she can see them, and more controversially, (iii) the physician who is to perform the abortion provide a medical description of the images that includes the “presence, location, and dimensions of the unborn child within the uterus” and “the presence of external members and internal organs, if present and viewable.” Although the physician is required to display and describe the image, the woman may “avert[ ] her eyes from the displayed images” and “refus[e] to hear the simultaneous explanation and medical description.”

North Carolina’s statute, like the speech-and-display provisions in Texas and Oklahoma, provides an exception in cases of medical emergency.

Not surprisingly, these speech-and-display laws were challenged before they ever took effect. What was surprising was that the physicians and abortion providers who sought an injunction did not base their claims solely on a woman’s Fourteenth Amendment due process right. Rather, the plaintiffs also asked the federal courts to strike down the speech-and-display laws on First Amendment grounds. In particular, the challengers argued that the speech-and-display provisions constituted government-compelled speech and, therefore, violated the physicians “right to refrain from speaking at all.” The district courts agreed and enjoined the statutes without ever reaching the due process claim. On appeal, the Fifth Circuit upheld the Texas statute, relying in large

8. The Texas and North Carolina statutes were both challenged in federal court. See *Stuart,* 774 F.3d at 243; *Texas Med. Providers Performing Abortion Servs. v. Lakey,* 667 F.3d 570, 573 (5th Cir. 2012). The plaintiffs challenging the Oklahoma statute raised only state constitutional challenges in Oklahoma state court. See *Petition at 5,* 10-12, *Nova Health Sys. v. Edmondson,* No. CV-2010-533 (D. Okla. Apr. 27, 2010), 2010 WL 1734526.
9. *See id.* at 10-12.
10. *See id.* at 11-12.
13. *See Lakey,* 806 F. Supp. 2d at 977 (granting a preliminary injunction against the Texas law); *Stuart,* 834 F. Supp. 2d at 436 (granting a preliminary injunction against the North Carolina law). The Oklahoma statute has been enjoined as well, but on state constitutional grounds. See *Order Granting Summary Judgment Declaring Ultrasound Act as an Unconstitutional Special Law*
part on a frequently overlooked section of *Casey* that rejected compelled speech claims of physicians: “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.”14 Drawing on *Casey* and the Court’s subsequent decision in *Gonzales v. Carhart*,15 the Fifth Circuit rejected the physicians’ compelled speech claims, applying a form of rational basis review.16

In December 2014, the Fourth Circuit issued its opinion in *Stuart v. Camnitz*, affirming the district court’s order that permanently enjoined North Carolina’s speech-and-display provision.17 Contrary to the Fifth Circuit,18 the *Stuart* panel applied heightened scrutiny to the physicians’ compelled speech claims.19 Even though North Carolina required doctors to convey only factual information relating to the sonogram images, the *Stuart* panel concluded the disclosures amounted to ideological speech that triggered at least intermediate scrutiny under the First Amendment.20 As a result, *Stuart* created a circuit split, and in the process highlighted several areas of uncertainty that have developed regarding *Casey*’s analysis of compelled speech claims in the medical context.21

Given this uncertainty and the fact that the North Carolina Attorney General has filed a petition for a writ of certiorari in *Stuart*, this Article explores the new circuit conflict emphasizing the central points of contention between the Fourth and Fifth Circuits. In particular, the first section analyzes both the Fourth Circuit’s argument that *Casey* requires courts to apply at least intermediate scrutiny to the physicians’ compelled speech claims22 and the Fifth Circuit’s contrary conclusion that *Casey* imposes only a rational basis review on speech-and-display laws.23 The second section critically evaluates this circuit split, exploring the key areas of disagreement between the Fourth and Fifth Circuits that the Supreme Court will have to resolve if it takes the case and that other circuits should consider when addressing similar compelled speech claims in the medical context.

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17. See *Stuart*, 774 F.3d at 242.
18. See *Lakey*, 667 F.3d at 575.
19. See *Stuart*, 774 F.3d at 248 (citing *Stuart v. Loomis*, 992 F. Supp. 2d. 585, 600 (M.D.N.C. 2014)).
20. See id. at 245.
21. See id.; Lakey, 667 F.3d at 575.
22. See *Stuart*, 774 F.3d at 248.
23. See *Lakey*, 667 F.3d at 575.
II. THE CIRCUIT CONFLICT—THE FOURTH, FIFTH, AND EIGHTH CIRCUITS TRY TO DISCERN THE PROPER STANDARD OF REVIEW FOR SPEECH-AND-DISPLAY LAWS.

As the Fourth Circuit notes in Stuart, the First Amendment protects against restrictions on speech as well as regulations that compel speech.24 In the words of Wooley v. Maynard, “the First Amendment . . . includes both the right to speak freely and the right to refrain from speaking at all.”25 But the Court also has “long recognized that not all speech is of equal First Amendment importance.”26 Thus, to acknowledge that speech-and-display laws implicate the First Amendment rights of physicians does not automatically determine the level of scrutiny to apply to such claims. As the Court explained in Riley v. National Federation of the Blind, Inc.,27 the proper standard of review to apply to a compelled speech claim depends on the context of the speech: “Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon.”28 Thus, under Riley, the level of scrutiny for speech-and-display laws trades on the nature of the patient-physician communications in the medical context29 and the effect of the mandated disclosures on those communications.

Casey confirms this analysis, albeit in a short, succinct discussion. Although best known for articulating the undue burden test in relation to a Fourteenth Amendment due process claim, Casey also considered and rejected the claim that Pennsylvania’s compelled disclosures violated the First Amendment rights of physicians.30 That is, Casey considered and resolved a compelled speech claim in the context of “the practice of medicine.”31 As a result, Casey is a natural starting point when considering the constitutionality of speech-and-display laws.

Unfortunately though, Casey’s direct discussion of compelled speech is limited to a single paragraph in which the plurality states that “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."32 While certainly important to the speech-and-display provision at issue in Lakey and Stuart, Casey’s discussion has left unresolved several important questions that have divided the circuit courts.33 What level of scrutiny does Casey apply to compelled disclosures? Are the disclosures in Casey of the same kind as speech-and-display disclosures such that the same standard should apply? Does the standard change if the disclosures are ideological? And if so, are descriptions of sonograms ideological or factual? Should the professional speech doctrine or the Court’s Zauderer34 decision affect the analysis? And if so, how? How does Casey’s35 reference to Whalen36 impact the analysis?

Texas’s and North Carolina’s speech-and-display laws required the Fourth and Fifth Circuits to address these questions directly. And, as it turns out, these circuit courts reached significantly different answers, creating a circuit conflict that only the Supreme Court can resolve.

A. Stuart v. Camnitz: The Case for Heightened Scrutiny

In 2011, the North Carolina General Assembly passed the Woman’s Right to Know Act (the “Act”),37 which as the title suggests was part of the state’s informed consent requirements.38 The speech-and-display provisions in the Act augmented the Casey-like disclosures that the state already mandated and that were not challenged in the speech-and-display litigation.39 Thus, the panel had to explain why the speech-and-display disclosures—which the Fourth Circuit assumed “are the epitome of truthful, non-misleading information”40—should be treated differently from the disclosures in Casey.

32. Id. (citation omitted)

33. Compare Stuart, 774 F.3d at 245 (applying an intermediate scrutiny standard to compelled speech under the First Amendment), with Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 576 (5th Cir. 2012) (holding that the regulation of medical practice does not compel ideological speech that triggers First Amendment strict scrutiny).


35. See Casey, 505 U.S. at 884.


38. N.C. GEN. STAT. § 90-21.82.

39. Consistent with the disclosures in Casey, North Carolina Section 90-21.82 requires a doctor or qualified professional, at least 24 hours before a scheduled abortion, to (i) explain the risks of the procedure, the risks of carrying the fetus to term, and possible adverse psychological effects associated with abortion; (ii) convey the probably gestational age of the fetus; (iii) inform the woman that financial assistance for the pregnancy may be available, that the father may be obligated to pay child support, and that there are alternatives to abortion; and (iv) tell the woman that the state has a website on which she can view materials describing the fetus and offer to give or send the materials to her. N.C. GEN. STAT. § 90-21.82; see also Stuart v. Camnitz, 774 F.3d 238, 243-44 (4th Cir. 2014) (citing N.C. GEN. STAT. § 90-21.82) (discussing various provisions of North Carolina’s informed consent statute).

40. Stuart, 774 F.3d at 246 (quoting Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 577-78 (5th Cir. 2012)).
Although *Casey* considered and rejected a compelled speech claim,\(^41\) the *Stuart* panel neither started nor finished with *Casey*. Rather, the panel limited *Casey* to its facts, relegating its First Amendment analysis to a “particularized finding” that related only to “the information mandated by the state here.”\(^42\) According to the Fourth Circuit, *Casey* did not “announce[] a guiding standard of scrutiny for use in every subsequent compelled speech case involving abortion.”\(^43\) Consequently, the Fourth Circuit looked to the context of the disclosures to determine the proper level of scrutiny: “Laws that impinge upon speech receive different levels of judicial scrutiny depending on the type of regulation and the justifications and purposes underlying it.”\(^44\) Not surprisingly, the parties disagreed as to the proper level of scrutiny to apply in the context of compelled disclosures related to abortion.\(^45\) The physicians argued for strict scrutiny “because [the regulation] is content-based and ideological,” while the state advocated for rational basis “as a regulation of the medical profession in the context of abortion.”\(^46\) The Fourth Circuit disagreed with both parties and instead took a middle ground, concluding that North Carolina’s speech-and-display requirement “is a content-based regulation of a medical professional’s speech which must satisfy at least intermediate scrutiny to survive.”\(^47\)

The Fourth Circuit settled on intermediate scrutiny after considering the nature of the speech as well as the state’s right to regulate the medical profession.\(^48\) According to the panel, there was no question that the disclosure “is quintessential compelled speech [because it] forces physicians to say things they otherwise would not say.”\(^49\) Making matters worse for the state, “the statement compelled here is ideological; it conveys a particular opinion”\(^50\) and seeks to dissuade women from having an abortion by presenting “facts that all fall on one side of the abortion debate—and does so shortly before the time of decision when the intended abortion recipient is most vulnerable.”\(^51\) Under the Fourth

\(^{41}\) Planned Parenthood of Sc. Pa. v. Casey, 505 U.S. 833, 884 (1991) (“All that is left of petitioners’ argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State . . . We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.”).

\(^{42}\) *Stuart*, 774 F.3d at 249 (quoting *Casey*, 505 U.S. at 884).

\(^{43}\) Id.

\(^{44}\) Id. at 244.

\(^{45}\) Id. at 245.

\(^{46}\) Id.

\(^{47}\) Id.

\(^{48}\) Id.

\(^{49}\) Id. at 246; see Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995) (quoting Pac. Gas Elec. Co. v. Pub. Util. Comm’n of Cal., 475 U.S. 1, 11, 16 (1986)) (“Since all speech inherently involves choices of what to say and what to leave unsaid, one important manifestation of the principle of free speech is that one who chooses to speak may also decide ‘what not to say.’”).

\(^{50}\) *Stuart*, 774 F.3d at 246.

\(^{51}\) Id.
Circuit’s interpretation, the fact that the disclosures “are factual... does not divorce the speech from its moral or ideological implications” because the state sought to dissuade the woman from having an abortion. Moreover, the fact that North Carolina’s speech-and-display law allows doctors to express their own views on abortion and the speech-and-display requirement “does not cure the coercion—the government’s message still must be delivered (though not necessarily received).”

Thus, the panel concluded that North Carolina’s speech-and-display provision was a strong candidate for strict scrutiny even though the plurality did not apply that standard in Case.

In response, the state argued that, given its broad authority to regulate the medical profession, only rational basis scrutiny should apply. According to North Carolina, it could “require the provision of information sufficient for patients to give their informed consent to medical procedures” even when the profession involves speech activity. Although the Fourth Circuit acknowledged that North Carolina has authority to regulate the practice of medicine, it emphasized that its right is not boundless. Given that “[t]here are ‘many dimensions’ to professionals’ speech,” Stuart noted that it “must look to the context of the regulation to determine when the state’s regulatory authority has extended too far.” Drawing on the Ninth Circuit’s opinion in Pickup v. Brown, the Fourth Circuit panel contended that the protection afforded to the First Amendment rights of professionals “slides ‘along a continuum’ from ‘public dialogue’ on the one end to ‘regulation of professional conduct’ on the other.”

North Carolina’s speech-and-display requirement rested somewhere in the middle, regulating the treatment of patients as well as compelling physicians “to ‘say’ as well as ‘do.’” Thus, because North Carolina regulated both speech and conduct, its disclosures fell in the middle of the continuum and warranted at least intermediate scrutiny.

Having settled on the proper level of scrutiny, the Fourth Circuit considered whether North Carolina had an important interest in requiring disclosures

52. Id. See Hurley, 515 U.S. at 573 (stating that an individual’s “right to tailor [his] speech applies... equally to statement of fact the speaker would rather avoid”).
53. Stuart, 774 F.3d at 246.
54. See generally N.C. GEN. STAT. § 90-21.82 (requiring voluntary and informed consent to prior to abortion).
55. See Stuart, 774 F.3d at 245.
56. Id. at 247.
57. Id. (citing Riley, 487 U.S. at 796–97).
58. Id. (quoting Fla. Bar v. Went For It, Inc., 515 U.S. 618, 634 (1995)).
59. Id. (citing Riley, 487 U.S. at 796–97).
60. 740 F.3d 1208 (9th Cir. 2013).
61. Stuart, 774 F.3d at 248 (quoting Pickup, 740 F.3d at 1227, 1229).
62. Id.
63. Id. at 245. The Fourth Circuit does not feel compelled to resolve whether strict or intermediate scrutiny should apply because “the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied.” Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2667 (2011).
relating to the sonogram images and whether the speech-and-display requirement was substantially related to that interest. The first inquiry was relatively straightforward. Because the Court “has repeatedly affirmed the state’s ‘important and legitimate interest’ in preserving, promoting, and protecting fetal life,” the panel presumed that the state had an important interest in passing the speech-and-display requirement. Consistent with the Supreme Court’s analysis in Gonzales, “[t]he government may use its voice and its regulatory authority to show its profound respect for the life within the woman.”

But the Fourth Circuit denied that the provision was properly tailored. According to the panel, North Carolina’s speech-and-display disclosure requirement “interferes with the physician’s right to free speech beyond the extent permitted for reasonable regulation of the medical profession, while simultaneously threatening harm to the patient’s psychological health, interfering with the physician’s professional judgment, and compromising the doctor-patient relationship.” Although the state may require informed consent, the panel concluded that North Carolina’s speech-and-consent provision went far beyond Casey or traditional informed consent requirements and actually undermined rather than promoted other important state interests.

According to Stuart, the most egregious variation from traditional informed consent provisions resulted from the state’s requiring physicians to show and to describe the ultrasound image “to a woman who has through ear and eye covering rendered herself temporarily deaf and blind.” In such cases, the woman could not be informed because she would never receive the information. And even if presenting the information “may in some remote way influence a woman in favor of carrying the child to term,” such a requirement “does not bear the constitutionally necessary connection to the protection of fetal life.” In fact, the panel suggested that providing the information “risks the infliction of psychological harm on the woman who chooses not to receive [it].” Because North Carolina’s speech-and-display provision did not have a therapeutic exception that would allow physicians to forego or delay the explanation if giving the information at a specific time might physically or psychologically harm the woman, it “runs contrary to the state’s interest in ‘protecting the integrity and ethics of the medical profession’ and more generally to its interest in the psychological and physical well-being of the affected women.”
The Fourth Circuit’s concerns were aggravated by the context in which the information is given—“the patient [is] half-naked or disrobed on her back on an examination table, with an ultrasound probe either on her belly or inserted into her vagina.”73 Given that the disclosures occurred during the sonogram, the state was trying to “convey . . . the full weight of the state’s moral condemnation.”74 While the state has a right to express its preference for childbirth over abortion, the Fourth Circuit concluded that North Carolina could not “require a physician to deliver the state’s preference in a setting this fraught with stress and anxiety.”75 Thus, under the Fourth Circuit’s view, the informed consent provision compelled physicians to transmit the state’s ideological message under circumstances that interfered with the doctor-patient relationship and might actually harm the woman, North Carolina’s speech-and-display provision did not properly advance the state’s important interest in protecting fetal life.76 The panel, therefore, concluded that North Carolina’s speech-and-display provision violated the First Amendment rights of physicians.77

B. The Fifth and Eighth Circuits: The Case for Rational Basis Review

In applying heightened scrutiny to North Carolina’s speech-and-display provision, the Fourth Circuit acknowledged that its analysis conflicted with the Fifth and Eighth Circuits, which applied rational basis to informed consent provisions related to abortion.78 In particular, the Stuart panel disagreed with the emphasis that its sister circuits placed on the single paragraph in Casey addressing the physicians’ compelled speech claim.79 Having rejected the due process claim, the plurality in Casey explained:

All that is left of petitioners’ argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician’s First Amendment rights not to speak are implicated, . . . but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, . . . We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.80

73. Id. at 255.
74. Id.
75. Id.
76. Id.
77. Id. at 256.
78. See generally id. at 245, 248 (applying intermediate scrutiny in disagreement with the Fifth and Eight Circuits).
79. Id. at 248.
Because the Fourth Circuit limited *Casey* to its facts, this solitary paragraph neither deprived physicians of their First Amendment rights nor pronounced the standard of review for regulations “that compel speech to the extraordinary extent present here.” According to *Stuart*, rather than “hold sweepingly that all regulation of speech in the medical context merely receives rational basis review,” *Casey* “simply stated that it saw ‘no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.”

Yet even under the Fourth Circuit’s own summary of the Fifth and Eighth Circuits’ opinions, it is not clear that these circuits attempt to “announce[ ] a guiding standard of scrutiny for use in every subsequent compelled speech case involving abortion.” As *Stuart* noted, the Fifth Circuit determined that speech-and-display provisions “do not fall under the rubric of compelling ‘ideological speech’ that triggers First Amendment strict scrutiny” because such laws “require truthful, non-misleading, and relevant disclosures.” Drawing on *Casey* and *Gonzales*, the Eighth Circuit reached the same conclusion in relation to a statute that required “the disclosure to patients seeking abortions of an ‘[i]ncreased risk of suicide ideation and suicide.’” The Eighth Circuit held that a state may “use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient’s decision to have an abortion.” Under the Fifth and Eighth Circuits’ analysis, heightened scrutiny might apply if the government compels physicians to disclose information that is false, misleading, or irrelevant. Consequently, the conflict between the circuits is more nuanced than *Stuart* suggests. To fully understand the circuit split, one must look closely at the nature of the compelled speech at issue in *Lakey* and *Rounds* and its relationship to the required disclosures in *Casey*.

In *Lakey*, the Fifth Circuit considered the constitutionality of Texas’s speech-and-display law, which was styled as an act “relating to informed consent to an abortion.” Like North Carolina’s Act, Texas’s speech-and-display law amended Texas’s 2003 Woman’s Right to Know Act, which imposed

81. *Stuart*, 774 F.3d at 249.
82. *Id.* (quoting *Casey*, 505 U.S. at 884) (citation omitted).
83. *Id.*
84. *Id.* (quoting Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 576 (5th Cir. 2012)).
87. *See Lakey*, 667 F.3d at 576; Rounds II, 686 F.3d at 893 (quoting Rounds I, 530 F.3d at 735).
88. *See Stuart*, 774 F.3d at 248–49 (quoting Lakey, 667 F.3d at 575–76; Rounds I, 530 F.3d at 734–35).
89. *Lakey*, 667 F.3d at 572 (citing H.B. 15, 82d Leg., Reg. Sess. (Tex. 2011)).
90. *See N.C. GEN. STAT. § 90-21.82(b) (2013).*
requirements similar to those found in *Casey*.\(^9^1\) Pursuant to Texas’s speech-and-display provision, a woman’s consent to an abortion was deemed informed and voluntary only if the physician “who is to perform the abortion” did the following: (i) performed a sonogram; (ii) displayed the sonogram images so that the woman may view them; (iii) made the heartbeat of the fetus audible for the woman to hear; and (iv) explained “in a manner understandable to a layperson” the results of the sonogram and heart auscultation.\(^9^2\) Under Texas’s law, a woman could decline to view the sonogram images or to hear the fetal heartbeat,\(^9^3\) but could refuse to listen to the explanation of the sonogram images only if she certified that her pregnancy fell into one of three statutory exceptions, which included sexual assault and incest.\(^9^4\)

Plaintiffs challenged the Texas statute on First and Fourteenth Amendment grounds, and the district court found that Texas’s speech-and-display requirement violated the First Amendment rights of physicians.\(^9^5\) On appeal, the Fifth Circuit reversed,\(^9^6\) concluding that Texas’s informed consent provisions furthered at least two legitimate goals under *Casey*.\(^9^7\) First, such statutes “further[] the legitimate end of ‘ensur[ing] that a woman apprehend the full consequences of her decision . . . [thereby] reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.’”\(^9^8\) Second, the informed consent statute promoted the state’s “‘legitimate goal of protecting the life of the unborn’ through ‘legislation aimed at ensuring a decision that is mature and informed, even when in doing so the state expresses a preference for childbirth over abortion.’”\(^9^9\) According to the Fifth Circuit, the Court viewed these state interests as sufficient to defeat the physicians’ compelled speech claims in *Casey* because Pennsylvania’s informed consent requirements constituted “reasonable . . . regulation by the State.”\(^1^0^0\)

Applying the same analysis to Texas’s speech-and-display provision, the

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92. TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(4).
93. Id. § 171.0122(b)–(c).
94. See id. § 171.0122(d).
96. Id.
97. See id. at 580.
98. Id. at 575 (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 882 (1992)).
99. Id. (quoting Casey, 505 U.S. at 883; see also id. at 576 (quoting Gonzales v. Carhart, 550 U.S. 124, 160 (2007)) (noting that Carhart also recognized that “[t]he State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion”))
100. Casey, 505 U.S. at 884 (citations omitted).
Fifth Circuit concluded that heightened scrutiny was inconsistent with *Casey*.

Rather than subject Pennsylvania’s informed consent statute to such rigorous review, the plurality’s analysis was “the antithesis of strict scrutiny.”

Pennsylvania’s compelled speech requirements were “part of the practice of medicine” and, as such, were constitutional as “reasonable licensing and regulation by the State.” Moreover, contrary to the Fourth Circuit’s claim, the Fifth Circuit did not take Texas’s speech-and-display requirement to “fall under the rubric of compelling ‘ideological’ speech that triggers First Amendment strict scrutiny.”

Although the state sought to exercise its right under *Casey* to promote childbirth over abortion, Texas required the disclosure of only truthful, nonmisleading information regarding the risks of abortion as well as the status of the fetus. According to *Lakey*, the information was factual—not ideological—and promoted the state’s interests in making sure that the woman’s choice was fully informed and in promoting childbirth over abortion.

Contrary to the Fourth Circuit, the Fifth Circuit distinguished between the state’s intent in passing its speech-and-display law and the content of the required disclosure. While the former might be “ideological” in the sense that the state sought (consistent with *Casey*) to promote childbirth over abortion, the latter was not. The means chosen—the display and description of the image of the fetus at the time of the ultrasound—involving truthful, nonmisleading facts that, from the state’s perspective, directly related to a woman’s decision whether to terminate her pregnancy.

Moreover, the Fifth Circuit noted that its opinion was consistent with the Eighth Circuit’s analysis of a similar informed consent statute. In *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, the Eighth Circuit sitting en banc considered a First Amendment challenge to an informed consent provision that, among other things, required physicians to disclose that “the abortion ‘will terminate the life of a whole, separate, unique, living human being’ with whom the woman ‘has an existing relationship’ entitled to legal protection.”

101. *Lakey*, 667 F.3d at 575.
102. *Id.*
103. *Id.* (quoting *Casey*, 505 U.S. at 884).
104. *Id.* at 576.
105. *Id.*; see also TEX. HEALTH & SAFETY CODE ANN. § 171.012 (West Supp. II 2012) (requiring physician to give requisite information for informed consent to an abortion).
106. *Lakey*, 667 F.3d at 576; see *Casey*, 505 U.S. at 872 (“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 . . . .”)
107. Compare *Lakey*, 667 F.3d at 578–79, 584 (quoting *Casey*, 505 U.S. at 871), with *Casey*, 505 U.S. at 877 (discussing what is and is not medically necessary and required to be disclosed).
108. *See Lakey*, 667 F.3d at 574.
109. *Id.* at 575 (quoting *Casey*, 505 U.S. at 882–83).
110. *Id.* at 576–77 (discussing Planned Parenthood Minn., N.D., S.D. v. Rounds (*Rounds I*), 530 F.3d 724, 726, 734–35, 741 (8th Cir. 2008) (en banc)).
111. *Lakey*, 667 F.3d at 577 (quoting *Rounds I*, 530 F.3d at 726).
the Eighth Circuit concluded that:

[W]hile the State cannot compel an individual simply to speak the State's ideological message, it can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion, even if that information might also encourage the patient to choose childbirth over abortion.\footnote{112}{Rounds I, 530 F.3d at 734–35.}

The Fifth Circuit noted that Texas's disclosure requirements were not as extensive as the Minnesota statute at issue in Rounds because they were limited to “medically accurate depictions [that] are inherently truthful and non-misleading.” The Fifth Circuit, therefore, concluded that Rounds and Casey precluded the physicians’ First Amendment challenge.\footnote{113}{Id.} Although Texas’s speech-and-display provision required doctors to give information that was “more graphic and scientifically up-to-date[ ] than the disclosures discussed in Casey,” “[it is] not different in kind.”\footnote{114}{Id. at 578.} According to the Fifth Circuit, to hold otherwise would permit doctors to use the First Amendment to “essentially trump the balance Casey struck between women’s rights and the states’ prerogatives.”\footnote{115}{Id. at 577.}

In addition, the Fifth Circuit considered the claim, which the district court in Lakey and the Fourth Circuit in Stuart both made, that speech-and-display requirements differ in two material ways from the disclosures upheld in Casey: (1) the descriptions “of the sonogram and fetal heartbeat are ‘medically unnecessary’ . . . and therefore beyond the standard practice of medicine within the state’s regulatory powers,” and (2) instead of simply requiring physicians to make certain information available to women seeking to have an abortion, these provisions require physicians to provide—and women to hear—an explanation of the sonogram, thereby making doctors the “mouthpiece” of the state’s ideological preferences.\footnote{116}{Id. at 578–79; see Stuart v. Camnitz, 774 F.3d 238, 254 (4th Cir. 2014) (“The three elements discussed so far—requiring the physician to speak to a patient who is not listening, rendering the physician the mouthpiece of the state’s message, and omitting a therapeutic privilege to protect the health of the patient—markedly depart from standard medical practice.”).} The Fifth Circuit concluded that neither distinction made a constitutional difference.\footnote{117}{Lakey, 667 F.3d at 580.} With respect to the claim that the disclosures went beyond standard medical practice, the Fifth Circuit determined that Casey and Gonzales did not limit the scope of permissible disclosures to those in Casey.\footnote{118}{Id. at 580 n.9.} Rather, these cases interpreted medically relevant disclosures broadly to include information relating to the physical and psychological health of the mother as well as the impact of the abortion decision on the potential...
According to the Fifth Circuit, Casey and Gonzales “emphasize that the gravity of the decision may be the subject of informed consent through factual, medical detail, that the condition of the fetus is relevant, and that discouraging abortion is an acceptable effect of mandated disclosures.” Given that informed consent laws, including speech-and-display provisions, are meant to help a woman make the “best decision under difficult circumstances[,] denying her up to date medical information is more of an abuse to her ability to decide than providing the information.”

Similarly, Lakey rejected the claim that speech-and-display provisions are unconstitutional because they require physicians to discuss the ultrasound with the patient instead of merely letting her know how to obtain information regarding the abortion procedure. The First Amendment challenge in Casey was directed at “the provision of specific information by the doctor,” not at the particular method used to convey that information. Under the Fifth Circuit’s interpretation, the context of the compelled speech—not the particular mode of expression—was constitutionally significant. Casey upheld Pennsylvania’s requirement that “doctors . . . describe verbally the fetus’s gestational age, a description which the Casey plurality acknowledged was relevant to ‘informed consent’ only in a sense broad enough to include the potential impact on the fetus.” As Casey explained:

Nor can it be doubted that most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision. In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.

Thus, because Casey expressly upheld oral disclosures in the context of informed consent, the Fifth Circuit concluded that the fact that a speech-and-display provision’s “method of delivering this information is direct and powerful, . . . does not make a constitutionally significant difference from the ‘availability’ provision in Casey.”

119. Id. at 576 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 871, 882 (1992)).
120. Id. at 579.
121. Id.
122. Id.
124. Lakey, 667 F.3d at 580 (“The mode of compelled expression is not by itself constitutionally relevant, although the context is [relevant].”).
125. Lakey, 667 F.3d at 580 (citing Casey; 505 U.S. at 883).
126. Casey, 505 U.S. at 882.
127. Lakey, 667 F.3d at 579.
III. THE CONFLICT BETWEEN THE FOURTH CIRCUIT AND THE FIFTH AND EIGHTH CIRCUITS RAISES FOUR NOVEL QUESTIONS REGARDING COMPelled PHYSICIAN SPEECH

As the Fourth Circuit acknowledges, the newly created circuit split regarding speech-and-display laws is predicated in large measure on differing interpretations of Casey.\textsuperscript{128} In dismissing the compelled speech claims of physicians, the plurality concluded that “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.”\textsuperscript{129} While the Fourth Circuit viewed the disclosures as content-based regulations of speech and conduct that warranted at least intermediate scrutiny,\textsuperscript{130} the Fifth Circuit took Casey to apply “the antithesis of strict scrutiny”\textsuperscript{131} and applied rational basis.\textsuperscript{132}

Yet neither circuit court relied exclusively on Casey, nor should they have. As Casey explained, “a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure.”\textsuperscript{133} Similarly, in Gonzales the Court confirmed that the state does not lose the ability to regulate the practice of medicine simply because the regulation relates to abortion: “The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community.”\textsuperscript{134} Thus, speech-and-display laws implicate a broader question regarding a state’s authority to regulate professional speech generally.\textsuperscript{135} If the government can require disclosures in other contexts, is there something unique about the medical context that demands a different result? Or given that a state “has a significant role to play in regulating the medical profession,”\textsuperscript{136} can it require truthful, nonmisleading disclosures to “ensur[e] a decision that is mature

\textsuperscript{128} See Stuart v. Camnitz, 774 F.3d 238, 249 (4th Cir. 2014).
\textsuperscript{129} Casey, 505 U.S. at 884.
\textsuperscript{130} Stuart, 774 F.3d at 245.
\textsuperscript{131} Lakey, 667 F.3d at 575.
\textsuperscript{132} The disagreement surrounding Casey’s impact on mandatory disclosures in the medical context extends to state supreme courts. In Nova Health Sys. v. Pruitt, 292 P.3d 28 (Okla. 2012), cert.den. 134 S. Ct. 617 (2013), the Oklahoma Supreme Court struck down Oklahoma’s speech-and-display law in a short, three paragraph decision, claiming that in Casey “the United States Supreme Court has previously determined the dispositive issue presented in this matter.” Id. at 28. Consequently, there is a three way conflict among the courts that have analyzed speech-and-display laws. The Fifth Circuit takes Casey to support such mandatory disclosures, the Oklahoma Supreme Court interprets Casey as precluding such compelled statements, and the Fourth Circuit denies that Casey applies at all.
\textsuperscript{133} Casey, 505 U.S. at 884.
\textsuperscript{134} Gonzales v. Carhart, 550 U.S. 124, 163 (2007).
\textsuperscript{135} See id. at 159–60 (citing Casey, 505 U.S. at 873).
\textsuperscript{136} Id. at 157.
and informed? To answer these question, though, the Supreme Court (or other circuit courts if the Supreme Court does not grant North Carolina’s petition for certiorari) will have to consider at least four other issues that bear directly on the proper standard of review for speech-and-display laws: (i) whether the professional speech doctrine applies to regulations of the patient-physician relationship, (ii) whether Zauderer applies to compelled disclosures outside the commercial speech context, (iii) whether truthful, nonmisleading disclosures are ideological, and (iv) what impact Casey’s invocation of Whalen v. Roe should have on the scrutiny analysis.

A. The Professional Speech Doctrine

The professional speech doctrine recognizes that states have an important role to play in regulating professionals, even when those professions involve speech. As Justice White noted in his concurrence in Lowe v. S.E.C., the First Amendment does not insulate all professional speech from regulation: “The power of government to regulate the professions is not lost whenever the practice of a profession entails speech.” Although states have greater authority to compel factual disclosures in professional-client communications, as Justice Jackson noted in Thomas v. Collins they cannot restrict the rights of professionals, such as physicians, to speak generally about the practice of medicine or “make it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought.” Yet, even though the doctrine traces its roots back to Justice Jackson and Justice White, the Supreme Court has never adopted the doctrine, leaving circuit courts to fashion the limits of the doctrine on their own.

As Stuart demonstrates, the circuit courts have adopted fundamentally different versions of the professional speech doctrine. Having attempted to distinguish Casey, the Stuart panel relies on the professional speech doctrine to support is use of heightened scrutiny. In so doing, though, the Fourth Circuit generates additional conflicts with (i) the Third, Ninth, and Eleventh Circuits,

137. Casey, 505 U.S. at 883.
140. See Casey, 505 U.S. at 884 (citing Whalen v. Roe, 429 U.S. 589, 603 (1977)).
142. Id.
144. See Lowe, 472 U.S. at 228 (Justice White concurring); Thomas, 323 U.S. at 544 (Justice Jackson concurring); see also David Halberstam, Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions, 147 U. PA. L. REV. 771, 834–44 (1999) (citations omitted) (providing an overview of the development of the professional speech doctrine).
which hold that factual nonmisleading disclosures in the context of professional-client communications are subject to rational basis review, as well as (ii) its own professional speech precedents.

Because the Fourth Circuit denies that Casey establishes the proper level of scrutiny, the panel invokes the professional speech doctrine as developed in the Third, Ninth, an Eleventh Circuits to support its application of heightened scrutiny to North Carolina’s speech-and-display provision.\(^{145}\) Specifically, the Stuart panel relies on Pickup to show that the level of scrutiny applicable to regulations of professionals “slides ‘along a continuum’ from ‘pubic dialogue’ on one end to ‘regulation of professional conduct’ on the other.”\(^ {146}\) Because speech-and-display laws “require[] doctors to ‘say’ as well as ‘do,’” the panel concluded that such disclosures fall somewhere in the middle of continuum and, therefore, warranted as least “a heightened intermediate scrutiny standard used in certain commercial speech cases.”\(^ {147}\)

The Fourth Circuit’s interpretation of the professional speech doctrine, however, is inconsistent with the development of that doctrine in other circuits. As the Third Circuit acknowledges, “our sister circuits have concluded that regulations of professional speech are subject to a more deferential standard of review or, possibly, no review at all.”\(^ {148}\) While ultimately applying heightened scrutiny to a speech prohibition, the Third Circuit recognized—contrary to the Fourth Circuit—that Casey and Zauderer applied rational basis review to “a special category of laws that compel disclosure of truthful factual information.”\(^ {149}\) Although recognizing that “the information conveyed may be strictly factual,” Stuart did not attempt to distinguish the Third Circuit’s analysis of Casey and Zauderer, citing King only for the general proposition that “distinction between professional speech and professional conduct when deciding on the appropriate level of scrutiny to apply to regulations of the medical profession.”\(^ {150}\)

Moreover, the Fourth Circuit’s use of heightened scrutiny also conflicts with the Ninth Circuit’s analysis in Pickup. Although the central issue in Pickup was “whether [the law was] a regulation of speech or conduct,”\(^ {151}\) the Ninth Circuit’s analysis is more nuanced than the Fourth Circuit suggests. Pickup distinguishes between types of professional speech as well as between speech and conduct. According to the Ninth Circuit, the proper level of scrutiny to apply to professional speech depends on whether the professional’s speech is public or

\(^{145}\) See King v. Gov. of N.J., 767 F.3d 216 (3d Cir. 2014); Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2013); and Wollschlaeger v. Gov. of Fla., 760 F.3d 1195 (11th Cir. 2014).

\(^{146}\) Stuart, 774 F.3d at 248 (quoting Pickup v. Brown, 740 F.3d 1208, 1227, 1229 (9th Cir.2013)).

\(^{147}\) Id.

\(^{148}\) King, 767 F.3d at 235.

\(^{149}\) Id.

\(^{150}\) Stuart, 774 F.3d at 247 (citing King, 767 F.3d at 229).

\(^{151}\) Pickup, 740 F.3d at 1227.
private. When “a professional is engaged in a public dialogue, First Amendment protection is at its greatest.”\textsuperscript{152} But the standard is relaxed considerably when professionals engage in speech with their clients:

[T]he First Amendment tolerates a substantial amount of speech regulation within the professional-client relationship that it would not tolerate outside of it. And that toleration makes sense: When professionals, by means of their state-issued licenses, form relationships with clients, the purpose of those relationships is to advance the welfare of the clients, rather than to contribute to public debate.\textsuperscript{153}

In fact, the Ninth Circuit concluded that the compelled disclosures in \textit{Casey} required only “diminished” protection, which is why the plurality upheld the disclosures as “reasonable licensing and regulation by the State.”\textsuperscript{154} Consequently, because the regulation in \textit{Pickup} left “mental health providers free to discuss and recommend, or recommend against, SOCE, we conclude that any effect it may have on free speech is merely incidental . . . [and] hold that SB 1172 is subject to only rational basis review."\textsuperscript{155}

The Fourth Circuit’s invocation of the Eleventh Circuit’s recent decision in \textit{Wollschlaeger v. Governor of the State of Florida}\textsuperscript{156} fares no better. \textit{Stuart} cites \textit{Wollschlaeger} to support its claim that “[o]ther circuits have recently relied on the distinction between professional speech and professional conduct when deciding on the appropriate level of scrutiny to apply to regulations of the medical profession.”\textsuperscript{157} But the Eleventh Circuit follows the Ninth Circuit in recognizing that the proper level of review for regulations of professional speech depends on the public or private nature of the professional’s speech: “These [First Amendment] protections are at their apex when a professional speaks to the public on matters of public concern; they approach a nadir, however, when the professional speaks privately, in the course of exercising his or her professional judgment, to a person receiving the professional’s services.”\textsuperscript{158} Rather than apply heightened scrutiny, the Eleventh Circuit applied little or no

\begin{itemize}
\item \textsuperscript{152} \textit{Id.; see also} Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011) (quoting Dun & Broadstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985)) (“[S]peech on ‘matters of public concern’ . . . is ‘at the heart of the First Amendment’s protection.’”).
\item \textsuperscript{153} \textit{Pickup}, 740 F.3d at 1228.
\item \textsuperscript{154} \textit{Id.} (quoting \textit{Casey}, 505 U.S. at 884) (emphasis in \textit{Pickup}).
\item \textsuperscript{155} \textit{Id.} at 1231.
\item \textsuperscript{156} 760 F.2d 1195 (11th Cir. 2014).
\item \textsuperscript{157} \textit{Stuart} v. Camnitz, 774 F.3d 238, 248 (4th Cir. 2014).
\item \textsuperscript{158} \textit{Wollschlaeger}, 760 F.3d at 1218; \textit{see also id.} at 1221 (noting that “[a]lthough we accept that firearm safety may be a matter of public concern,” there was no First Amendment violation “in the context of a regulation of professional conduct that provides that the privacy of a physician’s examination room is not an appropriate forum for unrestricted debate on such matters”); King v. New Jersey, 767 F.3d 216, 236 (3d Cir. 2014) (“In the context of commercial speech, the Supreme Court has treated compelled disclosures of truthful factual information differently than prohibitions of speech, subjecting the former to rational basis review and the latter to intermediate scrutiny.”).
\end{itemize}
scrutiny, concluding that “[a] statute that governs the practice of an occupation is not unconstitutional as an abridgment of the right to free speech, so long as any inhibition of that right is merely the incidental effect of observing an otherwise legitimate regulation.” 159 In addition, Wollschaeger cites 160 Locke v. Shore, a 2011 Eleventh Circuit decision confirming that “[t]here is a difference, for First Amendment purposes, between regulating professionals’ speech to the public at large versus their direct, personalized speech with clients.” 161

Given that the Supreme Court has never adopted the professional speech doctrine, it is unsurprising that there is a circuit conflict regarding the proper standard for professional speech. What is surprising, though, is that Stuart considers the standard for professional speech 162 without discussing any of the Fourth Circuit’s precedents. The panel cites to Moore-King v. County of Chesterfield, Virginia, 163 which adopts the professional speech doctrine, but only for the proposition that “[t]he government’s regulatory interest is less potent in the context of a self-regulating profession like medicine.” 164 A closer review of the Fourth Circuit’s professional speech precedents, however, reveals that Stuart not only conflicts with the Third, Ninth, and Eleventh Circuits, but also is at odds with its previous professional speech decisions. 165

In Bowman, the Fourth Circuit upheld a Virginia law that barred unlicensed accountants from using certain terms in reports that were prepared for clients and directed at third parties as a valid regulation of the accounting profession. 166 The Fourth Circuit panel explained that strict scrutiny did not necessarily apply to professional regulations even if the regulations restricted speech: “Professional regulation is not invalid, nor is it subject to first amendment scrutiny, merely because it restricts some kinds of speech.” 167 The standard of review depended on the public or private nature of the speech being regulated. The professional speech doctrine applied to professional-client communications but not to a professional’s statement to the public: “[T]he relevant inquiry to determine

159. Wollschaeger, 760 F.3d at 1217.
160. Id. at 1219 (quoting Locke v. Shore, 634 F.3d 1185, 1191 (11th Cir. 2011)).
161. Locke, 634 F.3d at 1191.
162. Stuart v. Cannitz, 774 F.3d 238, 251 (4th Cir. 2014) (“Any state regulation that limits the free speech rights of professionals must pass the requisite constitutional test.”).
163. 708 F.3d 560 (4th Cir. 2013).
164. Stuart, 774 F.3d at 248 (citing Moore-King, 708 F.3d at 570).
165. Compare Stuart, 774 F.3d at 251 (“Though physicians and other professionals may be subject to regulations by the state that restrict their First Amendment freedoms when acting in the course of their professions, professionals do not leave their speech rights at the office door.”), with Moore-King, 708 F.3d at 569 (holding that the state’s regulation of licensing provisions affecting a profession raises no First Amendment problems).
166. See Accountants Soc’y of Va. v. Bowman, 860 F.2d 602, 605 (4th Cir. 1988) (“The statute in question restricts only accountants’ communications with and on behalf of their clients, as a means of regulating the professional activities of non-CPAs.”).
167. Id. at 604 (citing Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447, 456–57 (1978)). See also Moore-King, 708 F.3d at 569 (“the government can . . . regulate those who provide services to their clients for compensation without running afoul of the First Amendment.”)
whether to apply the professional speech doctrine is whether the speaker is providing personalized advice in a private setting to a paying client or instead engaged in public discussion and commentary. Professional speech analysis applies in the former context...168 According to the Fourth Circuit, “[t]he key to distinguishing between occupational regulation and abridgement of [F]irst [A]mendment liberties is in finding ‘a personal nexus between professional and client.’”169 As one commentator has described it, “when a physician speaks to a patient in the course of medical treatment, his opinions are normally regulated on the theory that they are inseparable from the practice of medicine.”170 The Fourth Circuit found such a nexus in Bowman because the non-licensed accountants were “exercis[ing] their professional judgment in making individualized assessments of each client’s financial situation.”171 Consequently, even though the Virginia statute restricted speech directed at both clients and third parties, it did not violate the First Amendment because the speech was not directed to the public.172

Stuart never even considers whether Bowman should apply in the medical context. Yet the similarities are pronounced. Like the accountants in Bowman,173 physicians who perform abortions offer individualized medical advice to and have a personal nexus with their patients.174 As evident from Stuart’s discussion of informed consent, a physician “takes the affairs of a [patient] personally in hand and purports to exercise judgment on behalf of the [patient] in light of the [patient]’s individual needs and circumstances.”175 North Carolina’s speech-and-display provision, therefore, would seem to fall within the confines of the professional speech doctrine because it (i) requires physicians to deliver truthful, nonmisleading information solely within the context of offering individualized medical advice,176 and (ii) does not compel or restrict any speech directed to the general public.177 As a result, under the professional speech

168. See Moore-King, 708 F.3d at 569 (quoting Bowman, 860 F.2d at 604).
171. Bowman, 860 F.2d at 604.
172. See id. (“While the information compiled by accountants and bookkeepers may be directed at third parties, it is not aimed at the general public.”).
173. See Bowman, 860 F.2d at 604 (quoting Lowe, 472 U.S. at 232 (White, J., concurring)).
174. See, e.g., Stuart v. Camnitz, 774 F.3d 238, 251–52 (4th Cir. 2014) (“Physicians determine the ‘adequate’ information for each patient based on what a reasonable physician would convey, what a reasonable patient would want to know, and what the individual patient would subjectively wish to know given the patient’s individualized needs and treatment circumstances.”).
175. Bowman, 860 F.2d at 604 (quoting Lowe, 472 U.S. at 232).
176. See Stuart, 774 F.3d at 246 (quoting Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 577–78 (5th Cir. 2012)) (acknowledging that “[i]t may be true, as the Fifth Circuit has noted, that ‘the required disclosures...are the epitome of truthful, non-misleading information’.”).
177. See Locke v. Shore, 634 F.3d 1185, 1191 (11th Cir. 2011) (“There is a difference, for First Amendment purposes, between regulating professionals’ speech to the public at large versus
doctrine developed in *Bowman* and *Moore-King*, North Carolina would seem to have the authority to regulate the speech between physicians and patients related to a sonogram because the speech-and-display requirement “amount[s] to the permissible regulation of a profession, not an abridgment of speech protected by the [F]irst [A]mendment.”\(^{178}\)

Given that speech-and-display statutes regulate only the “direct, personalized speech”\(^{179}\) between patients and physicians, such disclosures would seem to fit within the professional speech doctrine that the Third, Fourth, Ninth, and Eleventh Circuits developed prior to the Fourth Circuit’s decision in *Stuart*. Moreover, applying a lower level of scrutiny to doctor-patient communications related to the abortion procedure appears consistent with the plurality’s statement that the physician’s compelled speech claim in *Casey* was to be viewed “as part of the practice of medicine, subject to reasonable . . . regulation by the State.”\(^{180}\) Yet despite *Casey* and the concurrences of Justice Jackson in *Thomas*\(^{181}\) and Justice White in *Lowe*,\(^{182}\) the *Stuart* panel subjected North Carolina’s speech-and-display disclosures to heightened scrutiny.\(^{183}\) As a result, even though the circuits applying the professional speech doctrine—including the Fourth Circuit in *Bowman*—permit states to engage in “a substantial amount of speech regulation within the professional-client relationship,”\(^{184}\) North Carolina’s petition for certiorari will present two important questions regarding the professional speech doctrine: (i) whether the Court should adopt such a doctrine and, if so, (ii) whether the applicable standard is rational basis (as *Casey* and the Third, Ninth, and Eleventh Circuits suggest) or heightened scrutiny (as *Stuart* holds).\(^{185}\)

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their direct, personalized speech with clients. Florida’s license requirement regulates solely the latter . . . . [I]t does not implicate constitutionally protected activity under the First Amendment.”).

\(^{178}\) *Bowman*, 860 F.2d at 605.

\(^{179}\) *Locke*, 634 F.3d at 1191.


\(^{183}\) See *Stuart*, 774 F.3d at 249 (“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.”).

\(^{184}\) Pickup v. *Brown*, 740 F.3d 1208, 1228 (9th Cir. 2013); see Accountants Soc’y of Va. v. *Bowman*, 860 F.2d 602, 604 (4th Cir. 1988) (quoting Underhill Assoc. v. Bradshaw, 674 F.2d 293, 296 (4th Cir. 1982)) (“A statute that governs the practice of an occupation is not unconstitutional as an abridgment of the right to free speech, so long as any inhibition of that right is merely the incidental effect of observing an otherwise legitimate regulation.”).

\(^{185}\) See generally *Casey*, 505 U.S. at 884 (applying the reasonableness standard); id. at 981 (Scalia, J., concurring and dissenting in part) (arguing that a rational basis standard should be applied); *Pickup*, 740 F.3d at 1251 (holding that the statute at issue is subject to rational basis review).
B. Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio

In Stuart, the Fourth Circuit concluded that it should “borrow[] a heightened intermediate scrutiny standard used in certain commercial speech cases.”186 The Stuart panel did not mention, let alone analyze, Zauderer, a commercial speech case involving compelled disclosures in which the Court applied only rational basis scrutiny. To the extent that the Court’s commercial speech precedents are instructive in the informed consent context, though, Stuart should explain which line of commercial speech cases is appropriate and why. According to the Supreme Court, “the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides.”187 Intermediate scrutiny is meant to balance the commercial speakers’ right to control her message and the consumers’ interest “in the free flow of commercial information, [an] interest [that] may be as keen, if not keener by far, than his interest in the day’s most urgent political debate.”188

In Zauderer, however, the Court acknowledges that intermediate scrutiny does not apply to speech compulsions that require commercial speakers to disclose factual information.189 As the Court notes, an advertiser’s “constitutionally protected interest in not providing any particular factual information in his advertising is minimal,”190 Factual speech compulsions “trench much more narrowly on an advertiser’s interests than do flat prohibitions” because the government has an important interest in “dissipat[ing] the possibility of consumer confusion or deception.”191 As a result, given that factual disclosures directly help consumers without infringing on an advertiser’s First Amendment rights, the Court applies a lower level of scrutiny.

As Bowman, King, Pickup, and Wollschlaeger demonstrate, the same is true in other professional-client relationships.192 State regulation is allowed because “the purpose of those relationships is to advance the welfare of the clients, rather than to contribute to public debate.”193 In the medical context, factual disclosures relating to abortion or any other medical procedure are permitted to make sure a patient’s decision is well informed.194 As Casey explains, “a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a

186. Stuart, 774 F.3d at 248.
189. Id.
190. Id.
191. Id. (quoting In re R.M.J., 455 U.S. 191, 201 (1982)).
193. Pickup, 740 F.3d at 1228.
requirement that a doctor give certain specific information about any medical procedure."^{195} Unlike speech restrictions, speech-and-display laws require physicians to disclose only factual information and do not otherwise limit the physicians’ communications with his patient or the public generally. Consequently, such disclosures would seem to trench more narrowly on physicians’ speech rights and, consistent with Zauderer, be subject to a lower standard of review. If so, then Stuart’s use of heightened scrutiny is inconsistent with Zauderer. Thus, Stuart raises yet another important constitutional issue that the Court has not yet resolved—whether Zauderer applies outside the commercial speech context.

Despite the similarities between compelled speech in the commercial and medical contexts, Stuart does not consider whether Zauderer’s exception to intermediate scrutiny should apply to factual informed consent disclosures.\textsuperscript{196} In Zauderer, an Ohio law required attorneys who advertise that they represent clients on a contingent fee basis “to state that the client may have to bear certain expenses even if he loses.”\textsuperscript{197} Although recognizing that Ohio’s disclosures implicated the First Amendment rights of advertisers, the Court distinguished its prior cases that struck down speech compulsions.\textsuperscript{198} In particular, the Court focused on two aspects of Ohio’s required disclosure.\textsuperscript{199} First, the Court considered the context—commercial speech—and recognized Ohio’s important interest in regulating commercial advertising.\textsuperscript{200} According to Zauderer, because Ohio was “not attempt[ing] to ‘prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein,’”\textsuperscript{201} “the interests at stake in this case are not of the same order as those discussed in Wooley, Tornillo, and Barnette.”\textsuperscript{202} Instead, Ohio sought only to specify “what shall be orthodox in commercial advertising,” requiring attorneys to include in their advertising “purely factual and uncontroversial information about the terms under which [their] services will be available.”\textsuperscript{203}

Second, the Court emphasized the “material differences between disclosure requirements and outright prohibitions on speech.”\textsuperscript{204} Unlike speech restrictions, Ohio’s regulation did not “prevent attorneys from conveying information to the

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196. Stuart v. Camnitz, 774 F.3d 238, 245 (4th Cir. 2014) (holding content-based regulation of a medical professional’s speech must satisfy at least intermediate scrutiny).
197. \textit{Id.} at 650.
199. \textit{Id.} at 650.
200. \textit{Id.} at 651.
203. \textit{Id.}
204. \textit{Id.} at 650.
public; it . . . only required them to provide somewhat more information than they might otherwise be inclined to present.\textsuperscript{205} As a result, the Court concluded that “disclosure requirements trench much more narrowly on an advertiser’s interests than do flat prohibitions on speech.”\textsuperscript{206} As in \textit{Casey}, the Court upheld the disclosure requirement even though the disclosures “implicate[d] the advertiser’s First Amendment rights.”\textsuperscript{207} Although “unjustified or unduly burdensome” requirements might violate the attorneys’ First Amendment rights, the Court applied rational basis review, concluding that their speech rights were “adequately protected as long as disclosure requirements are reasonably related to the State’s interest,” which in the commercial advertising context was “preventing deception of consumers.”\textsuperscript{208}

The similarities between Ohio’s regulation and North Carolina’s speech-and-display provision are pronounced.\textsuperscript{209} First, consistent with the commercial speech context, the state has a significant interest in regulating the medical profession.\textsuperscript{210} As the Court confirmed in \textit{Gonzales}, “[u]nder our precedents it is clear the State has a significant role to play in regulating the medical profession,” which in the abortion context includes “an interest in ensuring so grave a choice is well informed.”\textsuperscript{211}

Second, as in \textit{Zauderer}, North Carolina’s compelled disclosures do not prevent doctors from addressing the public or expressing their views to patients regarding the speech-and-display provision, the sonogram images, the propriety of having an abortion, informed consent laws generally, or any other issue.\textsuperscript{212} The speech-and-display law requires physicians to provide information that some doctors might otherwise not be inclined to present, but under \textit{Gonzales} this fact supports North Carolina’s requiring such disclosures: “In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the abortion procedure to be used. It is, however, precisely this

\textsuperscript{205} \textit{Id.}
\textsuperscript{206} \textit{Id.} at 651 (quoting \textit{In re R.M.J.}, 455 U.S. 191, 201 (1982)). The Court also rejected the appellant’s claim that strict scrutiny should apply to compelled disclosures related to the attorney-client relationship:

Because the First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed, we do not think it appropriate to strike down such requirements merely because other possible means by which the State might achieve its purposes can be hypothesized.

\textit{Id.} at 651–52 n.14.
\textsuperscript{207} \textit{Id.} at 651.

\textsuperscript{208} \textit{Id.}


\textsuperscript{210} \textit{See} \textit{Stuart}, 774 F.3d at 242 (outlining the state’s interest to ensure informed consent); \textit{Gonzales v. Carhart}, 550 U.S. 124, 157 (2007) (quoting Washington v. Glucksberg, 521 U.S. 702, 731 (1997)) (outlining the state’s interest in protecting the integrity of the medical profession); \textit{Zauderer}, 471 U.S. at 651 (outlining the state’s interest in preventing the deception of consumers).

\textsuperscript{211} \textit{Gonzales}, 550 U.S. at 157, 159.

\textsuperscript{212} \textit{Stuart}, 774 F.3d at 243–44, 249 (quoting N.C. GEN. STAT. § 90-21.82 (2013)).
lack of information that is of legitimate concern to the State.” To the extent a physician does not think the required disclosures are medically relevant, the physician is free to explain those views to the woman seeking an abortion as well as to the public generally.

Furthermore, given that speech-and-display laws do not restrict any physician speech, Stuart’s reliance on Hurley is misplaced. Stuart cites Hurley for the proposition that “[i]listeners may have difficulty discerning that the message is the state’s, not the speaker’s, especially where the ‘speaker [is] intimately connected with the communication advanced.” In the patient-physician context, though, Zauderer indicates why Hurley’s concerns about the impact of compelled speech on third parties do not apply. Because North Carolina’s sonogram disclosures do not impose any speech restrictions on the physician, there is no threat that a listener—a woman seeking an abortion—would think that the speech-and-display requirement is conveying the physician’s message (unless, of course, the doctor agrees with that message and does not exercise his broad speech rights to distance himself from or criticize the requirement). In fact, under Gonzales the subsequent dialogue between the patient and her physician might further the state’s interest in ensuring that the woman makes an informed decision: “The State’s interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole . . . .”

Third, as in Zauderer, the interests at stake in the speech-and-display context are not of the same order as those discussed in Wooley and Barnette. North Carolina’s factual disclosures do not “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” Because the communications between patients and physicians occur in private, some courts might conclude, like the Ninth Circuit in Pickup, that “the First Amendment tolerates a

216. Id. at 246 (quoting Hurley, 515 U.S. at 576).
218. See Stuart, 774 F.3d at 246 (discussing a doctor’s ability to supplement the compelled speech).
220. See Zauderer, 471 U.S. at 651 (outlining the state’s interest in preventing the deception of consumers).
221. Wooley v. Maynard, 430 U.S. 705, 716 (1977) (explaining the state’s interest in the display of the South Carolina motto on its license plates).
substantial amount of speech regulation within the professional-client relationship that it would not tolerate outside of it.”

Although North Carolina has required certain disclosures, it has done so only in relation to specific truthful, nonmisleading information designed to “reduce[e] the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.”

As a result, the Fourth Circuit’s use of heightened scrutiny appears at odds with the reasons given in Zauderer and Casey for applying rational basis review. Although both cases acknowledge that the mandated disclosures “implicate” the First Amendment rights or professionals, both conclude that, because the disclosures involved truthful, nonmisleading information, those “rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interests.” In Zauderer, the state’s interest involved preventing deception of consumers in the commercial speech context. In Casey, Pennsylvania sought to advance its interests in protecting the psychological well-being of the woman contemplating an abortion and in promoting childbirth over abortion. Through its speech-and-display requirements, North Carolina seeks to do the same thing—promoting childbirth over abortion and ensuring that a woman’s decision is fully informed. Provided that the disclosed information is truthful, nonmisleading, and relevant to the state’s interests, Zauderer and Casey suggest that North Carolina may require “the physician [to] provide the information mandated” provided that the disclosures are reasonable.

Going forward, then, courts—including the Supreme Court if it grants North Carolina’s petition for certiorari in Stuart—must determine the proper scope of

223. Pickup v. Brown, 740 F.3d 1208, 1228 (9th Cir. 2013); see also ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 24 (Yale Univ. Press 2012) (“Within public discourse, the First Amendment requires law to respect the autonomy of speakers rather than to protect the targets of speech; outside public discourse, the First Amendment permits the state to control the autonomy of speakers in order to protect the dignity of the targets of speech.”).


225. See generally Stuart v. Cannitiz, 774 F.3d 238, 249 (4th Cir. 2014) (discussing North Carolina’s speech-and-display provisions and applying intermediate scrutiny).

226. Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985) (holding that Ohio’s disclosures “implicate[d]” the First Amendment rights of physicians but that their “rights are adequately protected as long as disclosure requirements are reasonably related to the State’s interest.”); Casey, 505 U.S. at 884 (recognizing that compelled disclosures implicate a physician’s First Amendment rights, “but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.”).


228. Casey, 505 U.S. at 882.

229. Stuart, 774 F.3d at 250 (quoting Gonzales v. Carhart, 550 U.S 124, 159 (2007)).

230. Casey, 505 U.S. at 884. Compare Zauderer, 471 U.S. at 651 (noting that Ohio required “that appellant include in his advertising purely factual and uncontroversial information”), with Casey, 505 U.S. at 882 (recognizing that required disclosures may be constitutional “[i]f the information the State requires to be made available to the woman is truthful and not misleading”).
Zauderer. Does Zauderer’s reasoning apply outside the commercial speech context? Is Zauderer a precursor to the professional speech doctrine? If so, should courts apply rational basis to factual disclosures whenever the government has a special interest in regulating a given area (e.g., commercial speech or the practice of medicine) and does not “‘prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein’”?231 Or are there reasons to limit Zauderer to the commercial speech context? And if so, what does that tell us about the plurality’s resolution of the compelled disclosures in Casey? How the Court answers these questions may determine whether speech-and-display laws—as well as required disclosures in various other professional contexts—are constitutional.

C. Whether Factual Disclosures Constitute Ideological Speech

In addition to relying on the professional speech doctrine, the Fourth Circuit contends that heightened scrutiny is appropriate because North Carolina’s speech-and-display law compels “ideological” speech.232 If the speech-and-display disclosures are ideological, the circuit courts seem to agree that some form of heightened scrutiny might apply.233 But only the Fourth Circuit concludes that these disclosures are in fact ideological.234 Although never expressly defining “ideological,” the Fourth Circuit suggests that speech is ideological in the speech-and-display context if the intent or effect of the speech is to dissuade a woman from having an abortion: “The clear import of displaying the sonogram in this context—while the woman who has requested an abortion is partially disrobed on an examination table—is to use the visual imagery of the fetus to dissuade the patient from continuing with the planned procedure.”235 The panel focuses on the state’s reasons for conveying the particular information: “The state freely admits that the purpose and anticipated effect of the [speech-and-display requirement] is to convince women seeking abortions to change their minds or reassess their decisions.”236 Under the Fourth Circuit’s view, then, the speech-and-display “statement compelled here is ideological” because “it conveys a particular opinion”—that the state wants to promote childbirth over abortion. Although “the words the state puts into the doctor’s mouth are factual, that does not divorce the speech from its moral or ideological

232. See Stuart, 774 F.3d 238, 245.
233. Stuart, 774 F.3d at 249; Lakey, 667 F.2d at 575.
234. Stuart, 774 F.3d at 245.
235. Id.
236. Id. at 246.
237. Id.
implications.”238 The intent to dissuade coupled with the timing—“shortly before the time of decision when the intended recipient is most vulnerable,”239—transforms factual disclosures into an ideological message.

The Fourth Circuit’s interpretation of ideological speech raises three additional problems for courts and practitioners who are trying to figure out the proper level of scrutiny to apply to speech-and-display disclosures. First, the panel’s definition of ideological speech directly conflicts with the Fifth Circuit’s position. In Lakey, the Fifth Circuit invokes Wooley to support its conclusion that “ideological” speech refers to speech that expresses a point of view.240 In Wooley, New Hampshire’s license plate promulgated a message, “Live Free or Die,” that conveyed a point of view that the Maynards found “morally, ethically, religiously and politically abhorrent.”241 According to the Fifth Circuit, truthful, nonmisleading information related to a woman’s decisions to have an abortion is not factual, no ideological: “Though there may be questions at the margins, surely a photograph and description of its features constitute the purest conceivable expression of ‘factual information.’”242 Such factual information—even if intended to encourage childbirth over abortion—does not constitute ideological speech that warrants heightened scrutiny.243 To the extent that receiving factual information (viewing the sonogram images and hearing a description of those images) causes a woman to forego an abortion, “that is a function of the combination of her new knowledge and her own ‘ideology’ (‘values’ is a better term), not of any ‘ideology’ inherent in the information she has learned about the fetus.”244

Although the disclosures in Casey (which made a woman aware that information about fetal development was available) differ from those in Stuart (which ensure that the information is provided),245 the question is whether this difference makes a constitutional difference. Under Lakey, the answer is “no.”246

238. Id.
239. Id.
240. Wooley v. Maynard, 430 U.S. 705, 715 (1977) (“Here...we are faced with a state measure which forces an individual...to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.”).
241. Id. at 713.
243. See Casey, 505 U.S. at 872.
244. Lakey, 667 F.3d at 577 n.4.
245. Compare Casey, 505 U.S. at 884 (stating the disclosures at issue were not a large burden and upholding them as a reasonable means to ensure a woman’s consent is informed), with Stuart, 774 F.3d at 252 (citing N.C. GEN. STAT. § 90-21.82 (2013)) (explaining that the statute reaches beyond the modified form of informed consent approved in Casey), and Stuart v. Huff, 834 F. Supp. 2d 424, 431 (M.D.N.C. 2011) (stating that the disclosures at issue go well beyond the bounds traditionally considered part of the informed consent process).
246. Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 580 (5th Cir. 2012) (quoting Casey, 505 U.S. at 883) (stating that the disclosures at issue, while more graphic than those in Casey, are no different in kind).
Although speech-and-display provisions require a more direct method of delivery, they do not alter the type of information that the state seeks to impart to a woman: “They are not different in kind, although more graphic and scientifically up-to-date, than the disclosures discussed in Casey—probable gestational age of the fetus and printed material showing a baby’s general prenatal development stages.”

Because speech-and-display laws require physicians to disclose only factual information, the Fifth Circuit, contrary to Stuart, subjects such provisions to rational basis review.

Second, the Fourth Circuit’s position—that speech is ideological if the intent of the mandated speech “is to convince women seeking abortions to change their minds or reassess their decisions”—contradicts Casey’s express acknowledgement that states can require doctors to disclose information “to ensure an informed choice, one which might cause the woman to choose childbirth over abortion.” Under the Fourth Circuit’s analysis, even the disclosures in Casey would seem to constitute ideological speech because they “might cause the woman to choose childbirth over abortion.”

But if this is correct, then Casey should have resolved the physicians’ compelled speech claim differently, applying at least intermediate scrutiny. But Casey did not impose heightened scrutiny, concluding that the disclosures were constitutional as “a reasonable measure to ensure an informed choice.”

The Fourth Circuit’s view of ideological speech is also at odds with Gonzales, which recognizes that a state may compel disclosures that are intended to and may have the effect of causing some women to forego an abortion: “It is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions.” Given that the truthful, nonmisleading disclosures in Gonzales did not trigger heightened scrutiny even though they were intended to (and actually did) reduce the number of abortions, it is not clear that Stuart is warranted in subjecting speech-and-display provisions to heightened scrutiny. In both situations:

247. Id.
248. Stuart, 774 F.3d at 246.
250. Id.
251. See id.
252. Casey is devoid of strict scrutiny language. The plurality repeatedly referenced Pennsylvania’s “legitimate goal” of protecting unborn life and stated that compelled physician disclosures are permissible “as part of the practice of medicine, [which is] subject to reasonable . . . regulation by the State.” Casey, 505 U.S. at 884 (emphasis added). In addition, Casey never considered whether Pennsylvania had any compelling interest in requiring physicians to speak or whether the Pennsylvania statute was narrowly tailored.
253. Id.
254. See Stuart v. Camnitz, 774 F.3d 238, 246 (4th Cir. 2014).
The State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know: that she allowed a doctor to [abort] her unborn child, a child assuming the human form.\footnote{256}

Even though “[a]ny number of patients facing imminent surgical procedures would prefer not to hear all details, lest the usual anxiety preceding invasive medical procedures become the more intense,”\footnote{257} the state still has a “legitimate concern” in correcting for what the state perceives is a “lack of information concerning” the procedure as well as in advancing “[t]he State’s interest in respect for life.”\footnote{258}

Third, Stuart’s focus on the effect speech-and-display disclosures might have on a woman considering whether to have an abortion\footnote{259} reintroduces arguments made in Akron v. Akron Center for Reproductive Health\footnote{260} and Thornburgh v. American College of Obstetricians & Gynecologists,\footnote{261} but rejected in Casey.\footnote{262} According to Casey, Thornburgh determined that the informed consent provisions in Akron were problematic for two reasons: “the information was designed to dissuade the woman from having an abortion and the ordinance imposed ‘a rigid requirement that a specific body of information be given in all cases, irrespective of the particular needs of the patient.’”\footnote{263} The Fourth Circuit makes the same claims in Stuart, finding North Carolina’s speech-and-display provision unconstitutional because it seeks to discourage abortion\footnote{264} and to provide information that some women may not want or that might even be harmful in a specific situation.\footnote{265}

\footnote{256}{Id. at 159–60.}
\footnote{257}{Id. at 159.}
\footnote{258}{Id. at 159–60 (citing Planned Parenthood of Sc. Pa. v. Casey, 505 U.S. 833, 873 (1992)).}
\footnote{259}{See Stuart, 774 F.3d at 250.}
\footnote{260}{462 U.S. 416 (1983).}
\footnote{261}{476 U.S. 747 (1986).}
\footnote{262}{See Casey, 505 U.S. at 883.}
\footnote{263}{Casey, 505 U.S. at 881–82 (quoting Thornburgh, 476 U.S. at 762).}
\footnote{264}{See Stuart, 774 F.3d at 245 (“The clear import of displaying the sonogram in this context… is to use the visual imagery of the fetus to dissuade the patient from continuing with the planned procedure.”); see also id. at 246 (“The state freely admits that the purpose and anticipated effect… are] to convince women seeking abortions to change their minds or reassess their decisions.”).}
\footnote{265}{See, e.g., id. at 252 (“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.”); id. at 253 (“[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 the information.”).}
Like the Fourth Circuit in *Stuart*,266 *Akron* expressed concern about forcing physicians to deliver information that might be irrelevant to a woman’s particular situation.267 According to *Thornburgh*, such information about fetal characteristics might “serve only to confuse and punish [the woman] and to heighten her anxiety, contrary to accepted medical practice.”268 *Thornburgh* also suggested that requiring information about medical assistance and paternity may, “[f]or a patient with a life-threatening pregnancy, . . . be cruel as well as destructive of the physician-patient relationship” and that “a victim of rape should not have to hear gratuitous advice that an unidentified perpetrator is liable for support.”269 Echoing these concerns, the *Stuart* panel worries that “forcing this experience on a patient over her objections’ in this manner interferes with the decision of a patient not to receive information that could make an indescribably difficult decision even more traumatic and could ‘actually cause harm to the patient.”270 The Fourth Circuit’s analysis essentially repeats the petitioners’ claims in *Casey* that Pennsylvania’s informed consent statute compelled ideological speech that triggered and failed strict scrutiny because it “forced [physicians] to convey the state’s message at the cost of violating their own conscientious beliefs and professional commitments.”271

Courts considering whether to adopt the Fourth Circuit’s analysis, therefore, confront a problem—the plurality rejected the petitioners’ claims in *Casey* and overturned *Thornburgh* and *Akron*.272 In so doing, the plurality acknowledged that the physical and psychological health of the woman are critically important,273 but *Casey* confirmed that the state has the authority to determine that specific information should be given to patients to ensure that their decisions are fully informed.274 Under *Casey* and *Gonzales*, if (i) the information is factual and (ii) doctors remain free to express their views about abortion and a woman’s treatment, then reasonable factual disclosures implicate physicians’ First

266. See id.
267. See *Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 445 (1985) (“For example, even if the physician believes that some of the risks outlined in subsection (5) are nonexistent for a particular patient, he remains obligated to describe them to her.”); *Thornburgh*, 476 U.S. at 762 (“The mandated description of fetal characteristics at 2-week intervals, no matter how objective, is plainly overinclusive. This is not medical information that is always relevant to the woman’s decision . . . .”).
268. *Thornburgh*, 476 U.S. at 762. In *Stuart*, the Fourth Circuit also invokes standards of the medical practice to support its holding. See *Stuart*, 774 F.3d at 255. The panel expresses its concern that “[t]he information is provided irrespective of the needs or wants of the patient, in direct contravention of medical ethics and the principle of patient autonomy.” Id.
270. *Stuart*, 774 F.3d at 255.
273. See id. at 846.
274. See id. at 873.
Amendment rights but do not violate those rights. Subjecting such factual disclosures to heightened scrutiny, therefore, is inappropriate for the same reasons that Casey overruled Akron and Thornburgh—it “go[es] too far” and undervalues the state’s “important interest in potential life.” Thus, courts considering speech-and-display provisions in the wake of Stuart and Lakey must consider carefully whether applying heightened scrutiny is consistent with Casey's rejection of Akron and Thornburgh.

D. Whalen v. Roe

Stuart highlights another unresolved issue that has crept into the case law regarding the standard of review for compelled disclosures in the medical context: what to do with Casey’s invocation of Whalen v. Roe. The Fourth Circuit relies heavily on Casey’s statement that “the physician’s First Amendment rights not to speak are implicated” to support its claim that individuals do not “simply abandon their First Amendment rights when they commence practicing a profession.” But the panel completely ignores the fact that Casey invokes Whalen to confirm that the physicians’ First Amendment rights are implicated “but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.” Despite Casey’s indicating that Wooley does not apply with the same force to regulations of the “practice of medicine” and stating that the government therefore can impose “reasonable” regulations, Stuart holds that this “single paragraph in Casey . . . does not [announce] the proper level of scrutiny to be applied to abortion regulations that compel speech to the extraordinary extent present here.” But Stuart, like the district court opinion that it affirms, never mentions Whalen or considers what role that case plays in Casey’s analysis of physicians’ First Amendment claims.

Any complete account of Casey, though, must explain the plurality’s invocation of both cases. Wooley confirms that compelled speech implicates the First Amendment rights of physicians. But what does Whalen do? To

275. See Stuart, 774 F.3d at 249 (quoting Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 576 (5th Cir. 2012); Planned Parenthood Minn., N.D., S.D. v. Rounds (Rounds I), 530 F.3d 724, 734–35 (8th Cir. 2008) (en banc)).
276. Casey, 505 U.S. at 882.
277. Casey, 505 U.S. at 884.
278. Stuart, 774 F.3d at 247.
279. Casey, 505 U.S. at 884.
280. Id.
281. Stuart, 774 F.3d at 249.
282. The Stuart panel suggests that there are different levels of compelled speech and that heightened scrutiny is required given that speech-and-display laws “compel speech to [an] extraordinary extent.” Id. But speech is either compelled or it is not. The nature of the underlying circumstances would seem to go to the woman’s due process claim rather than the physician’s First Amendment claim.
283. See id. (discussing the impact of Wooley on compelling physician’s speech).
understand that, one must look carefully at the section of Whalen to which Casey cites.\footnote{See id.} The Fourth Circuit does not even try to reconcile its heightened scrutiny analysis with Casey and Whalen and, consequently, reaches a decision at odds with both cases.

In Whalen, the Supreme Court considered whether a New York law requiring physicians to prepare prescriptions for certain drugs in triplicate and to file at least one of the copies with the state violated the constitutional right to privacy of prescribing physicians and their patients.\footnote{Whalen, 429 U.S. at 591, 593.} Through the prescription requirement, the New York legislature sought to facilitate enforcement of laws prohibiting the misuse of controlled substances and to deter those who might violate those laws.\footnote{Id. at 597–98.} The physicians and patients filed suit, claiming that the possibility of disclosure would make “some patients reluctant to use, and some doctors reluctant to prescribe [the applicable] drugs even when their use is medically indicated.”\footnote{Id. at 600.} The plaintiffs argued that the law “threaten[ed] to impair both their interest in the nondisclosure of private information and also their interest in making important decisions independently.”\footnote{Id. The court noted that “the statute did not deprive the public of access to the drugs.” Id. at 603.} The Supreme Court rejected these claims, concluding that the statute was “manifestly the product of an orderly and rational legislative decision,” that there “was nothing unreasonable in the assumption” that the statute might help officials enforce laws designed to reduce the use of dangerous drugs, and that the law “could reasonably be expected to have a deterrent effect on potential violators.”\footnote{Id. at 597–98.}

In the section of Whalen to which Casey refers, the Court recognized that the state has broad latitude to regulate the practice of medicine provided that such regulations do not: (1) preclude public access to a legitimate medical procedure or treatment, (2) prevent a patient from deciding, in consultation with her physician whether to pursue the procedure or treatment,\footnote{Id. at 603 (“Within dosage limits which appellees do not challenge, the decision to prescribe, or to use, is left entirely to the physician and the patient.”).} or (3) condition the doctor’s ability to pursue such a procedure or treatment on government consent.\footnote{Id.} In Whalen, as in Casey, the Court explained that what “is at stake” is the ability of a patient to make the ultimate decision in consultation with her physician.\footnote{Planned Parenthood v. Casey, 505 U.S. 833, 877 (1992).} As long as “the decision . . . is left entirely to the physician and the patient,”\footnote{Whalen, 429 U.S. at 603.} the state has substantial freedom to adopt reasonable regulations that may affect the decision-making process.\footnote{See id.} Moreover, the Whalen Court
determined that to the extent the compelled disclosures impaired the doctors’ “right to practice medicine free of unwarranted state interference . . . the doctors’ claim is derivative from, and therefore no stronger than, the patients’ [claim].”

Although Whalen did not involve a First Amendment claim, Casey incorporated the principles of Whalen into the abortion context generally, and the compelled physician speech context in particular. This is not surprising given that (i) Casey expressly states that “the doctor-patient relation here is entitled to the same solicitude it receives in other contexts,” and (i) Casey and Whalen are similar in several important respects. Both cases involve claims that a state law compelling disclosures violated a patient’s Fourteenth Amendment rights in connection with a medical procedure or treatment. Both emphasize that the patient must have the right to make the ultimate decision about the medical procedure or treatment, but that the state may adopt regulations—even ones that might be considered unnecessary—that affect that right. Both indicate that the state may require physicians to engage in activities that burden the physicians’ practice of medicine. Both hold that the rights of the physician are derivative of those of the patient. In light of Whalen, then, it becomes clear why Casey summarily disposed of the physicians’ First Amendment claims. Because the compelled disclosures did not unduly burden a woman’s right to choose, there was “no constitutional infirmity in the requirement that the physician provide the information.”

Ignoring the derivative nature of a physician’s rights, the Fourth Circuit contends that “[t]he 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.” The Fourth Circuit allows doctors to assert a separate First Amendment claim even though Casey instructs that “[t]he doctor-patient relation does not underlie or override the two more general rights under which the

295. Id. at 604.
296. Casey, 505 U.S. at 884 (“On its own, the doctor-patient relation here is entitled to the same solicitude it receives in other contexts. Thus, a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure.”).
297. Id.
298. See id. at 846, 877; Whalen, 429 U.S. at 603–04.
299. See Casey, 505 U.S. at 877; Whalen, 429 U.S. at 603.
300. See Casey, 505 U.S. at 883; Whalen, 429 U.S. at 603–04.
301. See Casey, 505 U.S. at 884; Whalen, 429 U.S. at 600.
302. Whalen, 429 U.S. at 604; see also Casey, 505 U.S. at 884 (“Whatever constitutional status the doctor-patient relation may have as a general matter, in the present context it is derivative of the woman’s position.”).
303. See Casey, 505 U.S. at 884.
304. Id.
305. Stuart v. Camnitz, 774 F.3d 238, 249 (4th Cir. 2014).
abortion right is justified: the right to make family decisions and the right to physical autonomy.  As a result, the Fourth Circuit erroneously contends that applying rational basis review to the physicians’ claims would create a new First Amendment test.

But Whalen shows why the Fourth Circuit’s analysis is incorrect. By citing to Whalen, Casey confirmed that disclosure requirements implicate the physician’s First Amendment rights but that in the context of the practice of medicine such disclosures are constitutional provided they are “reasonable . . . regulation[s] by the State.” Whalen, in turn, invokes Doe v. Bolton to confirm this understanding of a physician’s rights:

Nothing in [Doe] suggests that a doctor’s right to administer medical care has any greater strength than his patient’s right to receive such care . . . If [the abortion restrictions at issue in Doe] had not impacted upon the woman’s freedom to make a constitutionally protected decision, if they had merely made the physician’s work more laborious or less independent without any impact on the patient, they would not have violated the Constitution.

Because the physician’s rights are derived from those of his or her patient, the doctor does not receive greater protection under the First Amendment than the patient gets under the Due Process Clause. In Casey, the central concern was “the right of a pregnant woman to decide whether or not to bear a child without unwarranted state interference.” The plurality held that the compelled disclosures did not unduly burden a woman’s right to choose and, consequently, that there was “no constitutional infirmity in the requirement that the physician provide the information.”

Although speech-and-display requirements may force doctors “to provide somewhat more information than they might otherwise be inclined to present,” Casey and Whalen indicate that they are constitutional because those disclosures do not limit the physicians’ ability to advise their patients about the import of the sonogram and whether they believe an abortion is appropriate under the

306. Casey, 505 U.S. at 884.
307. Stuart, 774 F.3d at 245.
308. See Whalen, 429 U.S. at 604.
309. Id.
311. Casey, 505 U.S. at 884 (holding that physicians do not garner additional protection because the “doctor-patient relation does not underlie or override the two more general rights under which the abortion right is justified: the right to make family decisions and the right to physical autonomy”).
312. Whalen, 429 U.S. at 604 n.33 (citing Doe, 410 U.S. at 197–98); see also Casey, 505 U.S. at 883 (discussing informed choice as a legitimate goal of the state).
313. Casey, 505 U.S. at 884.
circumstances. Under this interpretation, Whalen provides direct support for the application of rational basis scrutiny to speech-and-display disclosures. Of course, Stuart provides the Supreme Court with the opportunity to determine whether this interpretation of Whalen and Casey is correct or whether the Fourth Circuit properly held that the speech-and-display disclosures are beyond the regulatory authority of the state. The Court’s resolution of this issue will determine the scope of a state’s authority to require truthful, nonmisleading disclosures that advance its interests in “Ensuring a decision that is mature and informed” and in “express[ing] a preference for childbirth over abortion.”

315. See Casey, 505 U.S. at 882; Whalen, 429 U.S. at 604 n.33 (citing Doe, 410 U.S. at 197–98).

316. See Stuart v. Camnitz, 774 F.3d 238, 245 (4th Cir. 2014) (summarizing the state’s argument that the requirement at issue should be treated only as a regulation of the medical profession subject to rational basis review).

317. Casey, 505 U.S. at 883.