No. 14-1172

IN THE
Supreme Court of the United States

CHERYL WALKER-MCGILL, IN HER OFFICIAL CAPACITY AS PRESIDENT OF THE NORTH CAROLINA MEDICAL BOARD, ET AL.,
Petitioners,

v.

GRETCHEN S. STUART, ET AL.,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

North Carolina General Statute § 90-21.85 requires that at least four hours and no more than 72 hours before performing an abortion, a physician (or qualified technician) must perform an ultrasound on a patient seeking an abortion and, during the ultrasound procedure itself, display the ultrasound image so that the patient may see it and describe it in a manner prescribed by the state. The physician must display and describe the image even when the patient objects, even when complying with the statute would harm the patient, and even when the patient seeks to avoid the state-mandated speech by covering her eyes and ears, as the statute expressly permits her to do. No other court has considered the constitutionality of such a uniquely coercive regulation of physician speech.

The question presented is:

Whether the Fourth Circuit correctly held that N.C. Gen. Stat. § 90-21.85 compels speech in a manner that abridges the affected physicians' freedom of speech in violation of the First Amendment.

PARTIES TO THE PROCEEDING

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

Respondents, plaintiffs in the district court and appellees in the court of appeals, are Gretchen S. Stuart, MD, on behalf of herself and her patients seeking abortions; James R. Dingfelder, MD, on behalf of himself and his patients seeking abortions; David A. Grimes, MD, on behalf of himself and his patients seeking abortions; Amy Bryant, MD, on

behalf of herself and her patients seeking abortions; Serina Floyd, MD, on behalf of herself and her patients seeking abortions; A Woman's Choice of Greensboro, Inc.;* Planned Parenthood South Atlantic;** A Woman's Choice of Raleigh, Inc.; Takey Crist, on behalf of himself and his patients seeking abortions; Takey Crist, MD, PA, d/b/a Crist Clinic for Women.

RULE 29.6 STATEMENT

No respondent has a parent corporation and no publicly held company owns 10% or more of any respondent corporation's stock.

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* Decker & Watson, Inc., doing business as Piedmont Carolina Medical Clinic, a plaintiff in the courts below, is now A Woman's Choice of Greensboro, Inc., and remains a respondent here.

** Planned Parenthood of Central North Carolina and Planned Parenthood Health Systems, Inc., separate plaintiffs in the courts below, have merged to become Planned Parenthood South Atlantic, which remains a respondent here.

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COUNTERSTATEMENT OF THE CASE

This case concerns respondent medical providers' First Amendment challenge to the Display of Real-Time View Requirement (the "Requirement"), N.C. Gen. Stat. § 90-21.85, one provision of the Woman's Right to Know Act (the "Act"), enacted by the North Carolina legislature in 2011. That provision imposes uniquely coercive and harmful requirements on how physicians must speak to and treat their patients. It requires a physician, during an ultrasound examination, to display and describe, in his or her own voice and in a manner prescribed by the state, ultrasound images of the embryo or fetus to a patient seeking an abortion, even if the patient objects, even if the physician believes following the Requirement will harm the patient, and even when the patient actively avoids seeing or hearing the mandated display and description by covering her eyes and ears, which the Requirement specifically allows the patient to do.

In a unanimous opinion authored by Judge Wilkinson, the court below concluded that the Requirement compels respondents' speech in violation of the First Amendment. That decision is correct, and conflicts with no other court of appeals decision, because no other court has considered a speech mandate as onerous as the Requirement. Nor is the question presented ever likely to recur, because even the very few display-and-describe ultrasound requirements that have been enacted in other states are significantly less intrusive than the Requirement.

The petition should be denied.

A. Factual Background

1. Respondents are North Carolina physicians and healthcare providers who treat patients seeking abortions in a variety of settings, including major hospitals like the University of North Carolina. Pet. App. 38a; C.A. App. 786.[1] Prior to the Act, respondents' informed-consent practice was comparable to that of doctors in other areas of medicine. Pre-existing North Carolina law already required a physician to obtain informed consent from each patient, including abortion patients. N.C. Gen. Stat. § 90-21.13(a)(2); *see also* 10A N.C. Admin. Code 14E.0305(a).

Consistent with this law and their ethical obligations, respondents and/or their staff informed each patient about the nature of the abortion procedure, its risks and benefits, and the alternatives available to the patient and their respective risks and benefits; they likewise counseled the patient to ensure that she was certain about her decision to have an abortion. *See* C.A. App. 326-27, 409-10, 427-28. Moreover, even before the Act, respondents' general practice was to *offer* patients the option to view the ultrasound and ask questions. *See* Pet. App. 49a.[2]

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[1] "C.A. App." refers to the joint appendix filed with the Fourth Circuit.

[2] A North Carolina regulation that pre-dates the Act requires an ultrasound prior to an abortion. *See* 10A N.C. Admin. Code 14E.0305(d). Respondents in any event perform ultrasounds on patients seeking an abortion for diagnostic purposes to confirm the pregnancy, determine its location, and to establish the gestational age of the embryo or fetus. *See* C.A.

2. In their medical practice, respondents followed two principles that the traditional law of informed consent has always recognized and, as the undisputed facts before the district court confirmed, current medical practice continues to recognize: patient autonomy and therapeutic privilege, i.e., the principle that disclosure is not required when it "poses such a threat of detriment to the patient as to become unfeasible or contraindicated from a medical point of view." *Canterbury v. Spence*, 464 F.2d 772, 789 (D.C. Cir. 1972); *see* Pet. App. 24a, 29a-30a.

Accordingly, consistent with their ethical obligations and traditional medical practice, even though respondents generally chose to offer their patients the opportunity to view ultrasound images, they respected the decisions of those patients who elected not to view the images. Pet. App. 47a-50a; C.A. App. 449-51, 481. And, in rare circumstances, consistent with best medical practices, respondents would not offer to display and describe ultrasound images to patients who, in their medical judgment, were at significant risk of suffering psychological harm as a result of the offer itself. Pet. App. 47a-48a & n.12, 49a-50a.

B. The Act

The Act includes two components relevant to this case.

1. First, the Act includes an "informed consent" provision much like the provision upheld in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion). Section

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App. 327, 410-11, 428.

90-21.82 of the Act—which is not at issue here, and which has been in effect since 2011—is entitled "Informed consent to abortion." N.C. Gen. Stat. § 90-21.82.[3] It states that no abortion may be performed without a woman's voluntary and informed consent and that at least 24 hours before the procedure, a physician or qualified professional must inform the woman, *inter alia*, of the particular medical risks associated with the abortion procedure to be employed, the probable gestational age of the embryo or fetus, that medical assistance benefits may be available for prenatal care and childcare, that she has the right to review printed materials created by the state that provide information about embryonic and fetal development, *and* that she can view an ultrasound of the embryo or fetus and listen to any heartbeat, *if she so chooses*. *Id.* §§ 1(b), (c), (e), 2(a), (e). This provision is not at issue.

2. Second, the Act contains the Requirement, which is altogether different, and looks nothing like traditional informed consent.

The Requirement mandates that the physician or qualified technician conduct an ultrasound that gives "an obstetric real-time view of the unborn child" at least four hours before the woman can have an abortion. N.C. Gen. Stat. § 90-21.85(a). During this ultrasound procedure, the woman must lie supine on an examination table either naked from the waist down, covered only by a drape, or with the

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[3] Respondents initially challenged some portions of Section 90-21.82 on vagueness grounds, but the parties and the district court agreed on savings constructions, and respondents did not appeal that ruling. Pet. App. 5a n.1.

lower portion of her abdomen bared. Pet. App. 32a, 43a; *see* C.A. App. 327, 411, 428-29, 787. Depending on the stage of pregnancy, the provider performs the ultrasound either by inserting an ultrasound probe into the woman's vagina or by placing the ultrasound probe on her abdomen. Pet. App. 32a, 43a; C.A. App. 327, 411, 428-29.

The Requirement dictates that in the midst of this ultrasound procedure, the physician or qualified technician must:

- "[d]isplay the images so that the pregnant woman may view them," § 90-21.85(a)(3);
- provide a simultaneous, detailed "explanation of what the display is depicting," including "the presence, location, and dimensions" of the embryo or fetus within the uterus, § 90-21.85(a)(2); and
- provide a "medical description of the images . . . [including] the dimensions of the embryo or fetus and the presence of external members and internal organs, if present and viewable," § 90-21.85(a)(4).

The Requirement contains only one, narrow exception for a "medical emergency," defined as a condition requiring an immediate abortion to avert the woman's death or "substantial and irreversible" physical (but not psychological or emotional) injury. §§ 90-21.85(a), 90-21.86.

Thus, the Requirement compels respondents to display and describe ultrasound images to a woman regardless of her reason for choosing to terminate her pregnancy, even if she objects, even if the

physician believes it will harm her and violate medical ethics, and even when doing so is contrary to the physician's medical judgment. *See* N.C. Gen. Stat. § 90-21.85; Pet. App. 23a-31a, 43a; C.A. App. 331-32, 339-41, 413-16, 429-33.

Most absurdly, respondents must display and describe the ultrasound images even if the woman attempts to resist physically, with the Requirement stating that it should not be interpreted "to prevent a pregnant woman from averting her eyes from the displayed images or from refusing to hear" the state-mandated speech. N.C. Gen. Stat. § 90-21.85(b); *see also* Pet. App. 32a. Indeed, even if a woman puts "eye blinders and headphones" on, the physician must still continue to describe and display the image to a woman who attempts not to hear or see it. Pet. App. 44a; *see also* C.A. App. 483-84, 787.

C. Decisions Below

1. Respondents filed this action in September 2011 and sought a preliminary injunction, which the district court granted. *See Stuart v. Huff*, 834 F. Supp. 2d 424, 427 (M.D.N.C. 2011). After a full opportunity for record development, the parties cross-moved for summary judgment. On January 17, 2014, in a detailed opinion, the district court granted in part respondents' motion for summary judgment and permanently enjoined the Requirement. Pet. App. 39a.

2. The court of appeals unanimously affirmed in an opinion by Judge Wilkinson. The court "agree[d] with the district court that the Requirement is a content-based regulation of a medical professional's

speech which must satisfy at least intermediate scrutiny to survive." Pet. App. 10a.

a. The court explained that the "First Amendment not only protects against prohibitions of speech, but also against regulations that compel speech." Pet. App. 11a. And the Requirement, the court held, "is quintessential compelled speech." Pet. App. 12a. More than that, the court explained that "the statement compelled here is ideological; it conveys a particular opinion." *Id.* "Context matters," *id.* (quotation omitted), the court explained, and "[w]hile it is true that the words the state puts into the doctor's mouth are factual, that does not divorce the speech from its moral or ideological implications," *id.*

Based on this contextual analysis, the court of appeals rejected petitioners' related contentions that (i) any regulation of professional speech is subject to minimal First Amendment scrutiny, Pet. App. 15a-17a, and (ii) this case is governed by this Court's summary rejection of a First Amendment challenge to different abortion regulations in *Casey*, 505 U.S. at 884 (plurality opinion), Pet. App. 17a-20a. Rather, the court held that a "heightened intermediate level of scrutiny is . . . consistent with Supreme Court precedent and appropriately recognizes the intersection here of regulation of speech and regulation of the medical profession in the context of an abortion procedure." Pet. App. 20a.

b. The court held that the Requirement does not survive intermediate scrutiny. The court acknowledged that the "protection of fetal life, along with the companion interests of protecting the

pregnant woman's psychological health . . ., is undeniably an important state interest." Pet. App. 21a. But the court recognized that the "means employed here are far-reaching—almost unprecedentedly so—in a number of respects and far outstrip the provision at issue in *Casey*." Pet. App. 21a-22a.

For one thing, the Requirement "resemble[s] neither traditional informed consent nor the variation found in the Pennsylvania statute at issue in *Casey*." Pet. App. 24a. Most of the informed-consent information required by the statute considered in *Casey* "is the same type that would be required under traditional informed consent for any medical procedure." Pet. App. 26a. The Pennsylvania statute also required, for example, informing the patient that "the *state* prints materials that describe the unborn child," *id.* (emphasis added), a provision that, the court believed, "deviate[s] only modestly from traditional informed consent," *id.*

The Requirement, in contrast, "reaches beyond the modified form of informed consent that the Court approved in *Casey*," imposing "a virtually unprecedented burden on the right of professional speech that operates to the detriment of both speaker and listener." *Id.* The physician must display and describe the ultrasound "irrespective of the needs or wants of the patient, in direct contravention of medical ethics and the principle of patient autonomy." Pet. App. 32a. For example, the Requirement forces physicians to speak "to a woman who has through ear and eye covering rendered herself temporarily deaf and blind," noting that even

petitioners' "own expert witness agrees that the delivery of the state's message in these circumstances does not provide any information to the patient and does not aid voluntary and informed consent." Pet. App. 26a-27a. Moreover, even as to "a willing listener," Pet. App. 27a-28a, the Requirement (unlike the provision upheld in *Casey*) "compels the physician to speak and display the very information on a volatile subject that the state would like to convey"—the "physician is compelled to deliver the state's preferred message in his or her own voice." *Id.* Although "the state may certainly express a preference for childbirth over abortion," it "cannot commandeer the doctor-patient relationship to compel a physician to express its preference to the patient." Pet. App. 28a-29a.

Further, "by failing to include a therapeutic privilege exception, the [Requirement] interferes with the physician's professional judgment and ethical obligations." Pet. App. 29a. That was not true in *Casey*, where this Court found it important that the Pennsylvania statute "contained a therapeutic exception so that it 'does not prevent the physician from exercising his or her medical judgment.'" Pet. App. 30a (quoting *Casey*, 505 U.S. at 883-84). The court found the lack of such an exception in the Requirement "particularly" troubling "for women who have been victims of sexual assaults or whose fetuses are nonviable or have severe, life-threatening developmental abnormalities"—in these circumstances, "having to watch a sonogram and listen to a description of the fetus could prove psychologically devastating." Pet. App. 30a-31a (citing C.A. App. 332-33).

Finally, the court found it significant that under the Requirement, "informed consent" is supposed to be given when the patient is "half-naked or disrobed on her back on an examination table, with an ultrasound probe either on her belly or inserted into her vagina." Pet. App. 32a. "Though the state is plainly free to express such a preference for childbirth to women," the court held, "it is not the function of informed consent to require a physician to deliver the state's preference" to a patient in such circumstances. Pet. App. 32a.

Thus, the court concluded that "[w]hile the state itself may promote through various means childbirth over abortion, it may not coerce doctors into voicing that message on behalf of the state in the particular manner and setting attempted here." Pet. App. 34a. The court therefore held that the requirement violates the First Amendment, and affirmed the district court's judgment. *Id.*

REASONS FOR DENYING THE PETITION

The sole question presented in the petition is unworthy of this Court's review. Petitioners' principal argument for certiorari is that the decision below conflicts with decisions of the Fifth and Eighth Circuits. But there is no circuit conflict warranting this Court's intervention—all courts agree that the government cannot mandate physicians (or anyone else) to engage in ideological speech, and the other decisions on which petitioners rely upheld abortion regulations different in important respects from the Requirement's speech mandate. In any event, the petition does not present a recurring question of

national importance. Finally, the decision below is entirely correct.

The petition should be denied.

A. There Is No Circuit Conflict Warranting This Court's Intervention

The petition asserts that the Court should grant certiorari to resolve an alleged circuit conflict between the Fourth Circuit, on the one hand, and the Fifth and Eighth Circuits, on the other. Pet. 7-11. There is no circuit conflict warranting this Court's review, because no court has ever considered, let alone upheld, a law imposing as "unprecedented" of a "burden on the right of professional speech" as the Requirement does. Pet. App. 26a.

The Fifth and Eighth Circuits have held that "[w]hile [i] the State cannot compel an individual simply to speak the State's ideological message, [ii] 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 [iii] that information might also encourage the patient to choose childbirth over abortion." *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576 (5th Cir. 2012) (quoting *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 735 (8th Cir. 2008) (en banc)) (emphasis omitted). *See also Planned Parenthood Minn., N.D., S.D. v. Rounds*, 686 F.3d 889, 906 (8th Cir. 2012) (en banc) ("*Rounds*").

The decision below disagrees with none of these legal principles. Rather, the Fourth Circuit concluded that the speech mandated by the Requirement "is ideological in intent and in kind."

Pet. App. 4a. And all courts—including the Fifth and Eighth Circuits—agree that a state regulation compelling physicians to engage in ideological speech is subject to searching First Amendment scrutiny.

Petitioners are, of course, correct that the Fifth and Eighth Circuits upheld particular regulations against First Amendment challenge, while the decision below invalidated the Requirement. But the regulations approved by the Fifth and Eighth Circuits—which both courts found to be non-ideological and subject only to rationality review—are fundamentally different from the Requirement in ways that bear directly on the appropriate level of scrutiny. No court has upheld a physician-speech regulation as uniquely intrusive as the Requirement.

1. In *Rounds*, the challenged regulations required physicians to provide certain written information concerning the risks of abortion to a patient prior to performing an abortion. 686 F.3d at 892-93. The Eighth Circuit expressly recognized that "the State cannot compel an individual simply to speak the State's ideological message," *id.* at 893, but concluded as a factual matter that the written risk disclosure requirements reflected scientific truth about the risks of abortion, *id.* at 894-905.

None of that is true of the Requirement, as the court below specifically concluded. To begin, the Fourth Circuit held the Requirement to be ideological in large part because it "is intended to convey *not* the risks and benefits of the medical procedure to the patient's own health, but rather the full weight of the state's moral condemnation." Pet. App. 32a (emphasis added). Moreover, in *Rounds,*

the patients were required to confirm that they received the written disclosures about risks as part of the informed consent process, S.D. Codified Laws § 34-23A-10.1(1)(g), while the court below explained that a woman can give legally valid informed consent under the Act even if she actively blocks out the image and refuses to hear the description mandated by the Requirement. Pet. App. 26a-27a. The Fourth Circuit took this fact to be good evidence that the Requirement's purpose is ideological and performative rather than informative.

Moreover, unlike the Requirement, the regulation construed by the Eighth Circuit in *Rounds* required a written disclosure—not a statement in the physician's own voice—and had to be provided "no later than two hours before the procedure [was] to be performed," not when the patient is partially naked on an examination table. S.D. Codified Laws § 34-23A-10.1; *compare* Pet. App. 28a, 31a-32a (Requirement forces the physician "to deliver the state's preferred message in his or her own voice" while the patient is "half-naked or disrobed on her back on an examination table, with an ultrasound probe either on her belly or inserted into her vagina"). The Fourth Circuit found it significant that the Requirement forces physicians to "explicitly promote[] a pro-life message" at a time "when the intended recipient is most vulnerable." Pet. App. 13a.

Thus, the Fourth and Eighth Circuits agree that the state may not require physicians to speak the state's ideological message. But the Fourth Circuit concluded that the Requirement had characteristics rendering it ideological that the Eighth Circuit

believed the regulation at issue in *Rounds* lacked. There is no conflict between those two decisions.

2. While the regulation upheld by the Fifth Circuit in *Lakey*, like the Requirement, requires physicians to display and describe an ultrasound in some circumstances, there are important distinctions between those regulations, and the Fourth Circuit found those distinctions significant in concluding that the Requirement is ideological and violates the First Amendment.

The Fourth Circuit concluded that the Requirement is ideological in part because it contains no therapeutic privilege exception—it requires physicians to deliver the state's message in all circumstances except in narrowly defined "medical emergencies," i.e., when the patient could die or suffer physical harm absent an abortion. Pet. App. 30a; *see supra* at 5. The court concluded that "[r]equiring the physician to provide the information regardless of the psychological or emotional well-being of the patient," Pet. App. 31a—particularly as to "women who have been victims of sexual assaults or whose fetuses are nonviable or have severe, life-threatening developmental abnormalities" and for whom "having to watch a sonogram and listen to a description of the fetus could prove psychologically devastating," Pet. App. 30a-31a (citing C.A. App. 332-33)—cannot plausibly serve any permissible state interests. Pet. App. 31a. Thus, there was no basis other than ideology, the court concluded, to depart so starkly from traditional informed-consent principles. *Id.*

Unlike the Requirement, the Texas regulation has several important exceptions, including for "pregnancy as a result of rape or incest," and "a fetus with an irreversible medical condition or abnormality." *Lakey*, 667 F.3d at 578 n.6. In other words, Texas physicians *do* have the option not to comply with that state's regulation in the circumstances in which the Fourth Circuit believed the Requirement's lack of a therapeutic privilege exception was particularly inconsistent with traditional informed consent. There are important differences between the statute the Fifth Circuit upheld and the one the Fourth Circuit invalidated.

For these reasons, there is no circuit conflict warranting this Court's review.[4] At best, there is a disagreement between the Fourth and Fifth Circuits concerning how to apply the proper legal standard to different speech regulations in abortion cases. But no court other than the court below has ever evaluated on First Amendment grounds a speech mandate that imposes the same sort of "virtually *unprecedented* burden on the right of professional speech" as the Requirement does. Pet. App. 26a (emphasis added). Particularly because this issue is

[4] Petitioners assert that the decision below "respectfully disagree[d]" with the standard of review adopted by the Fifth and Eighth Circuits, Pet. 10 (quoting Pet. App. 17a), but the petition's quotation excludes an important qualifier: any disagreement only applies *"[i]nsofar as* our decision on the applicable standard of review differs from the positions taken by the Fifth and Eighth Circuits." Pet. App. 17a (emphasis added). The Fourth Circuit's uncertainty over whether there really is any disagreement undermines petitioners' assertion of a concrete circuit conflict.

unlikely to recur with any frequency, if ever, *see infra* Section B, the Court should wait to see if there is a real disagreement among the courts of appeals before granting review.

B. The Petition Does Not Present A Recurring Question Of National Importance

Even if there were a circuit conflict over the question presented, review would still be unwarranted because the petition presents no recurring question of national importance.

1. Petitioners assert that "[s]tatutory provisions imposing physician disclosure requirements specific to abortions have become prevalent in the last two decades," and that "[w]hether, and the extent to which, the First Amendment precludes those efforts is an issue of pressing importance." Pet. 11-12. Yet nearly every statute petitioners cite presents no significant First Amendment issue under the principles articulated by the court below.

a. The petition cites 24 states that "require an ultrasound to be performed or offered to a woman prior to the performance of an abortion." Pet. 12; *see* Pet. 12 n.2 (citing statutes). But requiring physicians to perform an ultrasound, let alone to *offer* one, poses no First Amendment problem, because it does not require physicians to display or describe the ultrasound at all, much less in a manner prescribed by the state, and thus does not require them to speak the state's message. Indeed, North Carolina has long required that physicians perform an ultrasound before performing an abortion, *see supra* at 2 n.2—a provision not challenged here or in any other case of which

respondents are aware—and the record demonstrates that respondents would perform an ultrasound for medical reasons even if the state did not require one, *id*. The decision below simply has nothing to do with the 24 statutes on which petitioners rely.

Petitioners also cite four states that "require a physician to provide a simultaneous explanation of an ultrasound image *upon a woman's request*," Pet. 13 (emphasis added); *see* Pet. 13 n.5 (citing statutes), but the Requirement, of course, does not apply only "upon a woman's request." It applies in every case, even over a woman's objection, which is one reason why the Fourth Circuit held it invalid. Pet. App. 23a-33a. Indeed, the court below explained that the central failing of the Requirement is its rejection of the fundamental informed-consent principle of "patient autonomy in medical treatment." Pet. App. 24a. That principle is fully consistent with requiring physicians to display and describe an ultrasound *when the patient requests it*. Indeed, the record here demonstrates that respondents' practice was already to display and describe an ultrasound image upon request. Pet. App. 49a-50a. Again, the provisions petitioners cite are fully consistent with the decision below.

c. That leaves only five states that the petition describes as having "enacted essentially the same display-and-describe requirement at issue in this case." Pet. 12. If anything, the small number of provisions petitioners cite demonstrates exactly why the question presented is unlikely to recur. Two of the five cited provisions (Pet. 12 n.4) are the Requirement, and the Texas law upheld in *Lakey*,

the constitutionality of which has already been adjudicated. So too has the constitutionality of the cited Oklahoma statute (*id.*), which the Oklahoma Supreme Court invalidated on due process, not First Amendment grounds. *See Nova Health Sys. v. Pruitt*, 292 P.3d 28, 28 (Okla. 2012), *cert. denied*, 134 S. Ct. 617 (2013).

There are thus only two remaining cited provisions—one from Louisiana and one from Wisconsin—neither of which has been challenged. And unlike the Requirement, each contains an exception for women who are pregnant as a result of rape or incest, La. Rev. Stat. Ann. § 40:1299.35.2(E); Wis. Stat. § 253.10(3m).

The petition thus affords no basis to believe that the question presented will ever recur. At the very least, the shallowness of the alleged split and the few states that have enacted provisions even remotely resembling the Requirement counsels against granting certiorari here. If petitioners are right that the petition presents a question of recurring national importance, the Court will have the opportunity to resolve the question in the future, with the benefit of further percolation in the lower courts.

2. Petitioners also allege that this case implicates a broader "difficulty courts are having in determining the proper standard of review for statutes impacting professional speech," citing recent opinions from the Third, Ninth, and Eleventh Circuits. Pet. 14. But the court below held that its

analysis was consistent with each of the three decisions petitioners cite. Pet. App. 16a.[5] There is accordingly no broader disagreement among the circuits implicated by this case. The petition should be denied.

C. The Decision Below Is Correct

The Fourth Circuit's unanimous decision invalidating the Requirement under the First Amendment is also entirely correct. The Requirement mandates that physicians personally and in their own voice deliver a government message against abortion to their patients, even over a patient's objection, even when the physician believes delivering the message would harm the patient, and even when the patient is actively blocking out the speech. *See supra* at 4-6. Such a profound intrusion

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[5] The Third Circuit applied the same "intermediate" scrutiny to the regulation at issue there as did the court below. *See King v. Governor of N.J.*, 767 F.3d 216, 233 (3d Cir. 2014). This Court recently denied certiorari in *King*. *King v. Christie*, No. 14-672 (May 4, 2015). The Ninth Circuit has held, contrary to petitioners' position, that "doctor-patient communications *about* medical treatment"—like the Requirement—"receive *substantial First Amendment protection*." *Pickup v. Brown*, 740 F.3d 1208, 1227 (9th Cir. 2014) (emphasis added). And the Eleventh Circuit applied a deferential standard of review only because the law at issue there precluding physicians from asking patients "questions about firearm ownership" applied only "*when doing so would be irrelevant to patients' medical care*." *Wollschlaeger v. Governor of Fla.*, 760 F.3d 1195, 1219 (11th Cir. 2014) (emphasis added). Unlike with the Florida law upheld by the Eleventh Circuit, petitioners' principal argument is that the Requirement *is* relevant (indeed, necessary) to respondents' patients' medical care.

on physician speech is "virtually unprecedented," Pet. App. 26a, and certainly unconstitutional.

1. a. Petitioners do not dispute the well-established rule that the First Amendment protects not only against government restrictions on speech, but also against speech compelled by the government. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995); *see also Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013). As the Fourth Circuit explained, "[t]he Requirement is quintessential compelled speech" because "[i]t forces physicians to say things they otherwise would not say." Pet. App. 12a.

Consistent with the Court's precedent that the "level of scrutiny to apply to a compelled statement" turns on "the nature of the speech taken as a whole and the effect of the compelled statement thereon," *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988), the court of appeals undertook a careful analysis to determine the appropriate level of scrutiny in this case. Pet. App. 9a (examining "type of regulation at issue to determine the requisite level of scrutiny to apply").

In applying this contextual analysis, the court correctly rejected the suggestion that states may enact speech mandates at will if the subject is a professional generally, or a physician specifically. The court instead recognized that there are "many dimensions" to professionals' speech. Pet. App. 15a (citing *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995)). Thus, although the "state's power to prescribe rules and regulations for professions,

including medicine, has an extensive history," Pet. App. 14, not all regulations of professional speech are the same, Pet. App. 16a. Indeed, this Court has applied varying levels of scrutiny to regulations of professional speech. *See, e.g., Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667-78 (2011); *Legal Servs. Corp. v. Velasquez*, 531 U.S. 533, 543-44 (2001); *Riley*, 487 U.S. at 796.

Thus, while the court recognized that the state has an interest in "direct[ing] doctors to do certain things in the context of treating a patient," Pet. App. 16a, it also correctly explained that multiple factors compel the conclusion that the Requirement warrants more than rational-basis review. The court pointed out that the Requirement puts words directly into the mouths of physicians that they do not want to say, thus imposing a "clearly content-based regulation of speech," Pet. App. 16a, which normally is presumed invalid. Pet. App. 8a; *see, e.g.*, *Riley*, 487 U.S. at 795; *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012). And not only does the Requirement "forc[e] physicians to say things they otherwise would not say," but "the statement compelled here is ideological," Pet. App. 12a—it "explicitly promotes a pro-life message by demanding the provision of facts that all fall on one side of the abortion debate—and does so shortly before the time of decision when the intended recipient is most vulnerable," Pet. App. 13a. Ideological speech regulations are subject to heightened First Amendment scrutiny. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). The court likewise recognized that the Requirement contrasts starkly with prevailing

informed consent practice in the medical profession. Pet. App. 4a, 34a; *see infra* at 22-23.

b. Petitioners object to this straightforward conclusion principally based on this Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, which upheld against First Amendment challenge an informed-consent provision very different from the Requirement. 505 U.S. 833, 884 (1992) (plurality opinion). But the court of appeals correctly explained that the distinctions between the Requirement and the Pennsylvania law considered in *Casey* make all the difference for First Amendment purposes.

In particular, the court explained that, unlike the statute in *Casey*, the Requirement "markedly depart[s] from standard medical practice" in numerous ways. Pet. App. 31a. The statute in *Casey* only required physicians to *offer* their patients state-sponsored written materials and contained an express therapeutic privilege exception, *Casey*, 505 U.S. at 883-84, whereas the Requirement forces a physician to speak to a patient who is actively not listening and precludes physicians from exercising any medical judgment by omitting a therapeutic privilege exception. Pet. App. 31a. Indeed, the court correctly explained that the Requirement "look[s] nothing like traditional informed consent, or even the version[] provided for in *Casey*," *id.*—while "informed consent frequently consists of a fully-clothed conversation between the patient and physician, often in the physician's office," "[t]his provision . . . finds the patient half-naked or disrobed on her back on an examination table, with an ultrasound probe either on her belly or inserted into

her vagina," while the physician is compelled to deliver the state's message. Pet. App. 31a, 32a.

Petitioners' claim that the Requirement is only "*slightly different*" from the Pennsylvania statute upheld in *Casey*, Pet. 15 (emphasis added), is untenable. In *Casey*, the state's message about fetal life was communicated through the state's *own* speech, in a pamphlet produced by the state itself, which the physician only needed to offer to the patient, and only then if the physician concluded that the offer itself would not be harmful. Pet. App. 28a (citing 18 Pa. Cons. Stat. § 3205(a)(2)(i) & (a)(3), *Casey*, 505 U.S. at 881). Here, by contrast, the physician must deliver the state's message about fetal life in his or her own voice, regardless of what the patient wants, in the midst of a medical procedure. *Casey* would be more closely analogous to this case if the regulation there required the physician to read the state pamphlet to every patient while she was disrobed on an examination table, even over her objection, even if it is the physician's medical judgment that doing so would harm the patient, and even if the patient was actively covering her eyes and stopping her ears. *Casey* never approved of any such drastic speech mandate, as the court below correctly held.

Petitioners assert that the Fourth Circuit provided "no principled basis" for subjecting the requirement to a higher level of scrutiny than the Court applied in *Casey*. Pet. 17. But the court below analyzed the distinctions between *Casey* and the Requirement in detail, as just described. And the court correctly concluded that those differences required a different level of scrutiny, since the "level of scrutiny

to apply to a compelled statement" turns on "the nature of the speech taken as a whole and the effect of the compelled statement thereon." *Riley*, 487 U.S. at 796. Here, and in contrast to *Casey*, the nature and context of the Requirement's speech mandate compel heightened scrutiny, as the court of appeals correctly held.

2. Petitioners also err in their contention that the Fourth Circuit "never explained why the State did not satisfy" intermediate scrutiny. Pet. 17. Not only did the court of appeals (contrary to petitioners' assertion) "dispute that there is a close fit" between the state's goals and the Requirement's effect, Pet. 18, but it also explained the many ways in which the Requirement directly undermines the goals petitioners say it is supposed to further.

The court analyzed three interests that the State claimed were furthered by the Requirement: promoting the psychological health of women seeking abortions, maintaining the integrity and ethics of the medical profession, and protecting fetal life. Pet. App. 22a-23a. It then concluded that the Requirement failed intermediate scrutiny because it did not directly advance any of these interests in a manner that was proportional to the burden placed on physician speech. Pet. App. 30a-31a, 33a.

For example, the court explained that the Requirement actually undermines the psychological well-being of women seeking abortions by mandating that physicians display and describe the ultrasound image even over a woman's objection and even if it would be emotionally harmful to her. Pet. App. 30a-31a. Similarly, by eliminating any therapeutic

privilege exception and thus all physician judgment, which were explicitly preserved by the statute at issue in *Casey*, the Requirement "runs contrary to the state's interest in 'protecting the integrity and ethics of the medical profession.'" Pet. App. 30a (citing *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007)). Indeed, the Requirement's mandate that the physician display and describe the ultrasound image "irrespective of the needs or wants of the patient" is "in direct contravention of medical ethics and the principle of patient autonomy" that lies at the core of informed consent. Pet. App. 32a.

The court likewise correctly concluded that the "means here exceed what is proper" to promote the interest in fetal life. Pet. App. 33a. As the court noted, by requiring physicians to deliver the state's anti-abortion message when the patient is particularly vulnerable—and indeed even when the patient is covering her eyes and ears—the Requirement is designed not simply to persuade but to convey "the full weight of the state's moral condemnation" to the woman, using the physician's own voice. Pet. App. 32a. "Though the state is plainly free to express such a preference for childbirth to women, it is not the function of informed consent to require a physician to deliver the state's preference in a setting this fraught with stress and anxiety." *Id.*

Indeed, while petitioners strangely ignore pages and pages of the Fourth Circuit's reasons for holding that the Requirement fails intermediate scrutiny, they make no effort to explain how the Requirement could possibly be reasonably tailored to achieving any informed-consent-related state interest when

the state requires physicians to recite the state's message *even when the patient physically avoids seeing or hearing it*—a requirement that petitioners' own expert admitted serves no purpose at all. *See supra* at 8. That is farce, not informed consent, and it demonstrates beyond any doubt that the Requirement is an impermissible attempt to use physicians to spread the state's ideological message. The First Amendment simply does not allow that result. The petition should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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