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Casey and a Woman's Right to Know: Ultrasounds, Informed Consent, and the First Amendment

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SCOTT W. GAYLORD & THOMAS J. MOLONY*

ABSTRACT

Twenty years after Planned Parenthood of Southeastern Pennsylvania v. Casey was decided, courts across the country are being called on to apply the Court’s undue burden test to novel abortion regulations. The most recent wave of regulation involves the use of ultrasound technology. Twenty-two States currently require physicians to perform, offer to perform, or follow specific protocols when performing an ultrasound prior to any abortion procedure. National attention, however, has focused on the growing number of States that require physicians to display and describe the ultrasound images to a woman seeking an abortion. Three States—Texas, North Carolina, and Oklahoma—have already passed such legislation, and several other States currently are considering similar bills.

The ultrasound statutes in Texas, North Carolina, and Oklahoma were immediately challenged in the state and federal courts. Instead of focusing on the woman’s Fourteenth Amendment due process rights, the central issue in the federal cases has been whether physicians have a First Amendment right to be free from compelled disclosures relating to the ultrasounds. The federal courts have struggled with how to resolve these First Amendment claims within the abortion context. While the Fifth Circuit Court of Appeals upheld the Texas speech-and-display statute, state and federal courts enjoined similar statutes in Oklahoma and North Carolina.

This article explores the split between and among the courts that have addressed the First Amendment challenges to these mandatory speech-
and-display regulations. In particular, the article evaluates how Casey’s undue burden test affects the First Amendment speech rights of physicians in the abortion context. Drawing on Casey’s references to Wooley v. Maynard and Whalen v. Roe, the article concludes that the government has broad authority to mandate disclosures designed to inform a woman’s decision about an abortion. Under Casey, mandatory speech-and-display requirements that do not impose a substantial obstacle to a woman’s exercise of her right to abortion are constitutional if they are reasonable, which Casey defines as being truthful, nonmisleading, and relevant. As a result, the article contends that courts should uphold the Texas, North Carolina, and Oklahoma ultrasound statutes—as well as the similar statutes being considered by state legislatures across the country—against First Amendment challenges of physicians.
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INTRODUCTION

The next wave of abortion regulations has arrived. In the wake of the Supreme Court’s groundbreaking decision in \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey}, numerous states adopted informed consent statutes modeled on the Pennsylvania statute in \textit{Casey},\textsuperscript{1} which required physicians to provide certain information to a woman 24 hours before an abortion.\textsuperscript{2} In the following years, States and even the federal government began testing the bounds of \textit{Casey}’s newly created undue burden test through partial-birth abortion legislation, which banned certain late-term abortion procedures.\textsuperscript{3} Now, national attention has focused on the use of ultrasound technology. Twenty-two states have enacted statutes that require physicians\textsuperscript{4} to perform, offer to perform, or follow specific


\textsuperscript{4} The statutes vary as to who may or must perform the various required measures. For example, in Arizona, the ultrasound may be performed by, and the related disclosures may be made by, “the physician who is to perform the abortion, the referring physician or a qualified person working in conjunction with either physician.” ARIZ. REV. STAT. ANN. § 36-2156(A)(1) (2012). In contrast, under the Texas statute, only the physician who is to perform the abortion may display and explain the ultrasound. TEX. HEALTH & SAFETY CODE ANN. §§ 171.012(a)(4)(B), (C) (Vernon 2012). For the sake of simplicity, this
protocols when performing an ultrasound prior to any abortion procedure.\(^5\) Six States currently are considering legislation that would impose similar ultrasound requirements.\(^6\) The trend shows no sign of stopping.\(^7\)

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\(^{5}\) Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Michigan, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, and West Virginia have adopted statutes regulating the use of ultrasounds in connection with abortions. See Appendix I (providing details about the various state statutes). Because ultrasounds routinely are performed in connection with abortions, the statutes that establish protocols if a physician performs an ultrasound prior to an abortion impose meaningful obligations. See Lena H. Sun, *Virginia ultrasound bill joins other states’ measures*, The Washington Post, Feb. 26, 2012, http://www.washingtonpost.com/national/health-science/virginia-ultrasound-bill-joins-other-states-measures/2012/02/24/glQAervUcR_story_1.html. (“Despite the controversy over what type of ultrasound would be required in Virginia’s bill, both abdominal and vaginal ultrasounds are, in fact, used by most abortion providers. They are the most accurate tool for determining the development stage of a fetus, doctors said.”); Laura Leslie, *NC ultrasound law requires ‘invasive’ scan for many*, WRAL.com, http://www.wral.com/news/state/nccapitol/blogpost/10785444/ (“Planned Parenthood requires an ultrasound before every abortion to “date” the pregnancy. NC law allows abortion only within the first 20 weeks, except when the mother’s life or health is threatened.”).

\(^{6}\) Illinois, Pennsylvania, and Virginia are considering adding statutes that would regulate the use of ultrasounds, and bills are pending in Alabama, Idaho, and Mississippi that would amend existing statutes. See Appendix II (providing details regarding the pending legislation). There may be as many as eleven states without existing regulations with respect to ultrasounds with legislation pending. See Sun, supra note 5.

While nine States currently require a woman to have an ultrasound prior to having an abortion, the national spotlight has concentrated on three—Texas, North Carolina, and Oklahoma. Pursuant to the mandatory speech-and-display requirements in each of these states (collectively, the “Speech-and-Display Regulations”), a woman must have an ultrasound, and the images must be displayed so that she can see them.\(^8\) Moreover, and more controversially, the physician who is to perform the abortion must explain the images, providing a medical description that includes “the dimensions of the embryo or fetus” and “the presence of external members and internal organs.”\(^9\)

Not surprisingly, given the importance and novelty of these mandatory speech-and-display requirements, the Texas, North Carolina, and Oklahoma regulations were immediately challenged in state and federal courts. What is surprising, however, is the basis of the ruling in each of the federal court cases.\(^10\) Instead of grounding their decisions on a woman’s Fourteenth Amendment due process rights, the courts analyzed whether the Speech-and-Display Regulations unconstitutionally compelled the plaintiffs—physicians and other medical providers, on behalf of themselves and their patients—to engage in government-compelled speech.\(^11\)

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8 Each of these Speech-and-Display Regulations provides for an exception in the case of medical emergency. See N.C. GEN. STAT. ANN. § 90-21.85(a) (2012); OKLA. STAT. tit. 63, § 1-738.3d(D) (2012); TEX. HEALTH & SAFETY CODE ANN. §§ 171.0124 (Vernon 2012).


10 The Texas and North Carolina statutes were challenged in federal court. In contrast, the Oklahoma statute is being considered in an Oklahoma state court and solely on State constitutional grounds. Petition ¶¶ 17-18, 48-61, Nova Health Systems v. Edmondson, No. CV-2010-533, 2010 WL 1734526 (Okla. Dist. Apr. 27, 2010). Id.

Perhaps reflecting the novelty of these claims, the federal courts have split on the constitutionality of the speech-and-display requirements. While the district courts in Texas and North Carolina enjoined the ultrasound statutes that compelled physicians to deliver government-mandated speech, the Fifth Circuit upheld the Texas statute. Moreover, although all the courts invoked Casey, they applied fundamentally different analyses when reviewing the Acts, with the lower courts using strict scrutiny and the Fifth Circuit applying rational basis.

This Article analyzes the split among the federal courts that have ruled on the constitutionality of the Speech-and-Display Regulations and explores how Casey affects the physicians’ alleged right to be free from government compelled speech. Given that nine out of the twenty-two States with ultrasound statutes already have speech-and-display requirements and that the number of States mandating descriptions of

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14 Compare Stuart, 2011 WL 6330668, at *6 (“[i]t seems unlikely that the Supreme Court decided by implication that long-established First Amendment law was irrelevant when speech about abortion is at issue”) with Lakey, 2012 WL 45413, at *4 (quoting Casey, 505 U.S. at 884) (“[t]he only reasonable reading of Casey’s passage is that physicians’ rights not to speak are, when ‘part of the practice of medicine, subject to reasonable licensing and regulation by the State.’

15 The requirements in some States arise only if the woman wishes to see the ultrasound or have it explain to her. See Appendix I.
fetal images may double in the coming year,\textsuperscript{16} the courts will be required to hear more and more challenges to these aggressive ultrasound laws. With this in mind, Part I provides an overview of \textit{Casey} and the ultrasound statutes that a majority of the States have enacted or currently are considering. Part I also explores the decisions in \textit{Lakey} and \textit{Stuart}, setting out the competing interpretations of \textit{Casey} that the Fifth Circuit and the North Carolina district court have used in upholding and striking down, respectively, mandatory speech-and display requirements.

Part II critically analyzes the \textit{Lakey} and \textit{Stuart} decisions, arguing that (i) \textit{Casey} requires courts to apply a rational basis test to the compelled speech requirements in the Speech-and-Display Regulations and (ii) under this standard of review, the Texas and North Carolina Acts are constitutional. As part of the analysis, Part II explains the relationship between \textit{Casey} and the First Amendment rights of physicians—drawing on \textit{Wooley v. Maynard} and \textit{Whalen v. Roe} to provide a detailed account of a State’s ability to compel speech in the abortion context. Part III considers how \textit{Casey}’s standard for compelled speech is likely to affect the numerous ultrasound statutes enacted or being considered by legislatures across the country. The Article concludes that \textit{Casey} has much more to say about the interaction between the First Amendment and abortion regulations than the federal court cases to date have suggested. Although \textit{Casey}’s discussion of the First Amendment appears short, it draws on Supreme Court precedent to provide a powerful defense of the constitutionality of the various mandatory ultrasound statutes being enacted throughout the country.

\textsuperscript{16} The Alabama legislature is considering a bill modeled on the Oklahoma statute, a Mississippi bill mimics the Texas statute, and the Pennsylvania bill, though unique in many respects, is quite extensive. \textit{Compare} S. 12, 2012 Leg., Reg. Sess. § 3(b) (Ala. 2012) to OKLA. STAT. tit. 63, § 1-738.3d (B), (C) (2012); \textit{compare} H.R. 1107, 2012 Leg., 127th Leg. Sess. § 2 (Miss. 2012) to TEX. HEALTH & SAFETY CODE ANN. §§ 171.012(a)(4), 171.0122(b)-(d) (Vernon 2012); \textit{see} H.R. 1077, Gen. Assem., 2011 Sess. §§ 4(a)(1), 5 (Pa. 2011) and Appendices 1 and 2.
I. OVERVIEW OF CASEY AND THE SPEECH-AND-DISPLAY REGULATIONS

In Casey, a plurality of the Court upheld a State statute that required “the giving of truthful, nonmisleading information about the nature of the [abortion] procedure, the attendant health risks and those of childbirth, and the ‘probable gestational age’ of the fetus.”17 With improvements in the resolution and availability of ultrasound technology, State legislatures across the country have begun incorporating the use of ultrasounds into their abortion regulations. Drawing on Casey, these States have required physicians to offer or even perform an ultrasound to provide additional “truthful, nonmisleading” information “to ensure that a woman apprehend the full consequences of her decision.”18

Abortion foes hope that these ultrasound statutes, which are frequently called or included in Woman’s Right to Know Acts,19 will save the lives of unborn children20 by making sure that a woman understands more clearly what is growing inside of her and what will be removed when she has an abortion.21 Pro-choice advocates, on the other hand, claim that the

17 Casey, 505 U.S. at 882.
18 Id.
21 See Sun, supra note 5 (“Proponents say the ultrasound requirement is intended to give women accurate, necessary information.”).
laws are demeaning, invasive, and ineffective. Moreover, they contend that, because “routine ultrasound is not considered medically necessary as a component of first-trimester abortion, the requirements appear to be a veiled attempt to personify the fetus and dissuade a woman from obtaining an abortion.”

Of course, the characterization of the proposed effects of ultrasound regulations by either side in the long-standing abortion debate does not resolve the constitutional question underlying the legal actions in Texas and North Carolina: whether mandatory speech-and-display requirements violate a physician’s right not to be compelled to speak. To answer that question, one must move beyond the rhetoric surrounding abortion and analyze how the Supreme Court in *Casey* requires abortion regulations to be evaluated. In particular, one must consider how *Casey*’s undue burden test applies to compelled speech within the abortion context.

In *Casey*, the Court considered various constitutional challenges to the Pennsylvania Abortion Control Act of 1982 as amended. In addition to parental and spousal consent requirements, the Pennsylvania Act included an informed consent provision, which required physicians to provide the following information to a woman seeking an abortion:

> Except in a medical emergency, the statute requires that at least 24 hours before performing an abortion a physician

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22 See Sun, *supra* note 5 (quoting a Planned Parenthood executive as say that the Virginia ultrasound bill is “about shaming and demeaning women” and citing a person who operates five Texas abortion clinics as saying that requiring ultrasounds “has not deterred women from seeking abortions”); Terry O’Neill, *Mandatory Ultrasound Laws Violate Women’s Rights and Bodies*, HUFFINGTON POST, Feb. 27, 2012, http://www.huffingtonpost.com/terry-oneill/mandatory-ultrasound-laws_b_1300219.html (“[A]ny mandatory ultrasound law . . . is a violation of a woman’s right to bodily integrity and an ugly intrusion on her right to choose to terminate a pregnancy.”).

inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth, and the “probable gestational age of the unborn child.” The physician or a qualified nonphysician must inform the woman of the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion. An abortion may not be performed unless the woman certifies in writing that she has been informed of the availability of these printed materials and has been provided them if she chooses to view them.24

Among other things, the informed consent provision was intended “to ensure that a woman apprehend the full consequences of her decision”25 and “to ensure an informed choice, one which might cause the woman to choose childbirth over abortion.”26

Applying its newly announced undue burden test, the plurality struck down the spousal notification requirement but upheld the 24-hour waiting period, the informed consent requirements, and the parental consent provision.27 According to the Court, the Constitution protects “the woman’s right to make the ultimate decision.”28 So long as a State regulation is reasonable and does not have “the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus,”29 the woman retains the ability to decide to have an abortion. As the plurality states: “Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion.”

24 *Casey*, 505 U.S. at 881.
25 *Casey*, 505 U.S. at 882.
26 *Casey*, 505 U.S. at 883.
27 *Casey*, 505 U.S. at 895, 887, 899.
28 *Casey*, 505 U.S. at 877.
29 *Casey*, 505 U.S. at 877.
abortion will be upheld if reasonably related to that goal.”

Furthermore, according to Casey, an informed consent regulation is reasonable if it is “truthful,” “nonmisleading,” and “relevant ... to the decision.”

Under the undue burden test, then, statutes that require physicians to show or describe ultrasound images to a woman seeking an abortion are constitutional if they (i) do not create a substantial obstacle to a woman’s exercise of her rights and (ii) are reasonable, i.e., require the disclosure of truthful, nonmisleading, and relevant information. To make this determination, courts must look at the specific provisions of the ultrasound statutes. In general, there are three types of ultrasound statutes: (i) those that require physicians to perform an ultrasound before a woman has an abortion (nine states), (ii) those that require a physician to offer an ultrasound to a woman before she has an abortion (four states), and (iii) those that do not require physicians to perform or offer an ultrasound, but that impose obligations on the physician if an ultrasound is performed in connection with an abortion (nine states). Of the six ultrasound bills currently pending across the country, five fall into the first category, and one fits in the second. Appendices I and II give a general overview of the mandatory ultrasound laws that States have passed or that are currently pending.

Even the most benign ultrasound laws, like the one in West Virginia, implicate a medical provider’s First Amendment rights by compelling her to offer to display an ultrasound image to a pregnant woman seeking abortion. A growing number of statutes, however, compel much more, requiring oral explanations and descriptions of ultrasound images and

30 Casey, 505 U.S. at 878.
31 Casey, 505 U.S. at 882. See also Lakey, 2012 WL 45413, at *4.
32 See Appendix I for details regarding the laws enacted by the various States.
33 See Appendix II for details regarding the pending legislation.
34 W. VA. CODE ANN. 16-21-2(b)(4) (West 2012) (requiring a medical provider to offer a woman the opportunity to view the ultrasound image if one is performed).
results. These statutes (and proposed statutes), which arguably raise greater First Amendment concerns, are described briefly in the following tables.

**TABLE 1: ULTRASOUND STATUTES**\(^{35}\)

<table>
<thead>
<tr>
<th>State</th>
<th>Image Display</th>
<th>Oral Explanation</th>
<th>Waiting Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>Must offer live view</td>
<td>Must offer simultaneous explanation</td>
<td>1 hour</td>
</tr>
<tr>
<td>Florida</td>
<td>Must offer live view</td>
<td>Must offer simultaneous explanation</td>
<td>None</td>
</tr>
<tr>
<td>Kansas</td>
<td>Must offer</td>
<td>Must review results if requested</td>
<td>None</td>
</tr>
<tr>
<td>Louisiana</td>
<td>Must offer live view</td>
<td>Must offer simultaneous explanation</td>
<td>2 hours</td>
</tr>
<tr>
<td>Nebraska</td>
<td>If performed, must display live view; woman may choose not to look</td>
<td>If performed, must answer questions and provide simultaneous explanation if requested</td>
<td>If performed, 1 hour</td>
</tr>
<tr>
<td>North Carolina</td>
<td>Must display live view; woman may choose not to look</td>
<td>Must provide simultaneous explanation; woman may refuse to hear</td>
<td>4 hours</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>Must display live view, woman may choose not to look</td>
<td>Must provide simultaneous explanation</td>
<td>1 hour</td>
</tr>
<tr>
<td>Texas</td>
<td>Must display; woman may choose not to look</td>
<td>Must provide explanation; in limited cases, woman may choose not to receive</td>
<td>24 hours</td>
</tr>
<tr>
<td>Utah</td>
<td>If performed, must offer live view</td>
<td>If performed, must offer detailed description</td>
<td>None</td>
</tr>
</tbody>
</table>

\(^{35}\) See Appendix I for citations to the various statutes.
### TABLE 2: ULTRASOUND BILLS

<table>
<thead>
<tr>
<th></th>
<th>Image Display</th>
<th>Oral Explanation</th>
<th>Waiting Period</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Alabama</strong></td>
<td>Must display live view, woman may choose not to look</td>
<td>Must provide simultaneous explanation</td>
<td>None</td>
</tr>
<tr>
<td><strong>Mississippi</strong></td>
<td>Must display; woman may choose not to look</td>
<td>Must provide explanation; in limited cases, woman may choose not to receive</td>
<td>24 hours</td>
</tr>
<tr>
<td><strong>Pennsylvania</strong></td>
<td>Must display; woman may choose not to look</td>
<td>Must answer questions, inform of gestational age and any abnormal finding and provide information about heartbeat</td>
<td>24 hours</td>
</tr>
</tbody>
</table>

The primary focus of this Article is on two statutes—the ones enacted in Texas and North Carolina—that are among those requiring the most extensive speech. These two statutes have faced recent federal court challenges, and the decisions in those cases serve to frame the emerging debate over compelled disclosures in the context of the States’ regulation of the medical profession generally and the abortion procedure in particular.

A. Texas Medical Providers Performing Abortion Services v. Lakey.

In 2011, the Texas Legislature passed Texas House Bill Number 15 (“H.B. 15”), which was styled as an Act “relating to informed consent to an abortion.”\(^\text{37}\) H.B. 15 amended Texas’s 2003 Woman’s Right to Know Act, which had imposed requirements similar to those found in *Casey.*\(^\text{38}\)

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\(^{36}\) See Appendix I for citations to the various bills.


Pursuant to the 2011 amendments, a woman’s consent to an abortion is deemed informed and voluntary only if the physician “who is to perform an abortion” (i) performs a sonogram, (ii) displays the sonogram images so that the woman may view them, (iii) makes the heart auscultation (i.e., heartbeat) of the fetus audible for the woman to hear, and (iv) explains “in a manner understandable to a layperson” the results of the sonogram and heart auscultation. 39 Although a woman may decline to view the sonogram images or to hear the fetal heartbeat, 40 she can refuse to listen to the explanation of the sonogram images only if she certifies that her pregnancy falls into one of three statutory exceptions, which include sexual assault and incest. 41 In addition, the procedures and descriptions generally must be performed at least 24 hours before the abortion. 42

The 2011 amendments also require a woman who seeks an abortion to sign a form stating that she received the statutorily prescribed material, understands her right to view the sonogram images and to hear the fetal heartbeat, and chooses to have an abortion. 43 If a woman decides not to have an abortion, the physician must provide her with a publication that explains how to establish paternity and to obtain child support. 44

On June 13, 2011, a group of physicians and abortion providers sued on behalf of all similarly situated Texas Medical Providers Performing Abortion Services (“Plaintiffs”) to enjoin the Commissioner of the Texas Department of State Health Services and the Executive Director of the Texas Medical Board (collectively, “Defendants”) under the First and

40 Tex. Health & Safety Code Ann. §§ 171.0122(b) and (c).
42 If a woman lives 100 or more miles away from an abortion provider, the procedures and descriptions must be conducted at least two hours before the abortion procedure. § 171.012__.
Fourteenth Amendment to the United States Constitution. Among other things, Plaintiffs argued that the 2011 Amendments compelled physicians to engage in government-mandated speech and patients to view or hear such speech even if the woman did not want the information or the doctor did not believe that the information was medically necessary.

Although H.B. 15 sought to regulate abortion pre- and post-viability, the district court did not rely directly on *Casey* when preliminarily enjoining the disclosure provisions of the Texas Act. Instead, the district court predicated its decision on the Supreme Court’s compelled speech cases. In particular, given that H.B. 15 required physicians to describe the ultrasound images of the fetus as well as the fetal heartbeat, the lower court relied on *Wooley v. Maynard* and *Riley v. Nat’l Fed’n of the Blind of North Carolina, Inc.* in finding that the Act violated the physicians’ “right to refrain from speaking at all.” Because the government sought to determine the content of the physicians’ speech regarding abortion, the restriction “must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest.”

According to the district court, Defendants failed to make any showing that the government had a compelling interest or that the legislation was narrowly tailored to that interest. As a result, Plaintiffs were entitled to a preliminary injunction unless *Casey* somehow foreclosed their First Amendment claim. The district court held that neither *Casey*’s undue burden test nor its cursory analysis of the compelled speech question replaced the strict scrutiny standard. In particular, the lower court held

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46 *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). *See also Riley*, 487 U.S. 781, 796 (1988) (“There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance.”).

that *Casey* did not supplant the Court’s compelled speech cases for three reasons. First, although *Casey* acknowledged “requiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to ensure and informed choice, one which might cause the woman to choose childbirth over abortion,”\(^{48}\) it did so only in the context of a Fourteenth Amendment challenge, not a First Amendment claim. As a result, the Court’s analysis was not dispositive with regard to Plaintiffs’ compelled speech challenge to H.B. 15.

Second, the district court stated that *Casey* did not overturn *Roe*’s holding that “[w]ith respect to the State’s important and legitimate interest in potential life, the ‘compelling’ point is viability.”\(^{49}\) Accordingly, the district court held that because the *Casey* Court never classified the State’s interest in potential life as “compelling”—referring to the State’s interest only as “important,” “substantial,” and “legitimate”\(^{50}\)—the government cannot mandate any and all disclosures it might desire: “[*Casey*] did not, however, give governments *carte blanche* to force physicians to deliver, and force women to consider, whatever information the government deems appropriate.”\(^{51}\) Rather, *Casey* stands for the limited proposition that mandating the disclosure of certain “truthful and not misleading” information “*may* be permissible.”\(^{52}\)

Third, although *Casey* approved Pennsylvania’s informed consent provision, the court found that H.B. 15’s requirements were “more onerous” and “less medically relevant” than those imposed by the Pennsylvania Abortion Control Act. Specifically, the Texas Act required

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\(^{48}\) *Casey*, 505 U.S. at 883.


\(^{50}\) *Lakey*, 2011 WL 3818879, at *26.


doctors to give a detailed description of the fetus instead of simply informing the woman of the fetus’s probable gestational age. While presumably not rising to the level of an undue burden, such additional requirements, at a minimum, undermined Defendants’ contention that \textit{Casey}’s approval of the Pennsylvania informed consent statute dictated the same result with respect to H.B. 15.

Moreover, the district court rejected Defendants’ argument that H.B. 15 was constitutional under \textit{Casey}’s compelled speech analysis. The \textit{Casey} plaintiffs, like the medical providers in \textit{Lakey}, argued that the disclosure requirements in the Pennsylvania statute violated their First Amendment right not to speak. The plurality rejected the First Amendment challenge:

\begin{quote}
To be sure, the physician’s First Amendment rights not to speak are implicated, see \textit{Wooley v. Maynard}, 430 U.S. 705, (1977), but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, cf. \textit{Whalen v. Roe}, 429 U.S. 589, 603 (1977). We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.\textsuperscript{53}
\end{quote}

Contrary to the plurality’s holding in \textit{Casey}, however, the district court in \textit{Lakey} agreed with the compelled speech challenge to H.B. 15, effectively limiting \textit{Casey} to the specific provisions in Pennsylvania’s informed consent law.\textsuperscript{54} Whereas the Pennsylvania statute satisfied strict scrutiny, the amendments to the Texas Act did not. According to the

\textsuperscript{53} \textit{Casey}, 505 U.S. at 884.

\textsuperscript{54} 2011 WL 3818879, at *27 (“[Plaintiffs] ignore … the obvious jurisprudential fact the Supreme Court was only ruling—indeed, \textit{could} only rule—on challenges to the particular statute with which it was presented.”).
district court, in *Casey*, the government (i) had “a compelling interest in ensuring patients are accurately informed about the nature of medical procedures they are considering, the health risks attendant to those procedures, and the risks and benefits of any alternatives,” and (ii) mandated the disclosure of only “reasonable” information. The district court found that, although the Texas legislature presumably shared the Pennsylvania legislature’s compelling interest “in ensuring patients are accurately informed about the nature of medical procedures they are considering, the health risks attendant to those procedures, and the risks and benefits of any alternatives,” the compelled speech in *Lakey* was unreasonable. The information that H.B. 15 mandated went beyond the “legitimate disclosures” in *Casey*, requiring physicians to describe “the presence of cardiac activity,” and “the presence of external members and internal organs’ in the fetus or embryo.” Apparently invoking a hybrid form of strict scrutiny and rational basis scrutiny, the district court “did not think” these additional disclosures were “particularly relevant to any compelling government interest” and that any relevance they might have was “greatly diminished by the disclosures already required under Texas law, which are more directly pertinent to those interests.”

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56 2011 WL 3818879, at *28. In fact, the district court stated that the First Amendment challenge in *Casey* “was meritless, if not frivolous, under the facts of that case.” *Id.*
58 2011 WL 3818879, at *28. The district court also expressed concerns about two other features of H.B. 15. First, the court intimated that the Act’s certification requirement impermissibly compelled the speech of pregnant women without a “sufficiently powerful government interest” and without being “sufficiently tailored to advance such an interest.” *Id.* at *29. Pursuant to section 171.012(a)(5), each woman seeking an abortion had to hear an explanation of the sonogram images unless she certified in writing that (i) her pregnancy resulted from sexual assault, incest, or other violations of the Texas Penal Code, (ii) she is a minor who is getting an abortion pursuant to a judicial bypass procedure, or (iii) her fetus has an irreversible medical condition or abnormality. Second,
On appeal, a unanimous panel of the Fifth Circuit Court of Appeals reversed. Drawing on *Casey*, the Fifth Circuit concluded that truthful, non-misleading informed consent statutes, such as the Pennsylvania statute in *Casey* and the Texas Act, furthered at least two legitimate goals. First, such statutes “furthered 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.’”\(^{59}\) Second, informed consent statutes promoted the States’ “‘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.’”\(^{60}\) As the *Casey* plurality expressly stated, these legitimate interests were sufficient to defeat the physicians’ compelled speech claims: “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.”\(^{61}\)

The Fifth Circuit held that the same analysis applied to H.B. 15. Contrary to the Texas district court’s opinion, the panel noted that *Casey*

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\(^{59}\) 2012 WL 45413, at *3 (*quoting Casey*, 505 U.S. at 882).

\(^{60}\) 2012 WL 45413, at *3 (*quoting Casey*, 505 U.S. at 882).\(^{61}\) The Fifth Circuit recognized that a majority of the Court confirmed this interest in *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007): “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.”

\(^{61}\) *Casey*, 505 U.S. at 884.
did not subject the Pennsylvania informed consent statute to strict scrutiny. In fact, the plurality’s disposition of the compelled speech claim in *Casey* was “the antithesis of strict scrutiny.” 62 Because the Pennsylvania compelled speech requirements were “‘part of the practice of medicine,’” they were constitutionally permissible as “reasonable licensing and regulation by the State[.]” 63 Such reasonable regulations, though, did not “fall under the rubric of compelling ‘ideological’ speech that triggers First Amendment strict scrutiny.” 64 Rather, requiring the disclosure of truthful, non-misleading information regarding the risks of abortion as well as the status of the fetus served to promote the State’s interests in making sure that the woman’s choice was fully informed and in promoting childbirth over abortion. 65

The Fifth Circuit noted that its opinion was consistent with the Eighth Circuit’s analysis of a similar informed consent statute. In *Planned Parenthood Minn. v. Rounds*, the Eighth Circuit, sitting en banc, also rejected the claim that a *Casey*-like informed consent statute compelled ideological speech that would warrant a higher level of scrutiny:

> [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

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63 2012 WL 45413, at *3 (quoting *Casey*, 505 U.S. at 882).
64 2012 WL 45413, at *5.
65 *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.”).
also encourage the patient to choose childbirth over abortion.66

The Fifth Circuit noted that the Minnesota statute, unlike H.B. 15, required various disclosures, including “a disclosure 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.”67 Given that H.B. 15’s required disclosures were limited to “medically accurate depictions [that] are inherently truthful and non-misleading,” Rounds and Casey precluded the physicians’ First Amendment challenge. Although the information H.B. 15 required to be disclosed is “more graphic and scientifically up-to-date, than the disclosures discussed in Casey,” “[t]hey are not different in kind.”68 Accordingly, if the Fifth Circuit were to uphold the compelled speech challenge, the physicians’ “First Amendment claim [would] essentially trump the balance Casey struck between women’s rights and the states’ prerogatives.”69

The Fifth Circuit also rejected the district court’s view that H.B. 15’s certification requirement violated women’s First Amendment speech rights. Pursuant to H.B. 15, a woman seeking an abortion must certify in writing her understanding that Texas law mandates that she have an ultrasound before obtaining an abortion, that she has the option to view the ultrasound images and to hear the fetal heartbeat, and that she is required to hear the doctor’s explanation of the ultrasound unless she meets one of the specific exceptions listed in the statute. The district court worried that, to avoid having to hear the description of the ultrasound images, a woman would have to certify to being a victim of rape or incest who feared

66 530 F.3d 724, 735 (8th Cir. 2008) (en banc).
67 2012 WL 45413, at *5 (quoting Rounds, 530 F.3d at 726).
69 2012 WL 45413, at *5.
physical reprisal if her situation was known, thereby disclosing her status and potentially jeopardizing her physical well-being.\(^{70}\)

Although recognizing that the wisdom of such certified exceptions might be debatable, the Texas legislature’s decision did not violate the First Amendment. Given that Texas was not constitutionally mandated to include any exceptions, the Fifth Circuit concluded that Texas “cannot create an inappropriate burden on free speech rights where it simply conditions an exception on a woman’s admission that she falls within” one or more of the exceptions.\(^{71}\) Moreover, the panel worried that the district court’s subjecting H.B. 15’s written consent requirement to strict scrutiny would invalidate informed consent requirements generally.\(^{72}\) But given that informed consent certifications are generally permissible, the panel saw “no constitutional objection to the certification required for an exception” to H.B. 15.\(^{73}\)

Finally, the Fifth Circuit considered the district court’s view that the disclosures required under H.B. 15 were unconstitutional because they differed from those upheld in *Casey* in two material ways: (i) the descriptions of the sonogram and fetal heartbeat were “medically unnecessary” and therefore beyond the standard practice of medicine within the state’s regulatory powers” and (ii) instead of simply requiring

\(^{70}\) *See, e.g.*, H.B. 15, Sec. 2 (amending Tex. Health & Safety Code Ann. § 171.012) (requiring the woman to certify that she understands she must “hear an explanation of the sonogram images unless I certify in writing to one of the following: I am pregnant as a result of a sexual assault, incest, or other violation of the Texas Penal Code that has been reported to law enforcement authorities or that has not been reported because I reasonably believe that doing so would put me at risk of retaliation resulting in serious bodily injury.”).

\(^{71}\) 2012 WL 45413, at *5.

\(^{72}\) *See* 2012 WL 45413, at *6 (“Appellees have offered no theory how the H.B. 15 informed-consent certification differs constitutionally from informed-consent certifications in general.”).

\(^{73}\) 2012 WL 45413, at *7.
physicians to make certain information available to women seeking to have an abortion, H.B. 15 requires physicians to provide—and women to hear—an explanation of the sonogram, thereby making doctors the “mouthpiece” of the state’s ideological preferences. The Fifth Circuit rejected the district court’s interpretation and found that neither distinction made a constitutional difference.

With respect to whether the disclosures were medically necessary, the Fifth Circuit panel noted that the district court’s attempt to limit the scope of permissible disclosures was inconsistent with *Casey* and *Gonzales*, which 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 life. 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 such as H.B. 15 are meant to help patients to make “the best decision under difficult circumstances[, d]eny[ng] her up to date medical information is more of an abuse to her ability to decide than providing the information.”  

Similarly, the Fifth Circuit panel rejected the district court’s claim that H.B. 15 was unconstitutional because it required physicians to discuss the sonogram with the patient instead of merely letting her know how to obtain a brochure or additional information regarding the abortion procedure. According to the Fifth Circuit, 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 the required

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74 2012 WL 45413, at *7.
75 2012 WL 45413, at *7.
76 *Casey*, 505 U.S. at 881.
information. In this way, Casey was similar to Wooley in which the context of the compelled speech, not the particular mode of expression, was constitutionally significant. In Wooley, New Hampshire violated the vehicle owner’s First Amendment rights by forcing him to display the state motto “Live Free or Die” on his license plate. In the context of license plates, the vehicle owner’s right against compelled speech was violated even though he was not forced to recite the motto. In the context of informed consent to a medical procedure, however, Casey upheld the Pennsylvania law requiring “doctors to 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.” Thus, given that Casey expressly upheld verbal disclosures in the context of informed consent, the fact that H.B. 15’s “method of delivering this information is direct and powerful, … the mode of delivery does not make a constitutionally significant difference from the ‘availability’ provision in Casey.”

B. Stuart v. Huff

In Stuart v. Huff, the United States District Court for the Middle District of North Carolina granted a preliminary injunction against provisions of North Carolina’s 2011 Woman’s Right to Know Act that require an “obstetric real-time view of the unborn child”—an ultrasound

77 Lakey, 2012 WL 45413, at *8 (“The mode of compelled expression is not by itself constitutionally relevant, although the context is.”). See also Johanns, 544 U.S. at 568 (Thomas, J., concurring) (“If West Virginia had compelled Mr. Barnette to take out an advertisement reciting the Pledge of Allegiance and purporting to be “A Message from the Barnette Children,” for example, that would have been compelled speech (if a less intrusive form of it), just like the mandatory flag salute invalidated in Barnette.”).


or a more technologically advanced method for viewing an unborn child—before a physician may perform an abortion. Under Section 91.85 of the Act, a physician who is to perform an abortion or a qualified technician working with the physician must perform the “real-time view” at least four hours prior to the procedure. During the “real-time view,” the physician or technician must display the images to the woman, explain them to her, and offer her the opportunity to hear the child’s heart tone. In addition, the Act requires the physician or technician to provide a medical description of the images that includes “the dimensions of the embryo or fetus and the presence of external members and internal organs, if present and viewable.” The pregnant woman must certify that all of the statutory requirements have been met before the abortion is performed. The Act expressly states that the pregnant woman is free to avoid looking at the images or hearing the explanation and description, and none of the requirements apply in the case of a medical emergency.

The plaintiffs in Stuart claimed that Section 90-21.85 of the Act—which the District Court referred to as the “speech-and-display requirements”—violates the First Amendment by compelling physicians “to deliver the State’s message discouraging abortion.” The court concluded that the plaintiffs were likely to succeed with respect to their

83 Id. §§ 90-21.85(a)(2); 90-21.85(a)(3).
84 Id. § 90-21.85(a)(4).
85 Id. § 90-21.85(a)(5).
86 Id. § 90-21.85(b).
87 Id. § 90-21.85(a).
88 Stuart, 2011 WL 6330668, at *2, 6. The plaintiffs also challenged the speech-and-display requirements as unconstitutionally vague and as a violation of the Fourteenth Amendment’s guarantee of substantive due process. Id. at *1. The District, however, declined to address these claims because it found that the plaintiffs’ First Amendment claim was sufficient to support the preliminary injunction. Id. (Stuart 1)
First Amendment claim and granted a preliminary injunction against the speech-and-display requirements.\(^89\) In reaching its conclusion, the court determined that the requirements were subject to a strict scrutiny standard of review and that the defendants had failed to establish that the requirements serve a compelling State interest and are narrowly tailored to serve that interest.

The court noted that the First Amendment generally protects a person from being compelled by the government to make statements of fact or opinion\(^90\) and that the Supreme Court has found “in a wide variety of circumstances” that government-compelled content-based speech is invalid unless it survives strict scrutiny.\(^91\) The court observed that the speech-and-display requirements compel physicians to engage in content-based speech by requiring them to “orally and visually convey specific material about the fetus to their patients”\(^92\) and that strict scrutiny normally would apply to such compelled disclosures.\(^93\)

Before settling on strict scrutiny as the appropriate standard to apply to the speech-and-display requirements, though, the District Court rejected three alternatives: the undue burden standard articulated in *Casey*, the lower standard applied to commercial or professional speech, and “some intermediate standard” applicable in the context of informed consent.\(^94\) As to the undue burden standard, the court claimed that the Supreme Court in *Casey* had applied the undue burden standard only in the context of the

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\(^89\) *Id.* at *6.* (Stuart)
\(^92\) Stuart, 2011 WL 6330668, at *3.
\(^93\) *Id.* (Stuart 3)
\(^94\) Stuart, 2011 WL 6330668, at *3-5.
Fourteenth Amendment and analyzed separately the Pennsylvania statute in relation to the First Amendment.\textsuperscript{95} The District Court, observed that \textit{Casey}’s First Amendment analysis was “without substantial detail,”\textsuperscript{96} however, and concluded that it was “unlikely that the Supreme Court decided by implication that long-established First Amendment law was irrelevant when speech about abortion is at issue.”\textsuperscript{97}

The District Court acknowledged that commercial speech—that is, “expression related solely to the economic interests of the speaker and its audience”\textsuperscript{98}—often enjoys less First Amendment protection than other speech,\textsuperscript{99} but noted that the meaning of, and the protection afforded to, “professional speech” is “less clear.”\textsuperscript{100} In any event, the court concluded that strict scrutiny applies to speech that includes both commercial and non-commercial aspects.\textsuperscript{101} The court declined to apply the lower commercial speech standard because the speech mandated by the speech-and-display requirements included non-commercial speech—though the court did not identify the speech that was non-commercial.\textsuperscript{102}

Finally, the court determined that an intermediate informed-consent standard did not apply because the speech-and-display requirements compel disclosure of more information than traditionally has been required when obtaining informed consent for an abortion (such as “the nature and risks of the procedure and the gestational age of the fetus”).\textsuperscript{103} Moreover, according to the court, the speech-and-display requirements go

\textsuperscript{95} \textit{Stuart}, 2011 WL 6330668, at *4.
\textsuperscript{96} \textit{Id.} (Stuart 4)
\textsuperscript{97} \textit{Id.} (Stuart 4)
\textsuperscript{99} \textit{Id.} (Stuart 4)
\textsuperscript{100} \textit{Id.} (Stuart 4)
\textsuperscript{101} \textit{Id.} (Stuart 4)
\textsuperscript{102} \textit{Id.} at 5. (Stuart)
\textsuperscript{103} \textit{Id.} (Stuart 5)
further than the informed consent provisions held valid in *Casey*, which required a provider to “make available” only materials produced by the State. The court considered it significant that the Act “compels [a] provider to physically speak and show the state’s non-medical message to patients unwilling to hear or see.” According to *Stuart*, “[o]ther courts have applied strict scrutiny in similar circumstances.”

Having determined that strict scrutiny applied, the court then concluded that the speech-and-display requirements were unlikely to survive that standard. The defendants had asserted that the State had compelling interests in protecting women from “psychological and emotional distress,” preventing coerced abortions and “promoting life and discouraging abortion.” The court, however, addressed only the last of the three and stated that, while promoting life and discouraging abortion may be a compelling interest after viability, “nowhere does *Casey* characterize the state’s interest in potential life as ‘compelling’ during the entire term of a woman’s pregnancy.” Nevertheless, even assuming all three proffered interests were compelling, the defendants did not establish that the speech-and-display requirements were narrowly tailored to serve those interests. The court indicated that the defendants did not offer any evidence that the speech-and-display requirements would protect against psychological and emotional distress and that undisputed evidence suggested that the requirements likely would cause such harm. In addition, the court stated that the defendants had not explained how the requirements would prevent coercion and that no explanation is

104 Id. (Stuart 5)
105 Id. (Stuart 5)
106 Id. (Stuart 5)
107 Id. at *5-6. (Stuart)
109 Id. at *5. (Stuart)
“immediately apparent.”\textsuperscript{110} Finally, the court asserted that the defendants had not offered evidence that less burdensome alternatives to the speech-and-display requirements, such as making the information available in written form or offering the patient “verbal or visual information” would not adequately serve the State’s interest in promoting life and discouraging abortion.\textsuperscript{111}

II. SCRUTINIZING LAKEY AND STUART

Although the Texas and North Carolina ultrasound statutes regulate procedures relating to abortion, neither \textit{Lakey} nor \textit{Stuart} reached the question of whether the statutes violate a woman’s due process rights under the Fourteenth Amendment. Instead, the central issue in each case was whether the speech-and-display requirements of the statutes violated the physicians’ First Amendment rights by requiring them to disclose specific information to a woman seeking an abortion. Thus, the courts were forced to consider, in light of \textit{Casey}, what the proper standard of review for compelled speech is in the abortion context.\textsuperscript{112}

While the First Amendment states only that “Congress shall make no law … abridging the freedom of speech, or of the press,”\textsuperscript{113} the Supreme Court has interpreted the free speech clause broadly.\textsuperscript{114} Under the Court’s

\textsuperscript{110} Id. (Stuart 5)

\textsuperscript{111} Id. at *6. (Stuart)

\textsuperscript{112} See, e.g., \textit{Lakey}, 2011 WL 3818879, at *24 (“Because Defendants have neither identified a compelling government interest, nor explained how the Act is narrowly tailored to advance that interest, Plaintiffs will prevail if \textit{Casey} does not foreclose their First Amendment claim.”).

\textsuperscript{113} U.S. CONST. art. I.

\textsuperscript{114} See, e.g., Paul D. Carrington, \textit{Public Funding of Judicial Campaigns: The North Carolina Experience and the Activism of the Supreme Court}, 89 N.C. L. REV. 101, 102 (2011) (“In recent years, the problem of selecting judges to sit on highest state courts has become a national crisis … largely as a result of decisions of the Supreme Court of the United States extending the meaning and application of the First Amendment to the
free speech jurisprudence, “[t]he First Amendment protects speech and speaker, and the ideas that flow from each.”

“As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear.” Accordingly, the Court has viewed the freedom not to speak as part and parcel of the freedom of speech: “The right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’”

Under the Court’s compelled speech doctrine, the government generally cannot “penalize[] the expression of particular points of view and force[] speakers to alter their speech to conform to an agenda that they do not set.”

Because “the First Amendment guarantees ‘freedom of speech,’ a term necessarily comprising the decision of both what to say and what not to say,” the Court has repeatedly struck down legislation that requires speakers to disseminate the message of third parties. By dictating the message of a speaker, the government “necessarily alters the content of the speech” and imposes a “content-based regulation of speech” that is

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115 Citizens United, 130 S. Ct. at 899.
117 Wooley, 430 U.S. at 714. In Wooley, the United States Supreme Court held that New Hampshire could not punish a vehicle owner for covering up the State motto “Live Free or Die” on its standard, state-issued license plate. That is, New Hampshire could not compel drivers to “use their private property as a ‘mobile billboard’ for the State's ideological message.” Id. at 715. To do so amounted to an impermissible speech compulsion. See also Bd. of Educ. v. Pico, 457 U.S. 853, 867 (1982).
119 Riley, 487 U.S. at 796; Wooley, 430 U.S. at 714 (“[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.”).
generally subject to strict scrutiny. As the Court stated in Riley, however, the context of the compelled speech dictates the applicable standard of review: “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.” Thus, as the Court has frequently held, the government can compel disclosures more readily in the commercial speech context because such requirements are subject to a lower, more deferential standard of review. The question with respect to speech-and-display requirements under ultrasound statutes, then, is whether Casey applies a lower standard for government-mandated speech in the abortion context, where the government requires physicians to convey specific information to a woman seeking an abortion. As discussed below, Casey does just that, establishing rational basis review for laws such as the ultrasound statutes enacted in Texas and North Carolina.

The district courts in Lakey and Stuart concluded that Casey does not alter the Court’s normally high standard of review for compelled speech. Drawing on Wooley and Barnette, the district courts struck down the Acts under strict scrutiny. The Lakey and Stuart courts’ use of strict scrutiny,

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121 Riley, 487 U.S. at 795; Turner Broad. Sys., Inc., 512 U.S. at 642 (“Laws that compel speakers to utter or distribute speech bearing a particular message are subject to ... rigorous scrutiny.”).
122 Riley, 487 U.S. at 796. See also U.S. v. Philip Morris USA, Inc., 566 F.3d 1095, 1143 (D.C. Cir. 2009) (“the level of scrutiny depends on the nature of the speech that the corrective statements burden”) (citing Riley, 487 U.S. at 796).
124 Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, __ (1976 (noting that “[even] commercial speech [that] is not provably false, or even wholly false, but only deceptive or misleading” may be regulated).
125 Lakey, 2011 WL 3818879, at *30 (“Defendants have failed to prove the Act furthers a compelling government interest, or that it is narrowly tailored to advance that interest.”)

however, is incorrect for at least two reasons. First, applying a strict scrutiny standard to the Texas and North Carolina speech-and-display requirements is inconsistent with the express language of *Casey*, which did not subject Pennsylvania’s disclosure requirements to the Court’s highest standard of review. In fact, as the Fifth Circuit noted in *Lakey*, the plurality’s analysis of the compelled speech claim in *Casey* is “the antithesis of strict scrutiny.”

At no point in its decision, let alone when considering plaintiffs’ compelled speech claims, does the plurality analyze whether Pennsylvania had a compelling interest in its various regulations or whether the legislation was narrowly tailored to any such interest. Instead, the *Casey* plurality articulated and applied its “undue burden” test to Fourteenth Amendment claims of pregnant woman, inquiring whether “a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus,” and then disposed of the compelled speech claims of the physicians in summary fashion.

Second, in citing *Wooley* and *Whalen*, *Casey* expressly adopts a lower standard for compelled disclosures in the medical context, including disclosures relating to abortion. As a result, *Casey* rejects the assumption that underlies the *Lakey* and *Stuart* district court opinions—that the required disclosures under the Texas and North Carolina ultrasound statutes are impermissible compelled speech. Although recognizing that the Free Speech rights of physicians are “implicated,” the plurality in *Casey* indicates that such rights do not warrant strict scrutiny in the context of a State’s regulation of abortion. By noting that the physicians’ First Amendment rights are implicated “only as part of the practice of

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*Casey*, 505 U.S. at 877.

*Casey*, 505 U.S. at 884.
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medicine, subject to reasonable licensing and regulation” and pairing Whalen with Wooley, the Court confirmed that a rational basis review applied to Pennsylvania’s informed consent statute.

A. Casey Rejects Strict Scrutiny in Favor of the Undue Burden Test

The district courts in Lakey and Stuart both apply strict scrutiny to the medical providers’ claims that the speech-and-display requirements under Texas and North Carolina law violate their First Amendment rights, but neither court addresses the tension that its analysis creates with Casey. If strict scrutiny applies to compelled speech in the abortion context, then Pennsylvania must have had a compelling interest, and the informed consent provisions must have been narrowly tailored to that interest. Yet Casey upholds the Pennsylvania informed consent requirement without ever mentioning the State’s compelling interest or evaluating whether the Pennsylvania statute was narrowly tailored. Thus, the Lakey and Stuart courts are forced to explain how their use of strict scrutiny is warranted when Casey appears to apply a much different—and lower—standard. The district courts do this in markedly different ways.

Lakey attempts to distinguish Casey on its facts. Specifically, the Texas district court contends that the First Amendment challenge in Casey was frivolous because Pennsylvania’s informed consent statute—unlike the Texas ultrasound statute—required physicians to convey only medically relevant information. According to Lakey, while the disclosures in Casey were reasonably related to the State’s compelling interest “in making sure patients are accurately informed about the risks of any medical procedure they are considering, including those associated with

129 Casey, 505 U.S. at 884.
130 See Lakey, 2011 WL 3818879, at *24 (indicating that the defendants were required to prove that the provisions of the Texas law that compelled physicians to speak were narrowly tailored to serve a compelling State interest); Stuart, 2011 WL 6330668, at *5 (finding that strict scrutiny applied to North Carolina’s speech-and-display requirements).
both abortion and childbirth,”131 the Texas legislature “[made] no attempt to meet this burden” with respect to the Texas ultrasound statute.132 The government failed to (i) articulate a compelling reason for requiring doctors to describe ultrasound images or fetal heart auscultation and (ii) explain why such disclosures were “medically necessary” in light of the Casey-like disclosures that were already required under Texas law.133 Yet the district court in Lakey never explains why, if Casey requires only that Pennsylvania’s compelled disclosures be reasonable, Texas’s speech-and-display requirements must be narrowly tailored.134 As a result, Lakey interprets Casey as creating different standards of review for different types of compelled disclosures.

In contrast, Stuart avoids engaging Casey directly. The district court interprets Casey’s statement that the “physician’s First Amendment rights not to speak are implicated”135 to require strict scrutiny, but never considers how such an interpretation is consistent with Casey’s upholding Pennsylvania’s informed consent statute. If, as Stuart suggests, strict scrutiny applies to compelled speech in the abortion context, then the Pennsylvania law compelling physician speech must have been narrowly tailored to serve a compelling government interest. The district court is correct that Casey did not explicitly “characterize the state’s interest in potential life as ‘compelling’ during the entire term of a woman’s

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133 Unlike the disclosure requirements upheld in Casey, the Texas Act “compels physicians to advance an ideological agenda with which they may not agree, regardless of any medical necessity, and irrespective of whether the pregnant women wish to listen.” 2011 WL 3818879, at *30.
134 2011 WL 3818879, at *24 (“The Court finds the provisions of the Act that compel speech by physicians are subject to strict scrutiny.”). See also id. (“Defendants must prove that the compelled speech portions of the Act further a compelling government interest and are narrowly tailored to achieve that interest.”).
135 Casey, 505 U.S. at 884.
pregnancy.” Stuart never even speculates, however, as to what—if indeed Casey applied strict scrutiny—compelling interest the Supreme Court found to support the Pennsylvania law.

If, as the district court in Lakey notes, “Casey refers to the government’s interest in potential life as ‘important,’ ‘substantial,’ and ‘legitimate,’ [but] stops short of characterizing it as ‘compelling,’” then it is odd that Lakey and Stuart repeatedly insist that strict scrutiny applies to compelled disclosures regarding abortion. Given that Casey does not use the language of strict scrutiny, Lakey and Stuart must look beyond Casey to other cases, cases that do not consider compelled disclosures in the abortion context. In so doing, though, the district courts reject Casey’s central holding—that the undue burden test controls abortion regulations.

Under Casey’s undue burden test, a regulation is invalid “if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.” The rule is a per se rule. If the court finds that the regulation is an undue burden, the regulation is unconstitutional. The State does not get an opportunity to show that the regulation is narrowly tailored to a compelling interest. If, on the other hand, the regulation does not impose an undue burden on a woman’s exercise of her right to an abortion, then the regulation need be only reasonable: “Unless it has that effect [of imposing a substantial obstacle] on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal.”

That Casey abandons strict scrutiny is also evident from the way Casey altered the analysis under Roe v. Wade. In Roe, the Court recognized that the State has two “separate and distinct interests” in

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138 Casey, 505 U.S. at 877.
139 Casey, 505 U.S. at 878.
regulating abortion—“an important and legitimate interest in preserving and protecting the health of the pregnant woman” and an “important and legitimate interest in protecting the potentiality of human life.”

According to Roe, each of the State’s interests became more substantial as the pregnancy progressed, with the State’s interest in the health of the woman becoming compelling “at approximately the end of the first trimester” and the State’s interest in the potential human life becoming compelling “at viability.” Once the government’s interest in a woman’s health became compelling, the State could adopt regulations that were subject only to a rational basis review—i.e., the regulations simply had to be “reasonably related to maternal health.” Similarly, once the government’s interest in protecting potential life became compelling, the State could “regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.”

As a result, Roe’s trimester framework sought to balance a woman’s fundamental right to have an abortion against interests of the State that increased in importance throughout the pregnancy:

Under this elaborate but rigid construct, almost no regulation at all is permitted during the first trimester of pregnancy.

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140 Roe, 410 U.S. at 162.
141 Roe, 410 U.S. at 162-63.
142 Roe, 410 U.S. at 164.
143 Roe, 410 U.S. at 165.
144 See Casey, 505 U.S. at 872 (noting Roe’s “trimester framework” and indicating that the “trimester framework” was applied by the Supreme Court in Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) and Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986)).
145 See Roe 410 U.S. at 153-54 (indicating that “fundamental rights” are included in the right to privacy under the Constitution and concluding that “the right to personal privacy includes the abortion decision”).
pregnancy; regulations designed to protect the woman's health, but not to further the State's interest in potential life, are permitted during the second trimester; and during the third trimester, when the fetus is viable, prohibitions are permitted provided the life or health of the mother is not at stake.\textsuperscript{146}

Although \textit{Casey} abandoned the trimester framework, it retained \textit{Roe}'s "essential" holding:

First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure. Second is a confirmation of the State's power to restrict abortions after fetal viability, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.\textsuperscript{147}

While viability remained the point after which the State could prohibit abortion,\textsuperscript{148} \textit{Casey} rejected \textit{Roe}'s balancing of the competing interests of the State and the woman when it came to pre- and post-viability regulation

\begin{itemize}
\item \textsuperscript{146} \textit{Casey}, 505 U.S. at 872.
\item \textsuperscript{147} \textit{Casey}, 505 U.S. at 846.
\item \textsuperscript{148} \textit{Casey} left intact \textit{Roe}'s recognition of the State's extensive ability to regulate and restrict abortion post-viability, so long as exceptions apply to preserve the life or health of the woman. \textit{See} \textit{Casey}, 505 U.S. at 879 (quoting \textit{Roe}, 410 U.S. at 164-65).
\end{itemize}
of abortion. In particular, when analyzing the State’s ability to regulate abortion pre-viability, the *Casey* plurality did not base the State’s regulatory authority on when particular interests became “compelling.” Instead, drawing on *Roe*’s recognition that a State has a “legitimate” interest in protecting a woman’s health and in protecting potential life throughout the term of a pregnancy, *Casey* adopts an “undue burden” standard to evaluate abortion regulations prior to viability.\footnote{\textsuperscript{149} See *Casey*, 505 U.S. at 871 (rejecting cases that applied strict scrutiny to “any regulation touching on abortion”).}

Provided that the regulation does not impose such a substantial obstacle on a woman’s ability to decide whether to have an abortion, the State’s regulation—whether pre- or post-viability—need only be reasonable:

What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose. Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal. Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.\footnote{\textsuperscript{151} *Casey*, 505 U.S. at 877-78 (internal citations omitted) (emphasis added).}
As *Casey* notes, regulations that are designed to inform the woman’s decision—by requiring the disclosure of truthful, nonmisleading information or otherwise—do not preclude the woman’s making the ultimate decision and, therefore, do not impose an undue burden:

To the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the “probable gestational age” of the fetus, those cases go too far, are inconsistent with *Roe*’s acknowledgment of an important interest in potential life, and are overruled.\(^{152}\)

In light of this language, the district courts’ efforts in *Lakey* and *Stuart* to subject the speech-and-display requirements to strict scrutiny are unavailing. *Casey* not only denies that “‘a rigid requirement that a specific body of information be given in all cases, irrespective of the particular needs of the patient’” is unconstitutional,\(^{153}\) but upholds such a requirement because it “is a reasonable measure to ensure an informed choice.”\(^{154}\)

Instead of focusing on the express language in *Casey*, *Stuart* cites to the district court opinion in *Lakey* and *Planned Parenthood Minn., N.D., S.D. v. Daugaard*, both of which *Stuart* claims “applied strict scrutiny in similar circumstances.”\(^{155}\)

\(^{152}\) *Casey*, 505 U.S. at 882.

\(^{153}\) *Casey*, 505 U.S. at 882 (*quoting Thornburgh*, 476 U.S. at 762).

\(^{154}\) *Casey*, 505 U.S. at 883.

Stuart’s reliance on these cases, however, is misleading and misplaced. In Lakey, the court applied strict scrutiny to the speech-and-display provisions of the Texas law. At the same time, though, the lower court acknowledged that Casey imposed only a reasonableness requirement on the compelled disclosures required under Pennsylvania law: “The Supreme Court rejected the petitioners’ compelled speech argument [in Casey] because physicians are, in a professional setting, subject to ‘reasonable’ regulation by the state, and the Court correctly concluded the information mandated by the state in the Pennsylvania statute is reasonable.” Moreover, the district court in Lakey declared that it “does not think the disclosures required by the Act are particularly relevant to any compelling government interest, but whatever relevance they may have is greatly diminished by the disclosures already required under Texas law, which are more directly pertinent to those interests.” Yet the court never explained how relevance and direct pertinence are related to the Court’s traditional strict scrutiny analysis. Thus, although Lakey invokes and applies strict scrutiny to defeat the Texas’s speech-and-display provisions, the court appears to have interpreted Casey to require some other, hybrid standard.

Stuart’s citation to Daugaard is even more misleading. In Daugaard, the district court applied strict scrutiny to South Dakota’s abortion law that compelled a physician to speak, but it did so only after concluding that the information required to be disclosed was misleading, irrelevant, and untruthful. Applying the Eighth Circuit’s decision in Planned Parenthood Minn., N.D., S.D. v. Rounds, the district court in Daugaard held that the “plaintiffs [had] the burden of demonstrating that the [South Dakota law at issue in the case] compels a physician to disclose untruthful,

159 Daugaard, 799 F.Supp.2d at 1072.
misleading, or irrelevant statements to a patient when consulting with her about an abortion.” 160 If the woman could make the initial showing (i.e., that the South Dakota law required disclosure of misleading, irrelevant and untruthful information), then the court considered whether the law served a compelling State interest and was narrowly tailed to serve that interest. 161 Unlike Stuart, Daugaard takes Casey to provide the State with two ways to justify a compelled speech requirement in the abortion context. The State can require a physician to provide truthful, nonmisleading information and, even if it does not, the State can show that the regulation survives strict scrutiny. When citing Daugaard to support its position, however, Stuart never makes the preliminary inquiry as to whether the North Carolina speech-and-display requirements compel speech that is truthful, nonmisleading, and relevant. Only if the court had initially found the compelled speech to be untruthful, misleading, or irrelevant could it reasonably claim that Daugaard applied strict scrutiny in “similar circumstances.” 162

160 Daugaard, 799 F.Supp.2d at 1072.
161 See Daugaard, 799 F.Supp.2d at 1072 (“Under the analytical framework established in Rounds, this court must now reevaluate whether the Act is ‘narrowly tailored to serve a compelling state interest.’” (emphasis added)). The United States District Court for the District of Nebraska in Planned Parenthood of the Heartland v. Heineman interpreted Rounds to require strict scrutiny if it is determined that the physician’s “First Amendment rights are implicated” and concluded that a physician’s First Amendment rights are implicated when the physician is required to disclose information that is untruthful, misleading, or irrelevant. Planned Parenthood of the Heartland v. Heineman , 724 F. Supp.2d 1025, 1048 n.18 (D. Neb. 2010). The court in Heineman suggests that “a more logical framework would be to end the inquiry once it is demonstrated that the bill requires medical providers to give untrue, misleading, or irrelevant information to patients.” Id. at 1048 n. 18. Indeed, the framework Heineman suggests seems to be analytically more sound given that it is hard to imagine how compelling a physician to provide information that is misleading, untruthful, or irrelevant could ever survive strict scrutiny.
B. Casey, Compelled Speech, and the Regulation of the Medical Profession

Casey’s support for the Texas and North Carolina speech-and-display provisions extends beyond the plurality’s not using the language of strict scrutiny when evaluating the constitutionality of the Pennsylvania regulations. In a frequently ignored section of Casey, the plurality directly addresses the physicians’ claim that they have a First Amendment right “not to provide information about the risks of abortion, and childbirth,” such as the disclosures required under the Texas and North Carolina ultrasound statutes. Even though such compelled statements implicate the physicians’ rights not to speak under the First Amendment, Casey permits States to require physicians to provide “truthful, nonmisleading information about the nature, the attendant health risks and those of childbirth, and the ‘probable gestational age’ of the fetus.” Moreover, the State can require such disclosures “even when those consequences have no direct relation to her health,” provided only that the compelled disclosures are reasonable:

To be sure, the physician’s First Amendment rights not to speak are implicated, see Wooley v. Maynard, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977), but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, cf. Whalen v. Roe, 429 U.S. 589, 603, 97 S.Ct. 869, 878, 51 L.Ed.2d 64 (1977). We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.

\[163\] Casey, 505 U.S. at 884.
\[164\] Casey, 505 U.S. at 882.
\[165\] Casey, 505 U.S. at 882.
\[166\] Casey, 505 U.S. at 884.
Thus, contrary to the district court’s suggestion in Lakey, the plurality did not dismiss the plaintiffs’ compelled speech claim because it was baseless or frivolous. In fact, the plurality expressly acknowledged that the physician’s First Amendment right not to speak was implicated. Rather, the Casey plurality affirmed that States have broad authority to regulate the medical profession—in the abortion context or otherwise—subject only to the plurality’s undue burden analysis. If the compelled disclosures are reasonable and do not impose a substantial obstacle to the woman’s right to an abortion, then they do not infringe on the physician’s First Amendment right not to speak.

Similarly, in Stuart, the district court ignored Casey’s First Amendment discussion because it was “without substantial detail.” The court never explained, however, why the plurality’s analysis was insubstantial or inapplicable. Instead, the court simply concluded that it “seem[ed] unlikely that the Supreme Court decided by implication that long-established First Amendment law was irrelevant when speech about abortion is at issue.” Yet the fact that the plurality resolved the First Amendment claim in three sentences does not mean that the plurality considered long-established First Amendment law irrelevant to speech about abortion. Rather, the plurality cited Wooley v. Maynard, one of its famous compelled speech cases, because it recognized that the physician’s claim directly implicated the First Amendment. By upholding the Pennsylvania disclosure requirements after invoking Wooley the plurality emphasized, however, that the Court’s traditional compelled speech doctrine did not dictate the outcome in Casey. Contrary to Stuart, Casey

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167 Lakey, 2011 WL 3818879, at *28 (“Nor is the reason for the Casey Court’s summary dismissal a mystery: the petitioners’ First Amendment challenge was meritless, if not frivolous, under the facts of that case.”).
168 Id. at *4. (Stuart)
169 Id. (Stuart 4)
did not abandon long-established First Amendment law; the plurality simply recognized that, consistent with Whalen, in the context “of the practice of medicine,” compelled speech is subject to a much lower standard—reasonableness.

In Stuart, the district court relied on Casey’s recognition that “[t]o be sure, the physician’s First Amendment right not to speak are implicated” but ignored the second part of the sentence: “but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.” By focusing only on the Wooley portion of the Court’s analysis, Stuart over-emphasized the importance of the Court’s compelled speech doctrine and defaulted to strict scrutiny. Any complete account of Casey must also explain the Court’s invocation of Whalen v. Roe, in which the Court determined that a statute requiring doctors to inform the State of New York when it prescribed certain controlled substances did not violate a patient’s constitutionally-protected privacy rights.

The district court in Lakey ignores Whalen altogether, and, although Stuart cites both cases, it does not acknowledge that Casey puts the two together. As a result, Lakey and Stuart obscure Casey’s meaning. As discussed more fully below, Casey indicates that the context in which speech is compelled matters. Pursuant to Wooley, speech-and-display requirements “implicate” a physician’s right to be free from government-mandated speech, but Whalen confirms that within the medical context such First Amendment rights are subject to a different—and much lower—level of scrutiny. Accordingly, while “long-established First Amendment law is [not] irrelevant when speech about abortion is at

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170 Casey, 505 U.S. at 884.
171 Casey, 505 U.S. at 884 (emphasis added) (internal citations omitted).
172 See Casey, 505 U.S. at 884 (citing Whalen v. Roe, 429 U.S. 589, 603 (1977)).
issue,"^{174} under *Whalen* the State has broader authority to regulate and license the practice of medicine.

1. *Wooley v. Maynard* and Forced Disclosures regarding Abortion

To varying degrees, the district courts in *Lakey* and *Stuart* rely on *Wooley* and the Court’s compelled speech cases to support the application of strict scrutiny to the disclosures required under the Texas and North Carolina ultrasound statutes. This reliance is misplaced for at least two reasons. First, *Casey* cites to *Wooley* only for a limited purpose—to confirm that a physician’s First Amendment right against compelled speech is “implicated” by the Pennsylvania informed consent statute,^{175} not to adopt strict scrutiny for compelled disclosures. Second, as discussed more fully in the next section, *Stuart* completely disregards the second—and critical—part of the same sentence in which the plurality invokes *Whalen* to confirm that reasonable restrictions on the medical profession are subject only to rational basis review.

In *Wooley*, the Court applied strict scrutiny and held that New Hampshire could not force drivers to carry a message that they found “morally, ethically, religiously, and politically abhorrent.”^{176} The Court did not require New Hampshire to remove “Live Free or Die” from its standard issue license plates. Rather, the Supreme Court simply held that New Hampshire could not punish a vehicle owner for covering up the State motto because requiring motorists to carry the message offended First Amendment values:

> Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life indeed constantly while his automobile is in public view to be an

^{175} *Casey*, 505 U.S. at 884.
^{176} *Wooley*, 430 U.S. at 713.
instrument for fostering public adherence to an ideological point of view he finds unacceptable. . . . New Hampshire's statute in effect requires that appellees use their private property as a “mobile billboard” for the State's ideological message or suffer a penalty.177

Casey demonstrates, though, that the speech in Wooley is significantly different from the speech mandated by the ultrasound statutes and, consequently, receives a lower level of scrutiny. As Akron I, Thornburgh, and Danforth showed, restrictions on abortion pre-CASEY were consistently struck down under strict scrutiny, which was fatal in fact to all such regulations. Thus, if the compelled disclosures in Casey had been subject to strict scrutiny, then the plurality would have analyzed whether the required statements were necessary to advance the State’s compelling interest and (most likely) found that those requirements violated the Constitution. As discussed above, the plurality did not apply strict scrutiny, however. Instead, it not only upheld the compelled disclosures under Pennsylvania law, but also acknowledged that the State may mandate that a doctor disclose truthful, non-misleading information to a woman without violating the Constitution.

Nor is it surprising that the Casey plurality refused to apply strict scrutiny to the physicians’ compelled speech claims. Given that the disclosures arise in the context of the physician-patient relationship, the physician’s rights are “derivative of the woman’s position.” 178 Accordingly, given that (i) Casey abandons strict scrutiny in favor of its newly articulated undue burden test and (ii) the physician’s rights are derivative of the woman’s rights, it would be inconsistent to apply strict scrutiny to an abortion provider’s First Amendment claims when the

177 Wooley, 430 U.S. at 715.
178 Casey, 505 U.S. at 884.
woman’s substantive due process claims are subject to the plurality’s lower, undue burden standard.

Stated differently, under *Casey*, the rights of the patient are paramount: “[w]hat is at stake is the woman’s right to make the ultimate decision.”\(^{179}\) If the State’s regulation, whether informed consent or a 24 hour waiting period, does not improperly interfere with the patient’s decision whether to have an abortion, the regulation does not violate the physician’s constitutional rights. The plurality expressly held 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.”\(^{180}\) Informed consent provisions require physicians to provide women with certain information to make sure their abortion decision is informed and knowing, but under *Casey* such requirements do not create a substantial obstacle to the woman’s exercise of her due process rights:

In short, requiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion. This requirement cannot be considered a substantial obstacle to obtaining an abortion, and, it follows, there is no undue burden.\(^{181}\)

As a result, there was no violation of the physician’s speech rights: “We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.”\(^{182}\)

\(^{179}\) *Casey*, 505 U.S. at 877.

\(^{180}\) *Casey*, 505 U.S. at 877.

\(^{181}\) *Casey*, 505 U.S. at 883.

\(^{182}\) *Casey*, 505 U.S. at 884.
Moreover, the fact that the State seeks to encourage childbirth over abortion does not convert the disclosure requirements into “ideological” speech that might warrant more rigorous scrutiny under the First Amendment. According to *Casey*, requiring doctors to provide information that might promote childbirth over abortion does not violate the woman’s or physician’s First Amendment rights because “under the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest.” Truthful, non-misleading information about a controversial subject such as abortion does not convert that information into an impermissible ideology that would warrant strict scrutiny.¹⁸⁵

¹⁸³ In its brief in *Casey*, Planned Parenthood argued that the Pennsylvania disclosure requirements forced a physician to promulgate “an ideological point of view he finds unacceptable,” thereby triggering strict scrutiny. 1992 WL 551419 at *54 (quoting *Wooley*, 430 U.S. at 715). Planned Parenthood’s First Amendment challenge was predicated on *Wooley*’s statement that a person has a “First Amendment right to avoid becoming the courier for [the government’s] message” as well as *Akron*’s claim that “it remains primarily the responsibility of the physical to ensure that appropriate information is conveyed to his patent, depending on her particular circumstances.” *Wooley*, 430 U.S. at 717; *Akron*, 462 U.S. at 443. In *Casey*, the plurality expressly overruled *Akron* and rejected Planned Parenthood’s claim that *Wooley* prohibited the mandatory disclosures. *Casey*, 505 U.S. at 884 (“We see no constitutional infirmity in the requirement that the physician provide the information mandated by [Pennsylvania] here.”).

¹⁸⁴ *Casey*, 505 U.S. at 886. See also id. at 882 (“we permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion.”).

¹⁸⁵ See, e.g., *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 734-35 (8th Cir. 2008) (interpreting *Casey* and *Gonzales* to hold 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.”); *Eubanks v. Schmidt*, 126 F. Supp.2d 451, 458 n.11 (W.D. Ky. 2000) (“It is possible to convey information about ideologically charged subjects without communicating another’s ideology, particularly in the context
The Supreme Court's First Amendment decision in *Casey* expressly rejected the notion that a state may require distribution only of ideologically neutral information regarding abortion—that is, information that not only is truthful and not misleading, but also that does not express a preference in favor of either childbirth or abortion, because Pennsylvania's challenged informational materials did express a preference for childbirth over abortion.\(^{186}\)

As a result, the *Casey* plurality cites *Wooley* to acknowledge that the physicians’ First Amendment rights are “implicated,” but, in the abortion context, does not apply strict scrutiny and upholds the Pennsylvania disclosure requirements.\(^{187}\)

Furthermore, in permitting States to require the disclosure of truthful, non-misleading information regarding the fetus and the abortion procedure, the government neither prohibits the patient from speaking nor compels her to adopt the government’s message.\(^{188}\) Unlike the vehicle owner in *Wooley*, neither the woman nor the doctor is forced “to be an instrument for fostering public adherence to an ideological point of view he finds of the reasonable regulation of medical practice…. [The pamphlets] provide information from which a woman might naturally select the choice favored by the legislature. By viewing the pamphlets as merely providing information and citing *Whalen v. Roe*, the Supreme Court seems to make precisely that point.”).

\(^{186}\) *Summitt Med. Center of Ala., Inc.*, 274 F. Supp.2d at 1270.

\(^{187}\) *Casey*, 505 U.S. at 882 (“To be sure, the physician’s First Amendment rights not to speak are implicated, see *Wooley v. Maynard* …, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.”).

\(^{188}\) See, e.g., *Johanss v. Livestock Marketing Ass’n*, 544 U.S. 550, 568 (2005) (Thomas, J., concurring) (“The government may not, consistent with the First Amendment, associate individuals or organizations involuntarily with speech by attributing an unwanted message to them, whether or not those individuals fund the speech, and whether or not the message is under the government's control.”).
The woman remains free to discuss the abortion decision with her physician (and others) and to choose childbirth or abortion. The State is not forcing women or physicians to accept or agree with a State endorsed message; rather, the State is providing additional factual, nonmisleading information so that women might “be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term.”

Similarly, in the present case, as in Rumsfeld, the party being compelled to speak remains free to comment on and discuss the merits of the governmentally mandated message: “Law schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy, all the while retaining eligibility for federal funds.” To the extent that physicians providing abortion services do not think that the required disclosures are medically relevant, those physicians can explain their position to the woman, which might serve to further the State’s interest in ensuring that women make informed choices regarding abortion.

In seeking to promote childbirth over abortion, the State exercises not only its “significant” authority to regulate the medical profession but also its right to express its own views as a speaker: “The right to free speech, of course, includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker’s message may be offensive to his audience.” Under the government speech doctrine, the government can “say what it wants” to insure that its

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189 Wooley, 430 U.S. at 715.
190 Casey, 505 U.S. at 883. See Lakey, 2012 WL 45413, at *6 (“To belabor the obvious and conceded point, the required disclosures of a sonogram, the fetal heartbeat, and their medical descriptions are the epitome of truthful, non-misleading information.”).
191 Rumsfeld, 547 U.S. at 60.
desired message is communicated. 193 When speaking, the government “‘is entitled to say what it wishes’” and “to select the views that it wants to express.” 194 Because the message is its own, the government can speak without worrying whether third parties—physicians who provide or women seeking an abortion—agree with that message.

As a result, given that (i) informed consent provisions do not impose an undue burden on a woman’s right to choose to have an abortion and (ii) “the ‘right to persuade’ is protected by the First Amendment,” 195 the plurality cites Wooley to confirm that compelled disclosures relating to abortion implicate the Court’s compelled speech doctrine. But the plurality also concludes that, within the abortion context, the government may require physicians to convey truthful, non-misleading information to the woman to ensure that her decision is informed and voluntary: “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…. We see no constitutional infirmity in the requirement.” 196 After all, as the plurality notes, “[w]hat is at stake is the woman’s right to make the ultimate decision, not a right to insulated from all others in doing so.” 197

193. Id. (quoting Bd. of Regents of Univ. of Wis. System v. Southworth, 529 U.S. 217, 229 (2000)).
195 Hill, 530 U.S. at 717 (quoting Thornhill v. Alabama, 310 U.S. 88 (1940)). See also American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 204 (1921) (“We are a social people and the accosting by one of another in an inoffensive way and an offer by one to communicate and discuss information with a view to influencing the other's action are not regarded as aggression or a violation of that other's rights.”).
196 Casey, 505 U.S. at 884.
197 Casey, 505 U.S. at 877.
2. *Whalen v. Roe* and the Reasonable Regulation of the Medical Profession

That the Court’s analysis of compelled speech in the context of abortion tracks its general undue burden test is not surprising. As the district court in *Lakey* noted when analyzing the mandatory disclosure provisions in H.B. 15, “the nature of the compelled speech determines the standard of review a court must apply.”\(^{198}\) And this general principle is derived from another one of the Court’s compelled speech cases, *Riley v. Nat’l Fed’n of the Blind of North Carolina, Inc.* In *Riley*, the Court acknowledged that the First Amendment provides broad protection against compelled speech—“[t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it”\(^{199}\)—but that this protection is not unlimited. The *Riley* Court emphasized that the level of scrutiny depended on the context in which the compelled speech occurred: “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.”\(^{200}\) Similarly, in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, the Court recognized that the right not to speak, *i.e.*, to be free from compelled speech, is limited to “suitably defined areas.”\(^{201}\) Where the “nature of the speech” involves an area over which the government has

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\(^{198}\) 2011 WL 3818879, at *24.

\(^{199}\) *Riley*, 487 U.S. at 790-91. *See also Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) (“The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion.”).

\(^{200}\) *Riley*, 487 U.S. at 796. *See also U.S. v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1143 (D.C. Cir. 2009) (“the level of scrutiny depends on the nature of the speech that the corrective statements burden”) (*citing Riley*, 487 U.S. at 796).

\(^{201}\) 471 U.S. 539, 559 (1985) (“There is necessarily, and within suitably defined areas, a [First Amendment] freedom not to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect” (internal quotation marks omitted)).
broad authority, such as the medical profession, the government has broad authority to require speech that is rationally related to that interest.\textsuperscript{202}

Instead of analyzing the nature of the speech at issue—speech that is mandated as part of a State’s regulating the medical profession in relation to abortion procedures—the district courts in \textit{Lakey} and \textit{Stuart} considered only whether the speech was commercial speech, which would warrant intermediate scrutiny. In \textit{Riley}, the Court focused on compelled speech in the context of professional fundraising communications that included commercial and non-commercial elements, finding that the non-commercial elements warranted strict scrutiny in that case.\textsuperscript{203} \textit{Riley} treated the solicitations as fully protected speech because “the component parts of a single speech [were] inextricably intertwined,” but the Court acknowledged that other types of speech, such as “[p]urely commercial speech,” “is more susceptible to compelled disclosure requirements.”\textsuperscript{204} Finding that any commercial speech involved in the abortion context is “inextricably intertwined” with the non-commercial components,” the district courts in \textit{Lakey} and \textit{Stuart} determined that “strict scrutiny is appropriate.”\textsuperscript{205}

\textsuperscript{202} \textit{Gonzales v. Carhart}, 550 U.S. 124, 157 (2007) (“Under our precedents it is clear the State has a significant role to play in regulating the medical profession.”).

\textsuperscript{203} See also \textit{Rumsfeld v. FAIR}, 547 U.S. 47 (2006) in which the Court upheld—against a compelled speech challenge—Congress’s authority to require law schools to give military recruiters access to campus facilities. The Court held that, in the war powers context, Congress’s war powers “include[] the authority to require campus access for military recruiters,” and “judicial deference [to Congress] is at its apogee when Congress legislates under its authority to raise and support armies.” \textit{Id.} at 58. As \textit{Riley} tells us, context matters. The “significant role” of the State “in regulating the medical profession” warrants similar deference to Congress’s war power in relation to First Amendment challenges.

\textsuperscript{204} \textit{Riley}, 487 U.S. at 796 and n.9 (citing \textit{Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio}, 471 U.S. 626 (1985)).

\textsuperscript{205} \textit{Lakey}, 2011 WL 3818879, at *24.
Given the importance of context when deciding the proper standard of review for compelled speech, it should not be alarming that the Court might apply a different standard in the medical context. Because “the State has a significant role to play in regulating the medical profession,”206 *Casey* employs a lower standard of review when dealing with compelled disclosures relating to medical procedures, including the provision of information to a woman seeking an abortion. Applying a lower standard is consistent with *Riley* as well as the Court’s prior recognition that “there is no right to practice medicine which is not subordinate to the police power of the states … and also to the power of Congress to make laws necessary and proper” to carry out its enumerated powers.207 Moreover, subjecting compelled disclosures in the abortion context to lesser scrutiny reflects the fact that the constitutional protection afforded the physician-patient relationship “is derivative of the woman’s position.”208

As *Casey* demonstrates, the upshot of this is that physicians are not entitled to any greater protection than the woman seeking an abortion, and, as discussed in the previous section, *Casey* applies the undue burden test, not strict scrutiny. Thus, physicians can claim a First Amendment right to refuse to provide the required information only if such disclosures impose an undue burden or, in the alternative, are unreasonable. In this way, an informed consent requirement related to abortion is “no different from a requirement that a doctor give certain specific information about any medical procedure.”209 Both types of disclosure requirements are subject to the same standard of review, and *Casey* tells us where to look to find the proper standard for regulations of the medical profession—*Whalen v. Roe*.

208 *Casey*, 505 U.S. at 884.
209 *Casey*, 505 U.S. at 884.
In *Whalen*, the Supreme Court considered whether a New York law, which required 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.\(^{210}\) Through the prescription requirement, the New York legislature sought to facilitate enforcement of other laws prohibiting misuse of controlled substances and to deter those who might violate those laws.\(^{211}\) Although the requirement to file prescriptions with the State was coupled with strict restrictions on the disclosure of information by State employees,\(^{212}\) the physicians and patients claimed that the possibility of disclosure of such medical information would make “some patients reluctant to use, and some doctors reluctant to prescribe, [the applicable] drugs even when their use is medically indicated.”\(^{213}\) The plaintiffs argued that the law therefore “threatened to impair both their interest in the nondisclosure of private information and also their interest in making important decisions independently.”\(^{214}\) The Supreme Court rejected these claims, upholding the law against the constitutional challenges.\(^{215}\)

*Casey* cited to the following paragraph from *Whalen*,\(^{216}\) thereby incorporating the relevant principles into *Casey*’s analysis of compelled disclosures within the context of a State’s regulation of abortion:

\(^{210}\) *Whalen*, 429 U.S. at 591, 593.

\(^{211}\) *Whalen*, 429 U.S. at 597-98.

\(^{212}\) *Whalen*, 429 U.S. at 594 n.12.

\(^{213}\) *Whalen*, 429 U.S. at 597.

\(^{214}\) *Whalen*, 429 U.S. at 597.

\(^{215}\) *Whalen*, 429 U.S. at 600 (“We are persuaded . . . that the New York program does not, on its face, pose a sufficiently grievous threat to either interest to establish a constitutional violation.”).

\(^{216}\) *Casey* cited a single page of *Whalen*, and the paragraph shown is the only full paragraph on the page.
Clearly, therefore, the statute did not deprive the public of access to the drugs. Nor can it be said that any individual has been deprived of the right to decide independently, with the advice of his physician, to acquire and to use needed medication. Although the State no doubt could prohibit entirely the use of particular Schedule II drugs, it has not done so. This case is therefore unlike those in which the Court held that a total prohibition of certain conduct was an impermissible deprivation of liberty. Nor does the State require access to these drugs to be conditioned on the consent of any state official or other third party. Within dosage limits which appellees do not challenge, the decision to prescribe, or to use, *is left entirely to the physician and the patient.*

Under *Whalen*, the State has broad latitude to regulate the practice of medicine provided only that such regulations do not (i) deny the public access to a legitimate medical procedure or treatment, (ii) deprive a patient from deciding, in consultation with her physician, to undergo or use such a procedure or treatment, and (iii) condition the doctor’s ability to perform or utilize such a procedure or treatment. For *Whalen* and *Casey*, it is the ability of a patient to make a decision in consultation with her physician that “is at stake.” So long as “the decision . . . is left entirely to the physician and the patient,” the State has substantial freedom to adopt reasonable regulations that may affect the decision-making process.

Although *Whalen* does not involve a First Amendment claim, *Casey* applies the principles of *Whalen* to the regulation of abortion. Nowhere in *Whalen* does the Court suggest that strict scrutiny applies to the regulation

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217 *Whalen*, 429 U.S. at 603 (emphasis added).
218 *Casey*, 505 U.S. at 878.
219 *Whalen*, 429 U.S. at 603 (emphasis added).
of medical procedures. Consistent with *Casey*, *Whalen* neither requires the State to have a compelling interest nor analyzes whether the regulations are narrowly tailored to serve a compelling interest. Instead, the Court upholds the law as the product of an “orderly and rational legislative decision” that was a “reasonable exercise of New York’s broad police powers.”\(^{220}\) In short, *Whalen* describes a rational basis test, which *Casey* applies to compelled disclosures in the abortion context.\(^{221}\)

*Whalen* also addresses the scope of physicians’ rights in the context of the physician-patient relationship. The Court in *Whalen* dismissed the doctors’ claims that the New York law impaired their rights to practice medicine freely.\(^{222}\) In doing so, the court noted that, to the extent the law affected the doctors’ procedures, the claim was “clearly frivolous,” and to the extent the law affected a patient’s willingness to accept needed medication, the claim was “derivative from, and therefore no stronger than, the patients.”\(^{223}\) Notably, in rejecting the doctors’ claims, *Whalen* cited *Doe v. Bolton*:

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\(^{220}\) *Whalen*, 429 U.S. at 597-98.

\(^{221}\) Other sections in *Whalen* support this reading. *Whalen* reinforces *Casey*’s recognition, discussed infra at __, that a State may require disclosures regarding abortion even though those disclosures are not medically necessary: “State legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part. For we have frequently recognized that individual States have broad latitude in experimenting with possible solutions to problems of vital local concern.” *Whalen*, 429 U.S. at 597. *See Case*, 505 U.S. at 882 (“We also see no reason why the State may not require doctors to inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health.”); id. at 886 (“as we have stated, under the undue burden standard a State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest.”).

\(^{222}\) *Whalen*, 429 U.S. at 604.

\(^{223}\) *Whalen*, 429 U.S. at 604.
The statutory restrictions on abortion procedures [at issue in that case] were invalid because they encumbered the woman's exercise of that constitutionally protected right by placing obstacles in the path of the doctor upon whom she was entitled to rely for advice in connection with her decision. If those obstacles 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. 224

Because the doctors’ rights were “derivative from, and no stronger than, the patients’,” Whalen—like Casey—disposed of the doctors’ claims in a single paragraph. In Casey, the plurality also acknowledged that “[w]hatever constitutional status the doctor-patient relationship may have as a general matter, in the present context it is derivative of the woman’s position . . . Thus, a requirement that a doctor give a woman certain information as part of her obtaining consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain information about any medical procedure.” 225 When considered in light of Whalen, Casey’s statements, which are contained in the paragraph immediately preceding Casey’s denial of the physicians’ First Amendment claims, demonstrate that if a regulation does not violate a woman’s right to have an abortion, it does not violate the physician’s First Amendment rights.

The similarities between Casey and Whalen, therefore, are striking. Both involve claims that a State law violates a patient’s Fourteenth

224 Whalen, 429 U.S. at 604 n.33.
225 Casey, 505 U.S. at 884 (emphasis added).
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 include allegations that the governing laws violate the rights of patients and physicians. Both indicate that the State may require physicians to engage in activities that burden the physicians’ practice of medicine. Both find that the rights of the physician are “derivative” of those of the patient and, consequently, both dispose of the physicians’ claims in a single paragraph.

226 See Casey, 505 U.S. at 846 (indicating that the Fourteenth Amendment Due Process Clause protects a woman’s right to decide to have an abortion); Whalen, 429 U.S. at 598; 600 n.23 (noting that the plaintiffs claimed that the statute violated their right to privacy and noting that the Court found that such a right derives from the Fourteenth Amendment).

227 See Casey, 505 U.S. at 878 (“What is at stake is the woman’s right to make the ultimate decision . . . .”); Whalen, 429 U.S. at 603 (noting that the law does not the New York law does not “deprive[ a person] of the right to decide independently, with the advice of physician, to acquire and use needed medication”).

228 See Casey, 505 U.S. at 882 (indicating that the State can “require doctors to inform a woman seeking an abortion of the availability of materials . . . [that] have no direct relation to her health”), id. at 886 (“[A] State is permitted to enact persuasive measures which favor childbirth over abortion, even if those measures do not further a health interest.”); Whalen, 429 U.S. at 597 (“State legislation which has some effect on individual liberty or privacy may not be held unconstitutional simply because a court finds it unnecessary, in whole or in part.”).

229 See Casey 505 U.S. at 884 (discussing the physician’s First Amendment rights to be free from government-mandated disclosures); Whalen, 429 U.S. at 604 (noting claim that the New York law violated the right of physicians to practice medicine freely).

230 See Casey, 505 U.S. at 882 (noting “no reason why the State may not require doctors” to provide certain information to women seeking abortions); Whalen, 429 U.S. at 879 (describing as frivolous any claim that the statute has an adverse effect on physicians’ procedures).

231 See 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
Given the similarities between *Casey* and *Whalen*, the plurality cross-references *Whalen* to explain why a state law that requires a physician to provide information to a woman seeking an abortion is subject to reasonable regulation by the State. Under *Whalen* and *Casey*, the level of scrutiny applicable to compelled speech in the context of “the practice of medicine”—whether relating to abortion or to a kidney transplant—is rational basis. Under rational basis scrutiny, the government must show only that it has a legitimate interest and that the challenged government regulation or action is reasonably related to that interest. In the medical context, “the physician’s First Amendment rights not to speak are ... subject to reasonable licensing and regulation by the State.” As a result, position.”); *Whalen*, 429 U.S. at 604 (“[T]he doctors’ claim is derivative from, and therefore, no stronger than, the patients’”).

232 See *Casey*, 505 U.S. at 884 (disposing of physicians’ First Amendment claim in one paragraph); *Whalen*, 429 U.S. at 604 (disposing of physicians’ Fourteenth Amendment claim in one paragraph).

233 See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007) (“Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substituted others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.”); *Kimel v. Florida Bd. Of Regents*, 528 U.S. 62, 83 (2000) (holding in the context of an equal protection claim based on alleged age discrimination that the government survives rational basis review when “the age classification in question is rationally related to a legitimate state interest.”).

234 *Casey*, 505 U.S. at 884. Although *Casey*’s undue burden test marks a significant departure from *Roe*—as evidenced by the Court’s overturning *Akron I* and *Thornburgh*—the plurality preserves *Roe*’s “reasonableness” standard when analyzing regulations of the abortion procedure. See *Roe v. Wade*, 410 U.S. 113, 164 (1973) (“the State, in promoting its interest in the health of the mother [during the second trimester], may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.”). As discussed below, *Casey* (i) interprets “maternal health” more broadly to include “psychological well-being” and (ii) permits the State to require disclosures “relating to the consequences to the fetus, even when those consequences have no direct relation to her health.” *Casey*, 505 U.S. 882. See also id. (“In attempting to ensure that a woman
in light of Whalen, it is easy to see why Casey summarily disposed of the physicians’ First Amendment claims. Once the Court had determined that the compelled disclosures did not unduly burden a woman’s right to decide whether to have an abortion, there was “no constitutional infirmity in the requirement that the physician provide the information.”

C. The Reasonableness of the Texas and North Carolina Ultrasound Statutes under Casey’s Rational Basis Scrutiny

Because Casey applies rational basis review to compelled disclosures in the abortion context, the district courts in Lakey and Stuart could strike down Texas’s and North Carolina’s informed consent provisions only if those provisions are an undue burden or unreasonable (which, under Casey, means untruthful, misleading, or irrelevant). In Casey, the plurality held that truthful, nonmisleading compelled disclosures did not impose an undue burden: “Because the informed consent requirement facilitates the wise exercise of that right, it cannot be classified as an interference with the right Roe protects.” Moreover, the Court held that the State’s requiring the disclosure of such truthful, nonmisleading information about the nature of the abortion procedure, the health risks associated with childbirth and abortion, and the “probable gestational age” of the fetus was reasonable: “In short, requiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to

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235 Casey, 505 U.S. at 884.
236 Casey, 505 U.S. at 887.
full term is a reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion.”

Under *Casey*, then, the physicians in *Lakey* and *Stuart* cannot make the requisite showing under rational basis scrutiny. As the plurality expressly acknowledged in *Casey*, reasonable informed consent requirements further the legitimate interests 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” and 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.” In addition, such informed consent requirements—even those that seek to promote childbirth over abortion—are reasonable if they are “truthful” and “nonmisleading.”

The disclosures mandated under the Texas and North Carolina statutes fit comfortably within the framework that the plurality set out in *Casey*. Under the Texas and North Carolina ultrasound statutes, the physician who is to perform the abortion must perform an ultrasound, display the images for the woman to see, and explain the results. As in *Casey*,

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237 *Casey*, 505 U.S. at 883; *Planned Parenthood of Indiana v. Comm’r of Indiana*, 794 F. Supp.2d 892, 915-16 (S.D. Ind. 2011); *Summit Medical Center of Alabama, Inc. v. Riley*, 274 F. Supp.2d 1262, 1270 (M.D. Ala. 2003) (“the fact that state-authored information expresses a preference for childbirth over abortion is irrelevant to the First Amendment analysis”).

238 *Casey*, 505 U.S. at 882, 883; *Planned Parenthood of Indiana, Inc.*, 794 F. Supp.2d at 915 (“And, as a general matter, a state has wide latitude in imposing regulations that are designed to ensure that ‘a woman makes a thoughtful and informed choice.’”) (quoting *Karl v. Foust*, 188 F.3d 446, 491 (7th Cir. 1999)).

239 *Casey*, 505 U.S. at 882; *Lakey*, 2012 WL 45413 at *5 (“informed consent laws that do not impose an undue burden on the woman’s right to have an abortion are permissible if they require truthful, nonmisleading, and relevant disclosures.”).

240 TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(4); N.C. GEN. STAT. § 90-21.85(a). The physician is not required to assert that she believes the information is needed to make an informed choice and remains free to criticize or explain her views on the propriety of
these disclosures serve the legitimate purposes of informing the woman of the “full consequences of her decision” and “ensuring a decision that is mature and informed.” Furthermore, the ultrasound and the explanation of its images provide truthful, nonmisleading information about the development and gestational age of the fetus: “Though there may be questions at the margins, surely a photograph and description of its features constitute the purest conceivable expression of ‘factual information.’” In fact, the government might reasonably believe that sonograms provide the most direct, truthful, and nonmisleading way to make sure that women considering abortion “apprehend the full consequences of [their] decision.”

III. CASEY’S APPLICATION TO OTHER ULTRASOUND STATUTES

The speech-and-display requirements under the Texas and North Carolina statutes are among the most extensive in the nation. Therefore, if abortion generally or at the particular stage of fetal development. See Eubanks, 126 F. Supp.2d at 458 n.12 (explaining in the context of a state law requiring physicians to inform women about pamphlets regarding abortion and to provide them upon request that “[t]he physician need not vouch for the pamphlets … [and] the physician is free to deliver her own message, criticizing, disavowing, or explaining the state pamphlet … [such that] there should never be an occasion in which that message is mistaken for the physician’s own.”); Summit Medical Center of Ala., Inc., 274 F. Supp.2d at 1271 (upholding an Alabama statute requiring physicians “to distribute materials and information promoting childbirth over abortion” because, among other things, the statute did not “restrain[,] the provider from expressing to the patient personal opinions in opposition to any statement contained in the materials.”); id. at 1272 (“no provision of the Act prohibits a physician from explaining, criticizing, or disavowing the State’s information.”).

241 Casey, 505 U.S. 882.
242 Lakey 2012 WL 45413, at *5 n.4; Eubanks, 126 F. Supp.2d at 459 (holding that photographs of fetal development, even though enlarged and color enhanced, “provide an accurate rendition of the fetus at various stages of development … [and t]herefore, … are ‘truthful and not misleading.’” (quoting Casey, 505 U.S. at 882).
243 Casey, 505 U.S. 882.
those statutes do not run afoul of the First Amendment rights of medical providers, neither do the others.

As indicated in Part I, the ultrasound statutes and bills enacted or pending before legislatures across the United States fall into three different categories: (i) those that require physicians to perform an ultrasound before a woman has an abortion, (ii) those that require a physician to offer an ultrasound to a woman before she has an abortion, and (iii) those that do not require physicians to perform or offer an ultrasound, but that impose obligations on the physician if an ultrasound is performed in connection with an abortion.\footnote{See Appendices 1 and 2 for details regarding the laws enacted, and the bills being considered, by the various States.} All of them require the display of ultrasound images for a pregnant woman to view, though the conditions under which the requirement arises differ depending on which category the statute or bill is in. In most cases, medical providers are required only to offer a woman the opportunity to view the images and must display them only if the woman wants to view them.\footnote{See Appendix 1 (showing that the statutes and bills that require only that image display be offered)} Nebraska, North Carolina, Oklahoma, and Texas are the only States that currently require display regardless of whether a woman wants to see the images, but the bills pending in Alabama, Mississippi, and Pennsylvania would do so as well.\footnote{See Appendices 1 and 2 (noting that all of the statutes and bills that mandate display specifically state that the woman may choose not to look).} Even the seven States that require display, however, specifically acknowledge that a woman may choose not to look.

Beyond display requirements, the statutes and bills vary widely, although four features appear with some frequency. First, some statutes and bills require medical providers to offer to make the fetal heart tone audible.\footnote{See Appendices 1 and 2 (indicating which statutes and bills require medical providers to offer to make the heart tone audible).} The Texas statute and the Mississippi bill require it, but
specify that a woman may choose not to listen.\textsuperscript{248} Second, some statutes require that the woman be offered a physical picture of the ultrasound image.\textsuperscript{249} The Pennsylvania bill would require medical providers to do so.\textsuperscript{250} Third, some statutes and bills require a waiting period after an ultrasound before an abortion may be performed.\textsuperscript{251} The longest waiting period is 24 hours; the shortest is one hour.\textsuperscript{252} Finally, some statutes and bills require physicians to offer or provide upon request an oral explanation of the ultrasound images.\textsuperscript{253} The Texas, North Carolina, and Oklahoma statutes, as well as the pending Alabama and Mississippi bills, require an explanation regardless of whether it is requested, and the Pennsylvania bill requires that the woman be told about gestational age, any abnormal findings, whether a heartbeat was detected, and whether detection or nondetection is normal for the stage of the pregnancy.\textsuperscript{254} Only the North Carolina statute specifies that, in all circumstances, a woman may “refus[e] to hear” the explanation.\textsuperscript{255} The Texas statute and

\textsuperscript{248} TEX. HEALTH & SAFETY CODE ANN. §§ 171.012(a)(4)(D), 171.0122(c) (Vernon 2012); H.R. 1107, 2012 Leg., 127th Leg. Sess. § 2 (Miss. 2012).

\textsuperscript{249} See Appendices 1 and 2 (indicating which statutes and bills require medical providers to offer a physical picture of the ultrasound image).


\textsuperscript{251} See Appendices 1 and 2 (indicating which statutes and bills have waiting periods).

\textsuperscript{252} See Appendices 1 and 2 (showing that the Missouri, North Dakota and Texas statutes and the Mississippi, Pennsylvania, and Virginia bills include 24-hour waiting periods and that the Arizona, Nebraska, Oklahoma and South Carolina statutes have one-hour waiting periods).

\textsuperscript{253} See Tables 1 and 2 infra (showing which statutes and bills provide for oral explanations).

\textsuperscript{254} See Tables 1 and 2 infra (indicating the statutes and bills that mandate an oral explanation).

\textsuperscript{255} N.C. GEN. STAT. ANN. § 90-21.85((b) (2012).
the Mississippi bills provide that a woman may elect not to receive the explanation, but only in limited circumstances.\textsuperscript{256}

All of the ultrasound statutes and bills described in Appendices 1 and 2 implicate a medical provider’s First Amendment rights because, at a minimum, they require a physician to \textit{offer} information to a woman seeking an abortion. None of them, however, require information that is anything other than truthful, nonmisleading, and relevant under the broad definition of relevance articulated in \textit{Casey}, and none of them require information that is more extensive than the speech-and-display requirements under the Texas and North Carolina statutes. Therefore, none of these other ultrasound requirements impermissibly infringe upon the First Amendment rights of physicians. The only additional thing that some statutes and bills require is that the woman be offered or given a physical picture of the ultrasound image. But this requirement is not different from a constitutional perspective from offering a woman the opportunity to view an on-screen image. The only difference is the medium for producing the image. Therefore, because offering or requiring an on-screen image is permissible under \textit{Casey}, so is offering or requiring a physical print.\textsuperscript{257}

\textsuperscript{256} \textbf{TEX. HEALTH \& SAFETY CODE ANN.} § 171.0122(d) (Vernon 2012) (indicating that a woman may reject the simultaneous explanation, subject to certain conditions, if (i) the pregnancy resulted from sexual assault, incest or violation of another criminal law, (ii) the woman is a minor who is using judicial bypass procedures for an abortion, or (iii) the fetus has “an irreversible medical condition or abnormality”); H.R. 1107, 2012 Leg., 127th Leg. Sess. § 2 (Miss. 2012) (same).

\textsuperscript{257} \textit{Eubanks v. Schmidt}, 126 F. Supp.2d 451 (W.D. Ken. 2000) (“True, some of the fetal development photographs are color enhanced and other photos are enlarged. Even so, the photographs are neither misleading nor untruthful. Regardless of their size, photographs do not become misleading so long as the statutorily required scale allows an average person to determine their actual size. Nor does the color enhancement make an otherwise accurate depiction misleading. The pictures provide an accurate rendition of the fetus at various stages in development, as required by the Statute.”).
On remand, the Texas district court granted summary judgment to the defendants in light of the Fifth Circuit’s decision in Lakey. In so doing, the Texas district court expressed concern that, by interpreting Casey’s reference to “reasonable regulation of medical practice” to allow all “truthful, nonmisleading, and relevant disclosures,” the circuit court opened the door to requiring medical providers to deliver “an extended presentation, consisting of graphic images of aborted fetuses, and heartfelt testimonials about the horrors of abortion,” so long as “the presentations did not impose an undue burden on the pregnant woman’s right to an abortion.”

Whether true or not, to quote Stuart, “[t]hat is not . . . this case.” The ultrasound statutes do not require such extreme disclosures. They merely require the disclosure of information with respect to a diagnostic device commonly used by medical providers who perform abortions. As Casey demonstrates, there is “no constitutional infirmity” in requiring physicians to provide that information.

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259 Carhart v. Gonzales suggests that such disclosure might, in fact, be permissible if it would not pose an undue burden. In upholding the federal partial-birth abortion ban, the Court observed that:

In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used [to perform an abortion], confining themselves to the required statement of risks the procedure entails. . . . It is, however, precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State. 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 pierce the skull and vacuum the fast-developing brain of her unborn child, a child assuming the human form.

261 See Sun, supra note 5 (indicating that ultrasounds are commonly used in connection with abortion procedures).
CONCLUSION

In Casey, a plurality of the Court articulated the undue burden test, and that standard has governed the Court’s evaluation of abortion regulations for the past twenty years. Until recently, the federal courts had not been called on to explore the interaction between the undue burden test and the First Amendment speech rights of physicians. But the recent speech-and-display regulations in Texas, North Carolina, and Oklahoma have required the courts to do just that. In reaching conflicting conclusions about Casey’s application to such compelled speech claims, though, the Fifth Circuit in Lakey and the North Carolina district court in Stuart have created uncertainty for courts across the country. Moreover, this uncertainty has made it difficult for state legislatures that are considering speech-and-display requirements modeled after the Texas and North Carolina statutes to know what types of regulations are constitutionally permissible.

This article contends that a careful review of Casey and the cases it cites reveals that the uncertainty created by Lakey and Stuart is unwarranted. Consistent with the Court’s compelled speech analysis in Riley, Casey holds that, although the speech-and-display regulations “implicate” the speech rights of medical providers, the level of scrutiny depends on the context of the speech.262 Given that (i) the State has broad authority over the medical profession263 and (ii) the rights of physicians are derivative of the woman’s right to an abortion,264 compelled disclosures are subject only to rational basis scrutiny. Under Casey, a State’s requiring compelled disclosures, which relate either to the physical

262 Riley, 487 U.S. at 795 (“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.”)

263 Gonzales, 550 U.S. at 157 (“Under our precedents it is clear the State has a significant role to play in regulating the medical profession.”).

264 Casey, 505 U.S. at 884.
or psychological health of the mother\textsuperscript{265} or the State’s interest in potential life\textsuperscript{266} is constitutional if the disclosures are reasonable and do not impose an undue burden on the woman’s right to decide whether to have an abortion\textsuperscript{267}

Under this standard, the Texas, North Carolina, and Oklahoma Speech-and-Display Regulations are constitutional. The compelled disclosures relating to the ultrasound images are “truthful” and “nonmisleading”\textsuperscript{268} and, therefore, are reasonable under \textit{Casey}\textsuperscript{269}. Thus, because the ultrasound images and the descriptions of those images are reasonable and are designed “to ensure that a woman apprehend the full consequences of her decision,” the courts should uphold the Texas, North Carolina, and Oklahoma Speech-and-Display Regulations as well as any similar statutes that have been enacted and are being considered across the country.

\textsuperscript{265} \textit{Casey}, 505 U.S. at 882 (“It cannot be questioned that psychological well-being is a facet of health.”). \textit{See also Lakey}, 2012 WL 45413, at *5.

\textsuperscript{266} \textit{Casey}, 505 U.S. at 883 (“we permit a State to further its legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion.”).

\textsuperscript{267} \textit{Casey}, 505 U.S. at 878 (“Unless it has that effect [of imposing an undue burden] on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal.”).

\textsuperscript{268} \textit{Casey}, 505 U.S. at 882 (holding that informed consent requirements are constitutional “when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the ‘probable gestational age’ of the fetus”).

\textsuperscript{269} \textit{Lakey}, 2012 WL 45413, at *4 (noting that “reasonable licensing and regulation by the State” in \textit{Casey} “applies to information that is ‘truthful,’ ‘nonmisleading,’ and ‘relevant … to the decision’ to undergo an abortion.”).
**APPENDIX I**

**ULTRASOUND LAWS**

NR = No requirement

<table>
<thead>
<tr>
<th>State</th>
<th>Ultrasound Requirement</th>
<th>Image Display</th>
<th>Heart Tone Audibility</th>
<th>Oral Explanation</th>
<th>Physical Picture</th>
<th>Waiting Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Must perform</td>
<td>Must offer</td>
<td>NR</td>
<td>NR</td>
<td>NR</td>
<td>None</td>
</tr>
<tr>
<td>Arizona</td>
<td>Must perform</td>
<td>Must offer live view</td>
<td>Must offer</td>
<td>Must offer simultaneous explanation</td>
<td>Must offer</td>
<td>1 hour</td>
</tr>
<tr>
<td>Arkansas</td>
<td>NR</td>
<td>If performed, must offer</td>
<td>NR</td>
<td>NR</td>
<td>NR</td>
<td>None</td>
</tr>
<tr>
<td>Florida</td>
<td>Must perform</td>
<td>Must offer live view</td>
<td>NR</td>
<td>Must offer simultaneous explanation</td>
<td>NR</td>
<td>None</td>
</tr>
</tbody>
</table>

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274 *Fla. Stat. Ann.* § 390.0111 (3)(a)(1)(b) (West 2012). Neither an offer to view nor an offer to provide an explanation may be made if evidence is provided that the woman is a victim of rape, incest, domestic violence or human trafficking or has been diagnosed with a condition for which a delay would cause a serious health risk. *Id.* § 390.0111(3)(a)(1)(b)(IV).
<table>
<thead>
<tr>
<th>State</th>
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<th>Physical Picture</th>
<th>Waiting Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Georgia</td>
<td>NR</td>
<td>If performed, must offer</td>
<td>If performed, must offer</td>
<td>NR</td>
<td>NR</td>
<td>None</td>
</tr>
<tr>
<td>Idaho</td>
<td>NR</td>
<td>If performed, must offer</td>
<td>NR</td>
<td>NR</td>
<td>If performed, must offer</td>
<td>None</td>
</tr>
<tr>
<td>Indiana</td>
<td>Must offer</td>
<td>Must offer</td>
<td>Must offer</td>
<td>NR</td>
<td>NR</td>
<td>None</td>
</tr>
<tr>
<td>Kansas</td>
<td>Must perform</td>
<td>Must offer</td>
<td>Must offer</td>
<td>Must review results if requested</td>
<td>Must offer</td>
<td>None</td>
</tr>
<tr>
<td>Louisiana</td>
<td>Must perform</td>
<td>Must offer live view</td>
<td>NR</td>
<td>Must offer simultaneous explanation</td>
<td>Must offer</td>
<td>2 hours</td>
</tr>
<tr>
<td>Michigan</td>
<td>NR</td>
<td>If performed, must offer live view</td>
<td>NR</td>
<td>NR</td>
<td>If performed, must offer</td>
<td>None</td>
</tr>
</tbody>
</table>

277 IND. CODE ANN. § 16-34-2-1.1(b) (West 2012).
278 KAN STAT. ANN. § 65-6709(h) (2012); 2011 Kan. Sess. Laws ch. 82 § 9(e)(4); KAN. ADMIN. REGS. §§ 28-34-137(b)(3), (d) (2012). Under Kansas law, a woman need only be offered the opportunity to hear the fetal heart tone if heart monitoring equipment is to be used. Id. § 65-6709(i) (2012)
<table>
<thead>
<tr>
<th>State</th>
<th>Ultrasound Requirement</th>
<th>Image Display</th>
<th>Heart Tone Audibility</th>
<th>Oral Explanation</th>
<th>Physical Picture</th>
<th>Waiting Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mississippi</td>
<td>Must perform</td>
<td>Must offer live view</td>
<td>Must offer</td>
<td>NR</td>
<td>Must offer</td>
<td>None</td>
</tr>
<tr>
<td>Missouri</td>
<td>Must offer</td>
<td>Must offer live view</td>
<td>Must offer</td>
<td>NR</td>
<td>NR</td>
<td>24 hours</td>
</tr>
<tr>
<td>Nebraska</td>
<td>NR</td>
<td>If performed, must display live view;</td>
<td>NR</td>
<td>If performed,</td>
<td>NR</td>
<td>If performed, 1 hour</td>
</tr>
<tr>
<td>North Carolina</td>
<td>Must perform</td>
<td>Must display live view; woman may choose not to look</td>
<td>Must offer</td>
<td>Must provide simultaneous explanation upon request</td>
<td>NR</td>
<td>4 hours</td>
</tr>
</tbody>
</table>


284 N.C. Gen. Stat. Ann. § 90-21.85(a), (b) (2012). If the woman has had a complying ultrasound within 72 hours, an additional one need not be performed. Id. § 90-21.85(a).
<table>
<thead>
<tr>
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<th>Oral Explanation</th>
<th>Physical Picture</th>
<th>Waiting Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>North Dakota</td>
<td>Must offer</td>
<td>Must offer live view</td>
<td>NR</td>
<td>NR</td>
<td>NR</td>
<td>24 hours</td>
</tr>
<tr>
<td>Ohio</td>
<td>NR</td>
<td>If performed, must offer live view</td>
<td>NR</td>
<td>NR</td>
<td>If performed, must offer</td>
<td>None</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>Must perform</td>
<td>Must display live view, woman may choose not to look</td>
<td>NR</td>
<td>Must provide simultaneous explanation</td>
<td>NR</td>
<td>1 hour</td>
</tr>
<tr>
<td>South Carolina</td>
<td>NR</td>
<td>If performed, must offer view during or after</td>
<td>NR</td>
<td>NR</td>
<td>NR</td>
<td>If performed, 1 hour</td>
</tr>
<tr>
<td>South Dakota</td>
<td>Must offer</td>
<td>Must offer</td>
<td>NR</td>
<td>NR</td>
<td>NR</td>
<td>None</td>
</tr>
</tbody>
</table>

287 OKLA. STAT. tit. 63, § 1-738.3d (B), (C) (2012).
<table>
<thead>
<tr>
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<th>Physical Picture</th>
<th>Waiting Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Texas</td>
<td>Must perform</td>
<td>Must display; woman may choose not to look</td>
<td>Must make audible; woman may choose not hear</td>
<td>Must provide explanation; in limited cases, woman may choose not to receive</td>
<td>NR</td>
<td>24 hours</td>
</tr>
<tr>
<td>Utah</td>
<td>NR</td>
<td>If performed, must offer live view</td>
<td>NR</td>
<td>If performed, must offer detailed description</td>
<td>NR</td>
<td>None</td>
</tr>
<tr>
<td>West Virginia</td>
<td>NR</td>
<td>If performed, must offer</td>
<td>NR</td>
<td>NR</td>
<td>NR</td>
<td>None</td>
</tr>
</tbody>
</table>

290 Tex. Health & Safety Code Ann. §§ 171.012(a)(4), 171.0122(b)-(d) (Vernon 2012). Under the Texas statute, a woman may reject the simultaneous explanation, subject to certain conditions, if (i) the pregnancy resulted from sexual assault, incest or violation of another criminal law, (ii) the woman is a minor who is using judicial bypass procedures for an abortion, or (iii) the fetus has “an irreversible medical condition or abnormality.” Id. § 171.0122(d). The explanation of the heart auscultation must be simultaneous. Id. § 171.012(a)(4)(D). The waiting period may be reduced to two hours if the woman “certifies that she currently lives 100 miles or more from the nearest abortion provider licensed under Chapter 245 or a facility that performs more than 50 abortions in any 12-month period.” Id. § 171.012(a)(4).

291 Utah Code Ann. §§ 76-7-306(6), (8) (West 2012). The requirement offer display and explanation do not apply if (i) the physician can demonstrate that he or she reasonably believed that doing so would have “resulted in a severely adverse effect on the physical or mental health of the pregnant woman, (ii) the pregnancy is the result of rape or incest or (iii) the pregnant woman is 14 years old or younger. Id. § 76-7-306(8).

## Ultrasound Bills

NR = No requirement

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<tr>
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<th>Physical Picture</th>
<th>Waiting Period</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Must perform</td>
<td>Must display live view, woman may choose not to look</td>
<td>NR</td>
<td>Must provide simultaneous explanation</td>
<td>NR</td>
<td>None</td>
</tr>
<tr>
<td>Idaho</td>
<td>Must perform</td>
<td>Must offer</td>
<td>NR</td>
<td>NR</td>
<td>Must offer</td>
<td>None</td>
</tr>
<tr>
<td>Illinois</td>
<td>Must offer if after 7 weeks gestation</td>
<td>Must offer live view</td>
<td>NR</td>
<td>NR</td>
<td>NR</td>
<td>None</td>
</tr>
<tr>
<td>Mississippi</td>
<td>Must perform</td>
<td>Must display; woman may choose not to look</td>
<td>Must make audible; woman may choose not hear</td>
<td>Must provide explanation; in limited cases, woman may choose not to receive</td>
<td>NR</td>
<td>24 hours</td>
</tr>
</tbody>
</table>


S. 12, 2012 Leg., Reg. Sess. § 3(b) (Ala. 2012).


H.R. 1107, 2012 Leg., 127th Leg. Sess. § 2 (Miss. 2012). Under the Mississippi bill, a woman may reject the simultaneous explanation, subject to certain conditions, if (i) the pregnancy resulted from sexual assault, incest or other violation of State law, (ii) the woman is a minor who is using judicial bypass procedures for an abortion, or (iii) the fetus has “an irreversible medical condition or abnormality.” Id. The explanation of the heart auscultation must be simultaneous. Id. The waiting period may be reduced to two hours if the woman certifies “that she currently lives one hundred (100) miles or more from the nearest abortion provider licensed under Section 41-75-1 et seq. or a facility that performs more than fifty (50) abortions in any twelve-month period.” Id.
<table>
<thead>
<tr>
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<th>Waiting Period</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Pennsylvania</strong></td>
<td>Must perform</td>
<td>Must display; woman may choose not to look</td>
<td>If auscultation performed, must offer</td>
<td>Must answer questions, inform of gestational age and any abnormal finding and provide information about heartbeat</td>
<td>Must provide</td>
<td>24 hours</td>
</tr>
<tr>
<td><strong>Virginia</strong></td>
<td>Must perform</td>
<td>Must offer</td>
<td>Must offer</td>
<td>NR</td>
<td>Must offer</td>
<td>24 hours</td>
</tr>
</tbody>
</table>

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298 H.R. 1077, Gen. Assem., 2011 Sess. §§ 4(a)(1), 5 (Pa. 2011). In addition to an exception for medical emergencies, the requirement do not apply to a woman who is pregnant as a result of rape or incest. *Id.* § 10.

299 H.D. 462, Gen. Assem., 2012 Sess. (Va. 2012). Under the Virginia bill, the waiting period is reduced to two hours if the “pregnant woman lives at least 100 miles from the facility where the abortion is to be performed.”