No. 14-1172

In The Supreme Court of the United States

CHERYL WALKER-MCGILL, MD, in her official capacity as President of the North Carolina Medical Board and her employees, agents, and successors, et al.,

Petitioners,

v.

GRETCHEN S. STUART, MD, on behalf of herself and her patients seeking abortions, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF *AMICI CURIAE* NORTH CAROLINA MEDICAL PROFESSIONALS, POST-ABORTIVE WOMEN AND PREGNANCY MEDICAL CENTERS IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI*[1]

Medical Professionals

Drs. Martin J. McCaffery, M.D., and Gregory J. Brannon, M.D., FACOG, are members in good standing of the North Carolina medical community. Drs. McCaffery and Brannon are legally and professionally interested, on behalf of themselves and their patients, in ensuring that every woman who seeks an abortion in North Carolina is given all relevant information relating to her fetus and the abortion procedure so that her decision to either terminate or carry her pregnancy to term is fully informed and, therefore, truly voluntary. Dr. McCaffrey is licensed to practice medicine in North Carolina and California and is Board-Certified in Neonatal-Perinatal Medicine. He is a Professor of Pediatrics in Neonatal-Perinatal Medicine at the University of North Carolina at Chapel Hill, Director of the Perinatal Quality Collaborative of North Carolina, and a practicing neonatologist at North Carolina Children's Hospital. He routinely counsels women with high risk pregnancies and regularly relies upon ultrasonography in his practice to fully inform his patients. Dr. Brannon is a

[1] As required by Rule 37.2(a), counsel of record for each party received timely notice of the intent to file this *amicus* brief and consented to its filing. Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person other than the *amici* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

physician licensed to practice in North Carolina. He is Board-Certified by the American Board of Obstetrics and Gynecology and is a fellow in the American College of Obstetrics and Gynecology. Based on their years of experience and expertise, Drs. McCaffrey and Brannon believe that *Stuart v. Camnitz*, 774 F.3d 238 (2014) is inconsistent with both the governing case law as well as the dictates of medical ethics, the common practice of most obstetricians and gynecologists in North Carolina, and the medical research indicating the efficacy of the patient's observing and then receiving her doctor's explanation of her ultrasound before deciding whether to terminate her pregnancy. Accordingly, if the Act is not enforced, they and their patients will be adversely affected.

Post-Abortive Women

Chimere Collins, Danelle Hallenbeck, Tracie Johnson, and Lanita Wilks are North Carolina residents who had abortions in North Carolina. The physicians performing their abortions either did not administer an obstetric ultrasound or did not display and accurately explain the images prior to performing the abortion as the Act challenged in this action would have required. Having now learned that such information was available, each woman believes that, because she did not receive an ultrasound with a medical explanation of the images displayed prior to the abortion, she did not – and could not – give fully informed consent. All of these women have suffered mental and emotional injuries as a result of having

an abortion that was procured without their having full knowledge about the development of the fetus and, therefore, without their fully informed consent.

Pregnancy Medical Centers (PMCs)

Carolina Pregnancy Care Fellowship (CPCF) represents 65 pregnancy resource agencies. Since 2014, CPCF has been a state contractor allocating state funding to affiliated pregnancy resource centers to provide, *inter alia*, limited ultrasound services for the purpose of diagnosing the existence of a live pregnancy. Asheville Pregnancy Support Services (APSS) and the Pregnancy Resource Center of Charlotte (PRCC) are North Carolina not-for-profit organizations that serve women and men in North Carolina who are involved in an unplanned pregnancy. In particular, the PMCs provide vital information, such as real-time imaging and fetal heart tone services, that the Act authorizes so that women can make fully informed decisions regarding their pregnancies. All medical services at APSS and PRCC are provided without charge by medical doctors who are obstetrician/gynecologists certified by the American Board of Obstetrics and Gynecology, registered nurses trained and tested for competency in limited obstetrical ultrasound, and registered diagnostic medical sonographers certified in obstetrics and gynecology by the American Registry of Medical Sonography.

Based on their years of experience working with post-abortive women in North Carolina, the PMCs

believe that many abortion providers in North Carolina do not give women sufficient information for them to make a truly informed decision about whether to have an abortion. The PMCs also believe that providing additional factual information about and displaying images of the fetus will help these women make a truly voluntary and informed decision regarding their pregnancies, which, in turn, will reduce the risk of adverse psychological consequences that all too often affect women who subsequently learn that their decision was not fully informed. *See Gonzales v. Carhart*, 550 U.S. 124, 159-60 (2007).

REASONS FOR GRANTING THE WRIT

Review is warranted in this case because the Fourth Circuit's opinion in *Stuart v. Camnitz*, 774 F.3d 238 (2014) (i) generates two different circuit conflicts on an issue of national import – the scope of a State's right to "protect[ ] 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" and to protect "the psychological well-being [of the woman seeking an abortion by] . . . reducing the risk that [she] may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed," *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833,

883, 882 (1992) – and (ii) is inconsistent with this Court's reasoning in *Casey*, *Zauderer v. Off. of Disc. Counsel*, 471 U.S. 626 (1985) and *Whalen v. Roe*, 429 U.S. 589 (1977). Moreover, given that the circuit conflicts are entrenched, only this Court can resolve the split among the circuits and clarify the proper level of scrutiny for compelled disclosures related to abortion and medical procedures generally.

I. Certiorari Should Be Granted Because the Circuits Are in Conflict over the Appropriate Level of Scrutiny to Apply to Compelled Disclosures Relating to Abortion.

The First Amendment protects "both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1995). Accordingly, *Casey* acknowledges that compelled disclosures related to abortion "implicate" the First Amendment rights of physicians. But recognizing that the First Amendment is implicated does not determine the appropriate level of scrutiny to apply to such disclosures. Under *Riley*, the level of scrutiny depends on the context of the compelled speech: "Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statement thereon." *Riley v. Nat'l Fed. for the Blind*, 487 U.S. 781, 796 (1988). In the speech-and-display context, then, the proper level of scrutiny

depends on the nature of patient-physician communications and the effect of the mandated disclosures on those communications.

Although *Casey* considered and resolved a compelled speech claim in the abortion context, an intractable conflict has developed between and among the Circuit Courts regarding the proper interpretation of *Casey*. This conflict has manifested itself in two distinct ways. *First*, the Fourth Circuit expressly rejects the Fifth and Eighth Circuits' interpretation of *Casey*. Whereas the Fifth and Eighth Circuits take *Casey* to establish a general rule – that truthful, nonmisleading, and relevant disclosures related to abortion are subject to rational basis scrutiny – the Fourth Circuit holds that *Casey* is limited to its facts and does not specify the level of scrutiny for compelled disclosures related to sonogram images.

Second, having attempted to distinguish *Casey*, the Fourth Circuit is forced to look to other First Amendment principles – such as the professional speech doctrine – to support its use of heightened scrutiny. In so doing, though, the Fourth Circuit generates another Circuit conflict, this time with the Third, Ninth, and Eleventh Circuits, which hold that factual, nonmisleading disclosures in the context of professional-client communications are subject to rational basis review. Moreover, the Fourth Circuit's reasons for using heightened scrutiny directly conflict with *Zauderer*, which upheld compelled disclosures related to legal advertising under rational basis review.

A. The Fourth Circuit's Heightened Scrutiny Analysis Openly Conflicts with the Fifth and Eighth Circuits, which Interpret *Casey* as Applying Rational Basis Review to Truthful, Nonmisleading Disclosures.

In *Stuart*, the Fourth Circuit expressly admits that its use of heightened scrutiny conflicts with decisions in the Fifth and Eighth Circuits. The central disagreement involves an extremely important but often overlooked section of *Casey* in which the plurality denied that physicians have a First Amendment right "not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State." *Casey*, 505 U.S. at 884. In particular, the plurality stated: "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, cf. *Whalen v. Roe*." *Id*. (internal citations omitted).

Given that compelled speech related to abortion "is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure," *Casey*, 505 U.S. at 884, determining the proper scope of this section is critically important. Yet the Circuits offer fundamentally different interpretations of this section,

leaving several important questions unresolved.[2] Does *Casey* establish a reasonableness standard for the disclosures required under Pennsylvania law or for all abortion-related disclosures? Does that standard apply in other medical contexts as well? Do truthful, nonmisleading disclosures constitute ideological speech if the State seeks to promote childbirth over abortion? The answers to these questions have wide-ranging consequences for the numerous States that have enacted informed consent statutes related to abortion, the women who seek to make an informed decision whether to have an abortion, the doctors and medical personnel who perform the procedure, and the nation as a whole. *See Casey*, 505 U.S. at 852.

The Fourth Circuit answers these questions in a significantly different way than the Fifth and Eighth Circuits, creating a nonuniform system of governmental regulations and of physicians' First Amendment

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[2] The disagreement surrounding *Casey*'s impact on mandatory disclosures in the medical context extends to state supreme courts. In *Nova Health Sys. v. Pruitt*, 292 P.3d 28 (Okla. 2012), *cert. denied*, 134 S. Ct. 617 (2013), the Oklahoma Supreme Court struck down Oklahoma's speech-and-display law in a short, three paragraph decision, claiming that in *Casey* "the United States Supreme Court has previously determined the dispositive issue presented in this matter." *Id*. at 28. Consequently, there is a three way conflict among the courts that have analyzed speech-and-display laws. The Fifth Circuit takes *Casey* to support such mandatory disclosures, the Oklahoma Supreme Court interprets *Casey* as precluding such compelled statements, and the Fourth Circuit denies that *Casey* applies at all.

speech rights. In analyzing the constitutionality of Texas' speech-and-display law (which is materially identical to North Carolina's speech-and-display statute), the Fifth Circuit concluded that *Casey* applied "the antithesis of strict scrutiny." *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 575 (5th Cir. 2012). Provided that informed consent statutes "require truthful, nonmisleading, and relevant disclosures," such laws do not impose an undue burden on a woman's right to choose. *Id*. at 576. In addition, because a State has a "significant role . . . in regulating the medical profession" and "may use its voice and regulatory authority to show its profound respect for the life within the woman," *Gonzales*, 550 U.S. at 128, such truthful, non-misleading, and relevant disclosures do not infringe the First Amendment rights of doctors. Although speech-and-display disclosures are "more graphic and scientifically up-to-date, than the disclosures discussed in *Casey*," the Fifth Circuit determined that they "are the epitome of truthful, non-misleading information" and, therefore, "are not different in kind." *Lakey*, 667 F.3d at 578. Thus, the Fifth Circuit upheld Texas' speech-and-display law as a reasonable regulation by the State. According to the Fifth Circuit, to hold otherwise would permit doctors to use the First Amendment to "essentially trump the balance *Casey* struck between women's rights and the states' prerogatives." *Id.* at 577.

In *Rounds*, the Eighth Circuit sitting en banc considered a First Amendment challenge to an informed consent provision that, among other things,

required physicians to disclose that the abortion "will terminate the life of a whole, separate, unique, living human being" with whom the woman "has an existing relationship" that is entitled to legal protection. *Planned Parenthood Minn. v. Rounds*, 530 F.3d 724, 726 (8th Cir. 2008 (en banc)). Drawing on *Casey* and *Gonzales*, the Eighth Circuit concluded that as long as the informed consent regulations are reasonable a State "can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion, even if that information might also encourage the patient to choose childbirth over abortion." *Id*. at 735.

In contrast, the Fourth Circuit limited *Casey* to its facts. The panel concluded that the plurality's "particularized finding" – that Pennsylvania's disclosures did not violate the First Amendment rights of physicians – "hardly announces a guiding standard of scrutiny for use in every subsequent compelled speech case involving abortion." *Stuart*, 774 F.3d at 249. The Fifth and Eighth Circuits "read too much into *Casey* and *Gonzales*," neither of which set forth "the proper level of scrutiny to be applied to abortion regulations that compel speech to the extraordinary extent present here." *Id*. Thus, having distinguished *Casey* and *Gonzales*, the *Stuart* panel looked to other First Amendment cases to support its application of heightened scrutiny to North Carolina's speech-and-display disclosures.

The conflict between the Circuits directly affects the ability of States to compel truthful disclosures related to abortion (and other medical procedures) and to promote their interests in "ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion." *Casey*, 505 U.S. at 883. Only this Court can resolve the conflict on this important issue because only this Court can provide the determinative interpretation of *Casey*.

B. The *Stuart* Panel's Reasoning Contravenes the Professional Speech Doctrine Employed in the Third, Ninth, and Eleventh Circuits as Well as This Court's Reasoning in *Zauderer*.

Because the Fourth Circuit denies that *Casey* establishes the proper level of scrutiny, the panel appeals to the professional speech doctrine as developed in the Third, Ninth, and Eleventh Circuits to support its application of heightened scrutiny.[3] *See*

[3] The professional speech doctrine recognizes that the State has an important role to play in regulating professionals even when their professions involve speech. In his concurrence in *Lowe v. S.E.C.*, Justice White noted that the First Amendment does not insulate all professional speech from regulation: "The power of government to regulate the professions is not lost whenever the practice of a profession entails speech." 472 U.S. 181, 228 (1985) (White, J., concurring). As Justice Jackson noted in *Thomas v. Collins*, States have greater authority to compel factual disclosures in professional-client communications but cannot restrict the rights of professionals, such as physicians, to

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King v. Gov. of N.J., 767 F.3d 216 (3d Cir. 2014); *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2013); and *Wollschlaeger v. Gov. of Fla.*, 760 F.3d 1195 (11th Cir. 2014). Under the professional speech doctrine, the level of scrutiny "slides 'along a continuum' from 'public dialogue' on one end to 'regulation of professional *conduct*' on the other." *Stuart*, 774 F.3d at 248 (citation omitted). Because speech-and-display laws "require[ ] doctors to 'say' as well as 'do,'" the Fourth Circuit concludes that such disclosures fall somewhere in the middle of the continuum and, therefore, warranted at least "a heightened intermediate scrutiny standard used in certain commercial speech cases." *Id*.

The Fourth Circuit's interpretation of the professional speech doctrine, though, generates two additional conflicts. First, the Fourth Circuit's use of intermediate scrutiny is inconsistent with the Third, Ninth, and Eleventh Circuits' development of the professional speech doctrine. As the Third Circuit acknowledges, "our sister circuits have concluded that regulations of professional speech are subject to a more deferential standard of review or, possibly, no review at all." *King*, 767 F.3d at 235. Although ultimately applying heightened scrutiny to a speech *prohibition*, the Third Circuit recognized – contrary to

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speak generally about the practice of medicine or "make it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought." 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

the Fourth Circuit – that *Casey* and *Zauderer* applied rational basis review to "a special category of laws that compel disclosure of truthful factual information." *Id.* at 236. Thus, the Fourth Circuit's application of heightened scrutiny to the truthful, nonmisleading disclosures under the Act is inconsistent with the Third Circuit's interpretation of *Casey* and *Zauderer*.

The Fourth Circuit also conflicts with the Ninth Circuit regarding the proper standard of review for truthful nonmisleading disclosures in the medical context. While recognizing that the level of review applied to regulations of a profession slides along a continuum, the Ninth Circuit's analysis is more nuanced than the Fourth Circuit suggests. The Ninth Circuit distinguishes between types of professional speech as well as between speech and conduct. According to the Ninth Circuit, the proper level of scrutiny to apply to professional speech depends on whether the professional's speech is public or private. When "a professional is engaged in a public dialogue, First Amendment protection is at its greatest."[4] But the standard is relaxed considerably when professionals engage in speech with their clients:

> [T]he First Amendment tolerates a substantial amount of speech regulation within the professional-client relationship that it would

[4] *See also Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) ("speech on matters of public concern is at the heart of the First Amendment protections").

> not tolerate outside of it. And that toleration makes sense: When professionals, by means of their state-issued licenses, form relationships with clients, the purpose of those relationships is to advance the welfare of the clients, rather than to contribute to public debate.

Pickup, 740 F.3d at 1228.[5] In fact, the Ninth Circuit concluded that the compelled disclosures in *Casey* required only "diminished" protection, which is why the plurality upheld the disclosures as "'*reasonable licensing and regulation by the State*.'" *Id*. (quoting *Casey*, 505 U.S. at 884) (emphasis in *Pickup*). As a result, the Ninth Circuit applied "only rational basis review." *Id.* at 1231.

The Fourth Circuit's invocation of *Wollschlaeger* fares no better. *Stuart* cites to the Eleventh Circuit's decision to support its claim that the level of scrutiny depends on whether the government is regulating speech or conduct. But the Eleventh Circuit, consistent with *Pickup*, recognizes that the proper standard for professional speech regulations is determined by the public or private nature of the professional's speech: "These [First Amendment] protections are at their apex when a professional speaks to the public on matters of public concern;

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[5] *See also Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011) ("There is a difference, for First Amendment purposes, between regulating professionals' speech to the public at large versus their direct, personalized speech with clients.").

they approach a nadir, however, when the professional speaks privately, in the course of exercising his or her professional judgment, to a person receiving the professional's services." *Wollschlaeger*, 760 F.3d at 1218. Rather than apply heightened scrutiny, the Eleventh Circuit applied little or no scrutiny, concluding that "[a] statute that governs the practice of an occupation is not unconstitutional as an abridgment of the right to free speech, so long as any inhibition of that right is merely the incidental effect of observing an otherwise legitimate regulation." *Id.* at 1217. Thus, the Fourth Circuit's use of heightened scrutiny directly conflicts with the professional speech doctrine as developed in the Third, Ninth, and Eleventh Circuits.

Second, *Stuart* conflicts with *Zauderer*, which applied rational basis review to factual, nonmisleading disclosures related to legal advertising. In *Zauderer*, an Ohio law required attorneys who advertise that they represent clients on a contingent-fee basis "to state that the client may have to bear certain expenses even if he loses." *Zauderer*, 471 U.S. at 650. Because Ohio was "not attempting to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein," the Court held that "the interests at stake . . . are not of the same order as those discussed in *Wooley*, *Tornillo*, and *Barnette*." *Id.* at 651 (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

Moreover, given that the disclosures involved "purely factual and uncontroversial information

about the terms under which [an attorney's] services will be available," Ohio's regulation did not "prevent attorneys from conveying information to the public; it . . . only required them to provide somewhat more information than they might otherwise be inclined to present." *Id*. at 650-51. As in *Casey*, the disclosures "implicate[d] the advertiser's First Amendment rights" but warranted only rational basis review because the attorney's speech rights "were adequately protected as long as disclosure requirements are reasonably related to the State's interest." *Id*. at 651.

The similarities between North Carolina's speech-and-display disclosures and Ohio's disclosures are pronounced. The State has a significant interest in regulating speech within the medical profession as well as commercial speech. *See Gonzales*, 550 U.S. at 157. North Carolina's compelled disclosures do not prevent doctors from addressing the public or expressing their views to patients regarding the speech-and-display requirement, the sonogram images, the propriety of having an abortion, or anything else. As in *Zauderer*, speech-and-display laws require the disclosure of truthful, nonmisleading information and do not "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642.

As a result, the Fourth Circuit's use of heightened scrutiny is directly at odds with the reasons given in *Zauderer* and *Casey* for applying rational basis review. Although both cases acknowledge that

the mandated disclosures "implicate" the First Amendment rights of professionals, both conclude that, because the disclosures involved truthful, nonmisleading information, those "rights are adequately protected as long as disclosure requirements are reasonably related to the State's interests." *Zauderer*, 471 U.S. at 651.

Review in this case, therefore, is necessary (i) to resolve the conflict among the Circuits regarding the appropriate level of scrutiny under the professional speech doctrine for truthful, nonmisleading disclosures in the medical context and (ii) to determine whether *Zauderer*'s reasoning – that "disclosure requirements trench much more narrowly on an advertiser's interests than do flat prohibitions on speech" and, as a result, warrant rational basis review, *id*. – applies outside the commercial speech context.

II. The Fourth Circuit Ignores Established Supreme Court Case Law and Impermissibly Reintroduces Reasoning in *Akron* and *Thornburgh* that *Casey* Expressly Rejected.

Review also is proper in this case because the Fourth Circuit's resolution of the physicians' First Amendment claims conflicts with relevant decisions of this Court. Specifically, the Fourth Circuit omits any discussion of *Whalen v. Roe* even though the plurality cites *Whalen* to support its conclusions that

truthful, nonmisleading disclosures needed to be only reasonable. A careful review of *Whalen* demonstrates that the Fourth Circuit's analysis is inconsistent with *Whalen* and *Casey*.

Furthermore, the Fourth Circuit's claim that truthful, nonmisleading disclosures are ideological speech because they seek to persuade a woman to forego an abortion impermissibly seeks to reintroduce reasoning from *Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416 (1983) and *Thornburgh v. Am. College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) that *Casey* rejected. The Fourth Circuit's analysis, therefore, creates a direct tension with *Casey* because it disregards the fact that "the State has a significant role to play in regulating the medical profession" and like "the Court's precedents after *Roe* . . . 'undervalue[d] the State's interest in potential life.'" *Gonzales*, 550 U.S. at 157 (quoting *Casey*, 505 U.S. at 873).

A. The *Stuart* Panel Disregards *Whalen v. Roe*, which *Casey* Invokes to Explain Why Compelled Medical Disclosures Need to Be Only Reasonable.

The Fourth Circuit's application of heightened scrutiny to the disclosures required under the Act directly conflicts with *Casey* and *Whalen*. The Fourth Circuit relies heavily on *Casey*'s statement that "the physician's First Amendment rights not to speak are implicated," *Casey*, 505 U.S. at 884, to support its claim that individuals do not "simply abandon their

First Amendment rights when they commence practicing a profession." *Stuart*, 774 F.3d at 247. But the panel completely ignores the fact that *Casey* invokes *Whalen* to confirm that the physicians' First Amendment rights are implicated "but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State." *Casey*, 505 U.S. at 884. Any complete account of *Casey*, therefore, must explain how *Whalen* bears on the compelled speech analysis. The Fourth Circuit does not even try to reconcile its heightened scrutiny analysis with *Casey* and *Whalen* and, consequently, reaches a decision at odds with both cases.

In *Whalen*, the Supreme Court upheld a New York law that required physicians to prepare prescriptions for certain drugs in triplicate and to file at least one of the copies with the State. The Court determined that the statute was "manifestly the product of an orderly and rational legislative decision," that there "was nothing unreasonable in the assumption" that the statute might help officials enforce laws designed to reduce the use of dangerous drugs, and that the law "could reasonably be expected to have a deterrent effect on potential violators." 429 U.S. at 597-98.

In the section of *Whalen* to which *Casey* refers, this Court held that the State has broad latitude to regulate the practice of medicine provided that such regulations do not: (i) preclude public access to a legitimate medical procedure or treatment, (ii) prevent a patient from deciding, in consultation with her physician, whether to pursue the procedure or

treatment, or (iii) condition the doctor's ability to pursue a particular procedure on government consent. *Id*. at 603. In *Whalen*, as in *Casey*, this Court explained that what "is at stake" is the ability of a patient to make the ultimate decision in consultation with her physician. *Casey*, 505 U.S. at 877; *Whalen*, 429 U.S. at 603. As long as "the decision . . . is left entirely to the physician and patient," the State has substantial freedom to adopt reasonable regulations that may affect the decision-making process. *Id*.

Although *Whalen* did not involve a First Amendment claim, *Casey* applies the principles articulated in *Whalen* to compelled speech in the abortion context. This is not surprising given that *Casey* expressly states that "the doctor-patient relation here is entitled to the same solicitude it receives in other contexts." *Casey*, 505 U.S. at 884. *Casey* and *Whalen* confirm that the doctors' "right to practice medicine free of unwarranted state interference . . . is derivative from, and therefore no stronger than, the patients'." *Whalen*, 429 U.S. at 603; *Casey*, 505 U.S. at 884 ("Whatever constitutional status the doctor-patient relation may have as a general matter, in the present context it is derivative of the woman's position.").[6]

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[6] *See also Whalen*, 429 U.S. at 604 n.33 (citing *Doe v. Bolton*, 410 U.S. 179 (1973)) (Nothing in [*Bolton*] suggests that a doctor's right to administer medical care has any greater strength than his patient's right to receive such care. . . . If [the abortion restrictions at issue in *Bolton*] had not impacted upon the woman's freedom to make a constitutionally protected

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Yet *Stuart* expressly contradicts *Casey* and *Whalen* on this point. Ignoring the derivative nature of a physician's rights, the Fourth Circuit contends that "[t]he fact that a regulation does not impose an undue burden on a woman under the due process clause does not answer the question of whether it imposes an impermissible burden on the physician under the First Amendment." 774 F.3d at 249. The Fourth Circuit allows doctors to assert a separate First Amendment claim even though *Casey* instructs that "[t]he doctor-patient relation does not underlie or override the two more general rights under which the abortion right is justified: the right to make family decisions and the right to physical autonomy." *Casey*, 505 U.S. at 884.

The Fourth Circuit's reasoning marks a significant departure from *Casey*. Whereas *Casey* concluded that "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," *id*., the Fourth Circuit determines that such compelled statements are beyond the State's regulatory authority. Review is warranted, therefore, because the Fourth Circuit's analysis is inconsistent with *Casey* and *Whalen* and severely limits a State's

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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.").

authority to require truthful, nonmisleading disclosures that advance its interests in "ensuring a decision that is mature and informed" and in "express[ing] a preference for childbirth over abortion." *Casey*, 505 U.S. at 883.

B. By Relying on Reasoning in *Akron* and *Thornburgh* that *Casey* Rejected, the Fourth Circuit's Opinion Threatens to Convert All Truthful Disclosures Related to Abortion into Ideological Speech Subject to Heightened Scrutiny.

In addition to relying on the professional speech doctrine, the Fourth Circuit contends that heightened scrutiny is appropriate because North Carolina's speech-and-display law compels "ideological" speech. According to the Fourth Circuit, the speech-and-display "statement compelled here is ideological" because "it conveys a particular opinion," *Stuart*, 774 F.3d at 246, that the State wants to promote childbirth over abortion. *See id*. ("The state freely admits that the purpose and anticipated effect of the [speech-and-display requirement] is to convince women seeking abortions to change their minds or reassess their decisions."). Although "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*.

The Fourth Circuit's interpretation of ideological speech raises three additional problems that only this

this Court can resolve. First, the panel's definition of ideological speech directly conflicts with the Fifth Circuit's view. In *Lakey*, the Fifth Circuit draws on *Wooley* to conclude that "ideological" speech refers to speech that expresses a point of view. In *Wooley*, New Hampshire's license plate promulgated a message, "Live Free or Die," that conveyed a point of view the Maynards found "morally, ethically, religiously and politically abhorrent." *Wooley*, 430 U.S. at 713. According to the Fifth Circuit, truthful, nonmisleading information related to a woman's decision to have an abortion is not ideological; it is factual: "Though there may be questions at the margins, surely a photograph and description of its features constitute the purest conceivable expression of 'factual information.'" *Lakey*, 667 F.3d at 577 n.4. Such factual information – even if intended to encourage childbirth over abortion – does not constitute ideological speech that warrants heightened scrutiny. To the extent that receiving factual information (viewing the sonogram images and hearing a description of those images) causes a woman to forego an abortion, "that is a function of the combination of her new knowledge and her own 'ideology' ('values' is a better term), not of any 'ideology' inherent in the information she has learned about the fetus." *Id.* Thus, the Fourth and Fifth Circuits have adopted inconsistent views regarding ideological speech.

Second, the Fourth Circuit's position – that speech is ideological if the intent of the mandated speech "is to convince women seeking abortions to

change their minds or reassess their decision," *Stuart*, 774 F.3d at 246 – contradicts *Casey*'s express acknowledgement that States can require doctors to disclose information "to ensure an informed choice, one which might cause the woman to choose childbirth over abortion." *Casey*, 505 U.S. at 883.[7] Under the Fourth Circuit's view, even the disclosures in *Casey* would constitute "ideological" speech because they "might cause the woman to choose childbirth over abortion." *Id*. *Casey*, therefore, should have applied at least intermediate scrutiny. But the plurality did not, concluding that the disclosures were "a reasonable measure to ensure an informed choice." *Id*. at 884.

Third, the Fourth Circuit's reasoning reintroduces arguments made in *Akron* and *Thornburgh* but rejected in *Casey*. *Thornburgh* determined that the informed consent provisions in *Akron* were problematic for two reasons: "the information was designed to dissuade the woman from having an abortion and the ordinance imposed 'a rigid requirement that a specific body of information be given in all cases, irrespective of the particular needs of the patient.'" *Casey*, 505 U.S. at 882 (citation omitted). The Fourth Circuit

[7] *Gonzales* confirms that States may mandate factual disclosures that lead some women to decide not to have an abortion without violating the Constitution: "It is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term." *Gonzales*, 550 U.S. 124, 160 (2007).

makes the same claims in *Stuart*, finding North Carolina's speech-and-display provision unconstitutional because it seeks to discourage abortion[8] and to provide information that some women may not want or that might be harmful in a specific situation.[9] In fact, the Fourth Circuit's analysis essentially repeats the petitioners' claims in *Casey* that Pennsylvania's informed consent statue compelled ideological speech that triggered and failed strict scrutiny because it "forced [physicians] to convey the state's message at the cost of violating their own conscientious beliefs and professional commitments." Brief of Pet'rs and Cross-Resp'ts, *Casey*, 505 U.S. 833 (1992) (Nos. 91-744, 91-902), 1992 WL 551419 at *16, *53-54.

Given that *Casey* rejected the petitioners' claims and overturned *Akron* and *Thornburgh*, *Stuart* is inconsistent with this Court's compelled speech cases in the abortion context because it views truthful, nonmisleading disclosures as impermissibly ideological speech. Moreover, the Fourth Circuit's opinion undermines the ability of a State "to further its

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[8] *Stuart*, 774 F.3d at 245 ("The clear import of displaying the sonogram in this context . . . is to use the visual imagery of the fetus to dissuade the patient from continuing with the planned procedure.").

[9] *See id*. at 255 (expressing concern that "forcing this experience on a patient over her objections' in this manner interferes with the decision of a patient not to receive information that could make an indescribably difficult decision even more traumatic and could 'actually cause harm to the patient.' ").

legitimate goal of protecting the life of the unborn by enacting legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion." *Casey*, 505 U.S. at 883. As a result, absent this Court's review, every State in the Fourth Circuit may lose its rights under *Casey* to require informed consent disclosures and to promote childbirth over abortion.

III. This Case Is a Clean Vehicle to Resolve the Circuit Conflict Regarding the Proper Standard for Compelled Disclosures Related to Abortion.

This case presents an ideal vehicle for resolving the circuit conflict regarding the proper level of scrutiny to apply to compelled disclosures related to abortion. The Fourth Circuit expressly recognizes that its decision conflicts with decisions from the Fifth and Eighth Circuits, and the panel clearly sets out the points of contention between and among the Circuits. In addition, because the Fourth Circuit predicates its use of heightened scrutiny on the professional speech doctrine, the resulting conflict with the Third, Ninth, and Eleventh Circuits is squarely presented. Furthermore, North Carolina's petition provides an appropriate vehicle to (i) clarify the scope of a State's right to compel truthful, nonmisleading disclosures to ensure that a woman's choice is fully informed and (ii) determine whether

applying heightened scrutiny to speech-and-display laws is consistent with *Casey*, *Whalen*, and *Zauderer*.

CONCLUSION

For the reasons set forth above, this Court should grant North Carolina's petition for a writ of certiorari.

Respectfully submitted,

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