No. _____

In the
Supreme Court of the United States

CHERYL WALKER-MCGILL, MD, IN HER OFFICIAL CAPACITY AS PRESIDENT OF THE NORTH CAROLINA MEDICAL BOARD AND HER EMPLOYEES, AGENTS AND SUCCESSORS, ET AL.,

Petitioners,

v.

GRETCHEN S. STUART, MD, ON BEHALF OF HERSELF AND HER PATIENTS SEEKING ABORTIONS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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March 2015 * Counsel of Record

QUESTION PRESENTED

Does North Carolina's statutory requirement that an ultrasound image be displayed and described to the patient prior to an abortion procedure violate the First Amendment rights of the provider?

LIST OF PARTIES
TO THE PROCEEDINGS

Petitioners, Cheryl Walker-McGill, MD*, in her official capacity as President of the North Carolina Medical Board and her employees, agents and successors; Roy Cooper, in his official capacity as Attorney General of North Carolina and his employees, agents and successors; Aldona Zofia Wos, in her official capacity as Secretary of the North Carolina Department of Health and Human Services and her employees, agents and successors; Jim Woodall, in his official capacity as District Attorney ("DA") for Prosecutorial District ("PD") 15B and his employees, agents and successors; Roger Echols*, in his official capacity as DA for PD 14 and his employees, agents and successors; Douglas Henderson, in his official capacity as DA for PD 18 and his employees, agents and successors; Billy West, in his official capacity as DA for PD 12 and his employees, agents and successors; Lorrin Freeman*, in her official capacity as DA for PD 10 and her employees, agents and successors; Benjamin R. David, in his official capacity as DA for PD 5 and his employees, agents and successors; Ernie Lee, in his official capacity as DA for PD 4 and his employees, agents and successors; Jim O'Neill, in his official capacity as DA for PD 21 and his employees, agents and successors, were the defendants in the district court and the appellants in the court of appeals.

* Modified to substitute the successor to the public office, named in their official capacity only, in the case below.

Respondents, Gretchen S. Stuart, MD, on behalf of herself and her patients seeking abortions; James R. Dingfelder, MD, on behalf of himself and his patients seeking abortions; David A. Grimes, MD, on behalf of himself and his patients seeking abortions; Amy Bryant, MD, on behalf of herself and her patients seeking abortions; Serina Floyd, MD, on behalf of herself and her patients seeking abortions; Decker & Watson, Inc., d/b/a Piedmont Carolina Medical Clinic; Planned Parenthood of Central North Carolina; a Woman's Choice of Raleigh, Inc.; Planned Parenthood Health Systems, Inc.; Takey Crist, on behalf of himself and his patients seeking abortions; Takey Crist, M.D., P.A., d/b/a Crist Clinic for Women, were the plaintiffs in the district court and the appellees in the court of appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONS, STATUTES AND CODES

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a-34a) is reported at 774 F.3d 238. The opinion of the United States District Court for the Middle District of North Carolina (Pet. App. 35a-95a) is reported at 992 F. Supp. 2d 585.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on December 22, 2014. (Pet. App. 1a-34a) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The relevant statutory provisions are reprinted in an appendix to this petition. (Pet. App. 96a-111a)

STATEMENT

This case involves a First Amendment challenge to a North Carolina law that requires doctors to provide certain truthful information to patients who will soon be undergoing abortions. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) ("*Casey*"), this Court specifically addressed how informed-consent provisions tailored to abortions should be assessed:

> 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.

Id. at 884 (citations omitted).

The Fifth and Eighth Circuits have interpreted that language as meaning what it says: that informed-consent laws tailored to abortions are part of States' general power to license and regulate the medical profession, and do not violate the First Amendment if they are "reasonable." *See Texas Medical Providers Performing Abortions Services v. Lakey*, 667 F.3d 570, 580 (5th Cir. 2012) ("*Lakey*"); *Planned Parenthood Minn. v. Rounds*, 530 F.3d 724, 734 (8th Cir. 2008) (en banc) ("*Rounds I*"). The Fifth Circuit accordingly upheld a Texas law virtually identical to North Carolina's, and the Eighth Circuit upheld a South

Dakota law that goes further than North Carolina's law.

By contrast, the Fourth Circuit read *Casey*'s First Amendment holding as good for one case only, and instead applied heightened scrutiny to North Carolina's requirement that doctors provide patients truthful information regarding the results of a pre-procedure ultrasound. The court went on to find that the North Carolina provision failed such scrutiny because it "impos[es] additional burdens" than "traditional informed consent" requirements and because "[t]hough the information conveyed may be strictly factual, the context surrounding the delivery of it promotes the viewpoint the state wishes to encourage." (Pet. App. 24a, 28a)

The Fourth Circuit's holding and reasoning cannot be reconciled with *Casey* and directly conflict with decisions by the Fifth and Eighth Circuits. This Court's review is warranted.

A. Statutory Background.

"An Act to Require a Twenty-Four-Hour Waiting Period and the Informed Consent of a Pregnant Woman Before an Abortion May Be Performed" became law on July 28, 2011, when the North Carolina General Assembly overrode a gubernatorial veto. 2011 N.C. Sess. Laws 405. The Act amended Chapter 90 of the North Carolina General Statutes, which governs medical and related professions, to add an article entitled the "Woman's Right to Know Act," with an

effective date ninety days after it became law. N.C.G.S. §§ 90-21.80 through 90-21.92 (2013).

The Act's "Informed consent to abortion" provision, N.C.G.S. § 90-21.82, sets out various prerequisites for the voluntary and informed consent to an abortion. (Pet. App. 100a-105a) Those include a requirement that a physician or qualified professional must orally inform the woman, by telephone or in person, at least twenty-four hours prior to the procedure, of specified facts relating to the procedure. N.C.G.S. § 90-21.82(1). (Pet. App. 103a)

A separate "Display of real-time view requirement" provision, N.C.G.S. § 90-21.85, sets out certain additional prerequisites for a woman to make an informed decision. (Pet. App. 106a-108a) Those include the requirement that, at least four hours before the abortion, a physician or a qualified technician working with the physician shall: perform an obstetric ultrasound on the pregnant woman;[1] provide a simultaneous explanation of the ultrasound display and an opportunity to hear the fetal heart tone; display the ultrasound images so that the pregnant woman may view them; and provide a medical description of the images, including the dimensions of

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[1] The requirement for an ultrasound preexisted the Act for, as noted by the District Court, "[s]ince 1994 the North Carolina Department of Health and Human Services has required by regulation an ultrasound for any patient who is scheduled for an abortion procedure. *See* 10A N.C. ADMIN. CODE 14E.0305(d)." (Pet. App. 45a)

the embryo or fetus and the presence of external members and internal organs if present and viewable. N.C.G.S. § 90-21.85(a)(1)-(4). (Pet. App. 106a-107a) The Act specifically provides that the woman may avert her eyes from the displayed images and may refuse to hear the explanation and medical description. N.C.G.S. § 90-21.85(b). (Pet. App. 108a)

B. Proceedings Below.

Plaintiffs, various physicians and health care providers, filed suit under 42 U.S.C. § 1983 in the United States District Court for the Middle District of North Carolina challenging the constitutionality of certain provisions of the Act. Named as defendants were various state officials in their official capacity. Plaintiffs' third amended Complaint included First Amendment, due process, and vagueness claims as to two provisions of the Act: (1) the "Informed Consent to Abortion" requirement, N.C.G.S. § 90-21.82 (Pet. App. 100a-105a) and (2) the "Display of Real-Time View" requirement, N.C.G.S. § 90-21.85. (Pet. App. 106a-108a)

The District Court granted Plaintiffs' motion for a preliminary injunction as to N.C.G.S. § 90-21.85 on First Amendment grounds, but allowed the remainder of the Act to go into effect. The District Court subsequently ruled that N.C.G.S. § 90-21.85 violates the First Amendment, and entered a permanent injunction prohibiting its implementation or enforcement. (Pet. App. 91a) The District Court denied relief on Plaintiffs' vagueness claim, finding that the Act imposes no criminal penalties, and adopted

agreed-upon savings constructions to eliminate any alleged vagueness in specified terms. (Pet. App. 94a-95a). Additionally, the District Court declined to reach the due process claim on the grounds that the issues presented were moot. (Pet. App. 94a)[2]

The Fourth Circuit affirmed. (Pet. App. 1a-34a) Expressly disagreeing with the Fifth and Eighth Circuits, the court held that *Casey* did not require rational basis review of N.C.G.S. § 90-21.85. The court declared that the "particularized finding" in *Casey* did not control (Pet. App. 19a) because North Carolina's compelled disclosures "far outstrip" the provisions of the Pennsylvania statute that were at issue. (Pet. App. 22a) The court held instead that, because North Carolina's law compels speech and advances the State's preference for childbirth over abortion, the "heightened intermediate scrutiny standard used in certain commercial speech cases" applies. (Pet. App. 20a)

The Fourth Circuit then concluded that § 90-21.85 fails intermediate scrutiny. The court reasoned that, while "the information conveyed may be strictly factual, the context surrounding the delivery of it promotes the viewpoint the state wishes to encourage." (Pet. App. 28a) Furthermore, in its view, the statute

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[2] After the District Court's order granting the preliminary injunction, several individuals and pregnancy counseling centers moved to intervene as defendants. The District Court's denial of that motion was affirmed on appeal. *Stuart v. Huff*, 706 F.3d 345 (4th Cir. 2013).

improperly compelled the delivery of ideological information "irrespective of the needs or wants of the patient" in a manner "intended to convey not the risks and benefits of the medical procedure to the patient's own health, but rather the full weight of the state's moral condemnation." (Pet. App. 32a) The court gave substantial weight to its conclusion that the display-and-describe requirements may "prove psychologically devastating" to the patient. (Pet. App. 31a)

REASONS FOR GRANTING THE PETITION

The Fourth Circuit's ruling irreconcilably conflicts with the decisions of the Fifth and Eighth Circuits on an issue of great national significance – the ability of a state to enact statutory requirements that compel physician speech to provide truthful information relevant to a patient's informed consent prior to an abortion.

The legal issues splitting the circuits are squarely presented, well developed, and ripe for resolution in this case. The Court should grant certiorari to resolve whether the First Amendment limits the States' ability to advance "its legitimate goal of protecting the life of the unborn by enacting legislation aimed at insuring a decision that is mature and informed." *Casey,* 505 U.S. at 883.

I. The Fourth Circuit Decision Creates a Significant Circuit Split.

In ruling North Carolina's mandatory disclosures unconstitutional, the Fourth Circuit explicitly rejected

the analysis employed by both the Fifth and Eighth Circuits in deciding similar questions. (Pet. App. 17a) These courts are in conflict in all respects: in how to interpret *Casey*, in the level of review applied, and in the ultimate holding.

1. The Fifth Circuit upheld against a First Amendment challenge a Texas statute that is nearly identical to the provision at issue in this case. Both statutes require physicians to display an ultrasound image to a woman seeking an abortion and to describe the results of the ultrasound, including "the dimensions of the embryo or fetus," "the presence of external members and internal organs," and the opportunity to hear the fetus's heartbeat. *Compare* TEX. HEALTH & SAFETY CODE § 171.012(a)(4) with N.C.G.S. § 90-21.85(a).

The Fifth Circuit found further support for that deferential standard of review in *Gonzales v. Carhart*, 550 U.S. 124 (2007) ("*Gonzales*"), which stated that "[t]he government may use its voice and regulatory authority to show its profound respect for the life within the woman." *Lakey*, 667 F.3d at 576 (quoting *Gonzales*, 550 U.S. at 128). The Fifth Circuit highlighted *Gonzales*'s recognition that "[i]n a decision so fraught with emotional consequence some doctors may prefer not to disclose" all relevant information, and "[t]he State's interest" in ensuring that there is a "dialogue that better informs . . . expectant mothers." *Id.* (quoting *Gonzales*, 550 U.S. at 157-59)

The Fifth Circuit found that the Texas disclosure requirement fell well within the bounds of the truthful, nonmisleading, and relevant information states could compel physicians to provide. "Though there maybe questions at the margins, surely a photograph and description of its features constitute the purest conceivable expression of 'factual information.'" *Lakey*, 667 F.3d at 577 n.4. All told, held the court, "requiring disclosures and written consent are sustainable under *Casey*, are within the State's power to regulate the practice of medicine, and therefore do not violate the First Amendment." *Id.* at 580.

2. The Eighth Circuit upheld against a First Amendment challenge a South Dakota informed consent provision that went beyond North Carolina's disclosure law. *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (en banc) ("*Rounds I*"). *See also Planned Parenthood Minn., N.D., S.D. v. Rounds*, 653 F.3d 662 (8th Cir. 2011) ("*Rounds II*"); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 686 F.3d 889 (8th Cir. 2012) (en banc). The South Dakota statute at issue required both oral and written disclosures, shortly before the procedure, that "the abortion will terminate the life of a . . . human being"; that the patient "has an existing relationship with . . . [the] human being"; and that a known risk of abortion is an "[i]ncreased risk of suicide ideation and suicide." *Rounds II*, 653 F.3d at 665-66 (quoting S.D.C.L. § 34-23A-10.1).

The Eighth Circuit had previously concluded that "while 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." *Rounds I*, 530 F.3d at 734-35. The court therefore deferentially reviewed the South Dakota statute and found it consistent with the First Amendment. *Id*. at 738.

3. The Fourth Circuit explicitly rejected the approach adopted by the Fifth and Eighth Circuits.

The Fourth Circuit "respectfully disagree[d]" as to the applicable standard of review (Pet. App. 17a), declaring that "our sister circuits read too much into *Casey* and *Gonzales*" in determining that a rational basis review was appropriate. (Pet. App. 18a) The Fourth Circuit characterized *Casey* as making only a "particularized finding" on the First Amendment issues presented by the Pennsylvania statute and dismissed reliance upon *Gonzales* because "it was not a First Amendment case." (Pet. App. 19a) Applying "a heightened intermediate scrutiny standard used in certain commercial speech cases" (Pet. App. 17a), the court declared that the display-and-describe requirement was a content-based speech regulation that compelled physicians to convey the state's "ideological" message (Pet. App. 12a).

Whereas the Fifth Circuit upheld a display-and-describe requirement as within the state's regulatory authority under *Casey*, the Fourth Circuit found the same type of requirement unconstitutional because

"[t]he means here exceed what is proper to promote the undeniably profound and important purpose of protecting fetal life." (Pet. App. 33a)

There is no reason to believe the Fifth Circuit will reconsider its holding. And the Eighth Circuit's two major decisions in *Rounds* were *en banc*. Only this Court can resolve the conflict.

II. The Case Squarely Presents Issues of National Importance.

Statutory provisions imposing physician disclosure requirements specific to abortions have become prevalent in the last two decades. Nearly all fifty states require some level of disclosures concerning the risks of abortion as part of the informed consent process. Others have enacted more focused disclosures as a means of ensuring informed consent to abortion while simultaneously expressing the state's preference for life.

States enact statutory disclosure requirements because "[a]bortion is . . . an act fraught with consequences for others," including the "society which must confront the knowledge that these [abortion] procedures exist, procedures some deem nothing short of an act of violence against innocent human life." *Casey*, 505 U.S. at 852. And so many States have understandably taken steps to ensure that patients are given information that better allows them to assess the decision – an approach this Court ha s expressly endorsed. "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 of the consequences that follow from a decision to elect a late-term abortion." *Gonzales*, 550 U.S. at 160. Whether, and the extent to which, the First Amendment precludes those efforts is an issue of pressing importance.

1. Twenty-four states now require an ultrasound to be performed or offered to a woman prior to the performance of an abortion.[3] Five states have enacted essentially the same display-and-describe requirement at issue in this case,[4] and an additional four states

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[3] *See* ALA. CODE § 26-23A-4 (2013); ARIZ. REV. STAT. ANN § 36-2151, -2146 (2013); ARK. CODE ANN. § 20-16-602 (2012); FLA. STAT. § 390.0111 (2013); GA. CODE. ANN. § 31-9A-3; IDAHO CODE ANN. § 18-609(5) (2013); IND. CODE § 16-34-2-1.1 (2013); KAN. STAT. ANN. §§ 65-4A09, -6709 (2011); LA. REV. STAT. ANN. § 40:1299.35.2 (2013); MICH. COMP. LAWS § 333.17015 (2013); MISS. CODE ANN. § 41-41-34 (2013); MO. REV. STAT. § 188.027(4) (2013); NEB. REV. STAT. § 28-327 (2013); N.C. GEN. STAT. § 90-21.85 (2013); N.D. CENT. CODE § 14-02.1-04(4) (2013); OHIO REV. CODE ANN. §§ 2317.56, 2919.191–.192 (LEXISNEXIS 2013); OKLA. STAT. TIT. 63, §§ 1-728.2–.3 (2013); S.C. CODE ANN. § 44-41-330, -340 (2012); S.D. CODIFIED LAWS § 34-23A-52 (2013); TEX. HEALTH & SAFETY CODE ANN. §§ 171.012, .0122 (WEST 2013); UTAH CODE ANN. §§ 67-7-305, -305.5 (LEXISNEXIS 2013); VA. CODE ANN. § 18.2-76 (2013); W. VA. CODE § 16 -2I-2 (2013); WIS. STAT. § 253.10 (2013).

[4] LA. REV. STAT. ANN. § 40:1299.35.2: N.C. GEN. STAT. § 90-21.85; OKLA. STAT. TIT. 63, §§ 1-728.2-.3; TEX. HEALTH & SAFETY CODE ANN. §§ 171.012, .0122; WIS. STAT. § 253.10.

require a physician to provide a simultaneous explanation of an ultrasound image upon a woman's request.[5]

Presently, the standard for assessing whether those statutes violate the First Amendment depends on which circuit the particular state is in. And in those states outside the Fourth, Fifth, and Eighth Circuits, the decision by the Fourth Circuit casts a cloud over abortion-disclosure laws.

2. The First Amendment issues presented here have consequences that go well beyond abortion-disclosure statutes. The Fourth Circuit decision is the latest of a string of cases to address professional speech issues arising from a state's regulation of the practice of medicine. Several recent decisions, each specifically involving speech within the doctor-patient relationship, have upheld the ability to prohibit specific types of speech in furtherance of a state's general regulation of the practice of medicine. *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014) (upholding a California statute prohibiting state-licensed mental health providers from engaging in "sexual orientation change efforts" with clients under the age of eighteen); *Wollschlaeger v. Governor of Florida*, 760 F.3d 1195 (11th Cir. 2014) (upholding a Florida statute prohibiting medical professionals from inquiring about patients' firearm ownership); *King v. Governor of the*

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[5] ARIZ. REV. STAT. ANN § 36-2151, -2146; FLA. STAT. § 390.0111; NEB. REV. STAT. § 28-327; UTAH CODE ANN. §§ 67-7-305, -305.5.

State of New Jersey, 767 F.3d 216 (3d Cir. 2014) (upholding a New Jersey "sexual orientation change efforts" statute).

The recent decisions demonstrate the difficulty courts are having in determining the proper standard of review for statutes impacting professional speech. The Ninth and Eleventh Circuits have applied rational basis review to enactments they characterized as regulations of professional conduct that implicate speech incidentally. By contrast, the Third and Fourth Circuits rejected the speech/conduct distinction and applied intermediate scrutiny to regulations of professional speech.

This case therefore presents an opportunity to provide guidance on how courts should address First Amendment challenges to state laws that regulate the medical profession (and other professions) in a manner that affects the speech of such professionals.

III. The Fourth Circuit Erred in Holding That North Carolina's Disclosure Requirements Violate the First Amendment.

North Carolina's display-and-describe requirement is a particularized informed consent law that fully conforms with the First Amendment. The Fourth Circuit erred in concluding otherwise.

1. States have the undeniable power to regulate professional activities, including the medical profession. "Under our precedents it is clear the State has a significant role to play in regulating the medical

profession." *Gonzales*, 550 U.S. at 157. That power "is not lost whenever the practice of a profession entails speech." *Lowe v. SEC*, 472 U.S. 181, 228 (1985) (White, J., concurring in judgment). For this reason, the Court in *Casey* had little difficulty upholding a Pennsylvania law "requir[ing] that a doctor give a woman certain information as part of obtaining her consent to an abortion." 505 U.S. at 884. That requirement, held the Court, is "no different from a requirement that a doctor give certain specific information about any medical procedure." *Id*.

Nor did the Court find any First Amendment difficulty with Pennsylvania's requiring doctors "to provide information about the risks of abortion, and childbirth, in a manner mandated by the State," such as giving the "probable gestational age" of the fetus and noting "the availability of printed . . . information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion." *Id*. at 881, 884. The Court concluded that all these requirements were part and parcel of "reasonable licensing and regulation by the State." *Id*. at 884.

So too, here. The information North Carolina requires doctors to provide is slightly different than the information Pennsylvania required in *Casey*. But the object of the statute is the same, as is its lawfulness. As the Fifth Circuit explained, "the required disclosures of a sonogram, the fetal heartbeat, and their medical descriptions are the epitome of

truthful, non-misleading information." *Lakey*, 667 F.3d at 577-78. They are not different in kind, although more graphic and scientifically up-to-date, than the disclosures discussed in *Casey*. *Id.* at 578.

Nor can *Casey* be distinguished on the ground that North Carolina's law is designed to advance specific policy objectives of the State. *All* informed consent laws advance state policy objectives. Beyond that, this Court has expressly held that States may tailor their informed consent laws to advance abortion-specific objectives:

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

Casey, 505 U.S. at 883 (emphasis added). North Carolina's law is therefore perfectly consistent with the First Amendment, as a reasonable regulation of medical practice.

2. In reaching the opposite conclusion, the Fourth Circuit made a series of errors. At the threshold, it erred in holding that the display-and-describe requirement is subject to heightened scrutiny. The court found that heightened scrutiny applied because the "state's avowed intent" was "to discourage abortion or at the very least cause the woman to reconsider her

decision" and because the regulation "compel[s] speech." (Pet. App. 10a, 12a)

Yet precisely the same could be said of the required disclosures at issue in *Casey*. All informed consent requirements, including abortion-specific requirements, involve compelled speech. And, as discussed above, the *Casey* Court recognized that the disclosure requirements in question reflected a "preference for childbirth over abortion," yet declined to apply heightened scrutiny to them.

In short, the Fourth Circuit provided no principled basis for subjecting North Carolina's law to a level of scrutiny different than the level of scrutiny *Casey* applied to Pennsylvania's law. The Fourth Circuit insisted that *Casey* "did not hold sweepingly that all regulation of speech in the medical context merely receives rational basis review." (Pet. App. 19a) Perhaps. But *Casey* unquestionably held that a law requiring doctors to provide truthful information about abortions, "to ensure that a woman apprehend the full consequences of her decision," is reviewed only for reasonableness. 505 U.S. at 882.

The Fourth Circuit compounded that error when it purported to apply intermediate scrutiny. The court declared that "the state bears the burden of demonstrating at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest." (Pet. App. 20a) (internal quotation marks omitted). Yet the court never explained why the State did not satisfy that standard. That is, the court never actually found

that the display-and-describe requirement does not "directly advance[ ] a substantial governmental interest" or was not "drawn to achieve that interest."

The Fourth Circuit did not dispute that the State has a substantial interest in "[t]he protection of fetal life," "the pregnant woman's psychological health, and ensuring that so grave a choice is well informed." (Pet. App. 21a) (internal quotation marks omitted). Nor did the court dispute that there is a close fit between those ends and display-and-describe requirement. Thus, the Fourth Circuit should have upheld the North Carolina law even under the improperly stringent level of scrutiny it applied.

The court held that the North Carolina disclosure requirements fail to satisfy intermediate scrutiny for two reasons, neither of which is tenable. First, citing *Hill v. Colorado*, 530 U.S. 703, 716-18 (2000), the court stated that it must "take into account the effect of the regulation on the intended recipient of the compelled speech." (Pet. App. 21a) The court went on to express concern that the required disclosures might threaten "harm to the patient's psychological health." (Pet. App. 22a)

That reasoning improperly confuses the undue burden inquiry with the First Amendment inquiry. Respondents have never asserted that North Carolina's display-and-describe law imposes an undue burden on a woman's right to abortion. If they wish to assert such a challenge, they can attempt to prove that the absence of a "therapeutic" exception violates a

woman's right to obtain an abortion. But that is not the province of the First Amendment.[6]

The Fourth Circuit's reliance on *Hill* shows just how far astray the court went. *Hill* held that a speech's detrimental impact on unwilling listeners is a state interest that could justify a restriction on free speech. 530 U.S. at 714-16. The Court did not suggest that a professional claiming a First Amendment shield from state regulation of his profession can assert the interests of potential listeners.

The Fourth Circuit's second principal reason for striking down North Carolina's disclosure requirement is that the disclosure "promotes the viewpoint the state wishes to encourage." (Pet. App. 28a) That repeats the error it made earlier in its analysis. As discussed, *Casey* expressly held that a State can impose a disclosure requirement to "further[ ] 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." 505 U.S. at 882. That is precisely what North Carolina's law does.

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[6] Nor, in any event, would that concern — even if valid — justify striking down the display-and-disclosure requirement on its face. As the Court held in *Ayotte v. Planned Parenthood of Northern New England*, the proper remedy for a state abortion law that unconstitutionally fails to include a health exception might be "an injunction prohibiting the statute's unconstitutional application," as opposed to "invalidating the statute *in toto*." 546 U.S. 320, 331, 332 (2006).

Casey emphasizes that "[w]hat is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so." 505 U.S. at 877. The State is not precluded from legislating in furtherance of its legitimate interests in requiring the disclosure of truthful and relevant information because "[t]he law need not give abortion doctors unfettered choice in the course of their medical practice." *Gonzales*, 550 U.S. at 163.

In sum, the Fourth Circuit's decision conflicts with this Court's decisions and with the decisions of two other circuits, and is wrong on multiple levels. Further review is warranted.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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March 2015

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INDEX