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

REPLY TO BRIEF IN OPPOSITION

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The Fourth Circuit's declaration of a First Amendment bar to North Carolina's requirement that doctors provide patients with specific, truthful information prior to an abortion procedure warrants this Court's review. The decision rejects the Court's guidance in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) ("*Casey*"), that the state's regulation of the practice of medicine can require physicians to provide mandated information. Instead, the Fourth Circuit applied heightened scrutiny and struck the disclosure provision, finding it imposed burdens on doctors beyond traditional informed consent requirements, and compelled ideological speech because it promoted the viewpoint of the state even though the information conveyed was strictly factual.

The decision directly conflicts with *Casey* and prior circuit court decisions expressly rejecting First Amendment challenges to a materially indistinguishable Texas statute as well as to South Dakota's pre-abortion disclosure requirements. This case presents important issues regarding state regulation of the practice of medicine that should be decided by the Court. Respondents' arguments to the contrary lack merit.

1. Respondents allege the lack of a circuit split, asserting there is at best a disagreement "concerning how to apply the proper legal standard to different

speech regulations in abortion cases." (BIO 15) As demonstrated in the Petition, the Fourth Circuit's opinion is contrary in material ways to decisions upholding similar statutes from Texas and South Dakota requiring specific disclosures prior to an abortion procedure.

Respondents attempt to minimize the significance of the conflict presented by focusing on the unremarkable claim that "all courts – including the Fifth and Eighth Circuits – agree" a state statute "compelling physicians to engage in ideological speech is subject to searching First Amendment scrutiny." (BIO 12) That is of course true but totally misses the point. Both the Fifth Circuit and the Eighth Circuit found the challenged statutory provisions requiring pre-abortion disclosures did not compel "ideological" speech. And the Fifth Circuit expressly analyzed and rejected a First Amendment challenge to legislation that is materially indistinguishable from North Carolina's display-and-describe requirements. The attempt to dodge the genuine and real circuit split by asserting that the statutory provisions upheld by the Fifth and Eight Circuits are "fundamentally different" from North Carolina's display-and-describe requirement "in ways that bear directly on the appropriate level of scrutiny" (BIO 12) cannot withstand analysis.

a. In *Texas Medical Providers Performing Abortion Services v. Lakey*, 667 F.3d 570 (5th Cir. 2012) ("*Lakey*"), the Fifth Circuit rejected a First Amendment challenge to a Texas statute that is nearly identical to the provision at issue in this case. (Pet. 8-9) The Texas statute requires physicians to display an ultrasound image to a woman seeking an abortion, to describe the results, including the dimensions of the embryo or fetus, describe the presence of cardiac activity, and to make available the opportunity for the woman to hear the fetal heartbeat. TEX. HEALTH & SAFETY CODE § 171.012(a)(4) (West 2013). The Texas statute specifically requires the physician to provide "a verbal explanation of the results of the sonogram images" and a "verbal explanation of the heart auscultation" of the fetus. TEX. HEALTH & SAFETY CODE § 171.012(a)(4)(C) and (D) (West 2013). The display-and-describe requirements of North Carolina's statute (Pet. 4-5; Pet. App. 106a-108a) are materially indistinguishable. And Respondents' claim that the Texas statute merely requires the physician to display and describe an ultrasound "in some circumstances" (BIO 14) is misleading and inaccurate.

Respondents maintain that the Texas statute "has several important exceptions," and suggest the existence of a general "therapeutic privilege exception" allowing physicians the option not to comply with the statute. (BIO 15) The Texas statute does provide that

a woman seeking an abortion is required by law to hear the physician's verbal explanation of the sonogram images unless she certifies in writing either that she is pregnant as a result of a sexual assault, is a minor proceeding pursuant to a specified judicial bypass procedure, or her fetus has an irreversible medical condition or abnormality. TEX. HEALTH & SAFETY CODE § 171.012(a)(6) (West 2013). But these emergency exceptions only allow non-compliance with the required disclosures under specific, limited circumstances and then only when the patient chooses to opt-out.

The Texas statute therefore does not include a general "therapeutic privilege exception" (see Reply to BIO, *infra*, at 8-9) under which the physician can choose not to comply with the mandatory disclosure requirements. Respondents have not and cannot demonstrate why the presence of specific emergency exceptions renders the holding in *Lakey* irrelevant either for a determination of the appropriate standard of review or for the substantive First Amendment analysis of North Carolina's display-and-describe requirement.

As to the appropriate standard of review, the Fifth Circuit characterized the First Amendment analysis in *Casey* as "the antithesis of strict scrutiny," 505 U.S. at 575, and determined that informed consent laws that

do not impose an undue burden on the woman's right to have an abortion "are part of the state's reasonable regulation of medical practice" *id.* at 576. The court concluded that the disclosures required by the challenged provisions of the Texas statutory procedure "are sustainable under *Casey*, are within the State's power to regulate the practice of medicine, and therefore do not violate the First Amendment." *Id.* at 580.

In its substantive First Amendment analysis, the Fifth Circuit interpreted *Casey* as establishing that when states require doctors to provide "information that is truthful, nonmisleading, and relevant to the decision to undergo an abortion" there is no violation because the "physicians' rights not to speak are, when part of the practice of medicine, subject to reasonable licensing and regulation by the State." *Lakey*, 667 F.3d at 575 (internal quotations and citation omitted). Furthermore, the Fifth Circuit found that laws requiring truthful, nonmisleading, and relevant disclosures "do not fall under the rubric of compelling 'ideological' speech that triggers First Amendment strict scrutiny," *id.* at 576, noting that the required disclosures "constitute the purest conceivable expression of 'factual information'" and that there is "not . . . any 'ideology' inherent in the information" required by the Texas statute. *Id.* at 577 n.4.

Plainly, both the standard of review and the substantive First Amendment analysis of the Fifth Circuit squarely conflict with that rendered by the Fourth Circuit.

b. Respondents make a similar unpersuasive attempt to minimize the relevance of Eighth Circuit decisions concerning statutory disclosure requirements. They describe the relevant South Dakota statute as "risk disclosure requirements [that] reflected scientific truth about the risks of abortion" (BIO 12), and distinguish North Carolina's statute on the basis that it was not intended to convey "the risks and benefits of the medical procedure to the patient's own health, but rather the full weight of the state's moral condemnation." (Pet. App. 32a) The actual statutory language at issue demonstrates the lack of merit in that asserted distinguishing difference.

As previously detailed, a series of Eighth Circuit decisions rejected a First Amendment challenge to statutory provisions mandating both oral and written disclosures that go far beyond North Carolina's requirements. (Pet. 9-11) South Dakota's legislation specifies that the physician must provide the patient with a written statement that "the abortion will terminate the life of a whole, separate, unique, living human being;" that the woman "has an existing relationship with that unborn human being;" and that

by having an abortion the woman's "existing relationship . . . will be terminated." S.D.C.L. § 34-23A-10.1(1)(b), (c), and (d) (2014).

The Eighth Circuit held that 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." *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 735 (8th Cir. 2008)(en banc). The court therefore denied the First Amendment challenge to the statute, finding the required disclosures were "part of the practice of medicine, subject to reasonable licensing and regulation by the State." *Id.* at 738 (quoting *Casey*).

The Fourth Circuit explicitly rejected the analysis employed by both the Fifth and Eighth Circuits, declaring that "they read too much into *Casey* and *Gonzales*." (Pet. App. 18a) However, a proper reading of the various circuit court decisions establishes that they are in fact in conflict in all respects: in how to interpret *Casey*, in the level of review to apply, and in the ultimate holding as to the First Amendment rights affected.

2. The Petition explains why the Court should decide the important issue presented, and includes a

list of other State statutory disclosure provisions requiring doctors to give patients relevant information concerning the decision to have an abortion. (Pet. 11-13) Additionally, the Petition outlines the Fourth Circuit's professional speech analysis and how it could impact generally the regulation of the practice of medicine. (Pet. 13-14)

a. Respondents attempt to diminish the importance of the question presented by claiming that the Petition presents "no significant First Amendment issue under the principles articulated by the court below." (BIO 16) Respondents' superficial analysis ignores the Fourth Circuit's broad pronouncements about First Amendment limitations applicable to North Carolina's display-and-describe requirement.

The Fourth Circuit premised its decision largely on its characterization that the disclosure requirements "resemble neither traditional informed consent nor the variation found in the Pennsylvania statute at issue in *Casey*." (Pet. App. 24a) Further, it found the mandated provision of specific information violated the First Amendment because it precluded the physician from determining "what the individual patient would subjectively wish to know," (Pet. App. 25a), or from utilizing a "therapeutic privilege exception" under which the physician is permitted "to decline or at least wait to convey relevant information" to avoid causing

a patient "serious psychological or physical harm." (Pet. App. 30a) The Fourth Circuit concluded that the challenged statute exceeded permissible limits on the state's regulation of the practice of medicine because it interfered with "the physician's professional judgment and the patient's autonomous decision about what information she wants." (Pet. App. 33a)

This expansive definition of a physician's First Amendment rights has ramifications for any state's regulation of abortion procedures. Additionally, the professional speech aspects of the Fourth Circuit decision impact the state's general regulation of the practice of medicine.

b. As set forth in the Petition, recent decisions have affirmed state prohibitions of specific types of speech by physicians within the doctor-patient relationship. *Pickup v. Brown,* 740 F.3d 1208 (9th Cir.), *cert. denied*, 2104 U.S. LEXIS 4636 (U.S. 2014); *Wollschlager v. Governor of Florida*, 760 F.3d 1195 (11th Cir. 2014); *King v. Governor of the State of New Jersey*, 767 F.3d 216 (3rd Cir.), *cert. denied*, 2015 U.S. LEXIS 3122 (U.S. 2014). (Pet. 13-14) Respondents, however, merely assert that there is no broad disagreement among the circuits, claiming that "the court below held that its analysis was consistent with" the decisions by the Third, the Ninth, and the Eleventh Circuits. (BIO 18-19)

The Fourth Circuit stands alone, as the statutory regulation of physician speech was upheld in each of the other cases, contrary to the result reached below. The other circuits expressly relied upon the Court's First Amendment discussion in *Casey* in support of their decisions, with both the Ninth Circuit and the Eleventh Circuit applying rational basis review. And Respondents claim that "[t]he Third Circuit applied the same 'intermediate' scrutiny to the regulation at issue there as did the court below" (BIO 19 n.5) is misleading. That court did uphold the New Jersey statute "as a regulation of professional speech that passes intermediate scrutiny." *King*, 767 F.3d at 246. However, in discussing the proper standard of review, the Third Circuit noted that the Court has "treated compelled disclosures of truthful factual information differently than prohibitions of speech, subjecting the former to rational basis review and the latter to intermediate scrutiny." *Id*. at 236 (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985)). The Third Circuit concluded that *Casey's* suggested application of rational basis review was "inapplicable to the present case because the law at issue is a prohibition of speech, not a compulsion of truthful factual information." *Id*.

The Petition therefore presents a First Amendment issue of national importance irrespective

of Respondents' attempt to minimize the broad scope of the Fourth Circuit opinion.

3. Respondents further assert that the Court should not accept the case for review because the Fourth Circuit's decision is "entirely correct." (BIO 19) As previously detailed, the court below failed to follow the guidance of this Court's prior decisions and erred in holding that North Carolina's disclosure requirements violate the First Amendment. (Pet. 14-20)

a. In declining to apply a rational basis standard of review, the Fourth Circuit characterized the Court's decision in *Casey* as making only a "particularized finding" that "did not hold sweepingly that all regulation of speech in the medical context merely receives rational basis review." (Pet. App. 19a) However, the Fourth Circuit's application of heightened intermediate scrutiny departs from *Casey*'s guidance 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." 505 U.S. at 884. In proper context, the display-and-describe provision here is consistent with the State's "significant role . . . in regulating the medical profession." *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007).

Nor does labeling the information at issue here "ideological" because it consists of the compelled "provision of facts that all fall on one side of the abortion debate" (Pet. App. 13a) comport with prior decisions concerning the applicable standard of review. As the Fifth Circuit explained, "the required disclosures of a sonogram, the fetal heartbeat, and their medical descriptions are the epitome of truthful, non-misleading information." *Lakey*, 667 F.3d at 577-78. And, while "more graphic and scientifically up-to-date, than the disclosures discussed in *Casey*," they "are not different in kind." *Id*. at 578.

b. The Fourth Circuit premised its substantive First Amendment analysis on its view that the statutory provisions in *Casey* set a ceiling as to the disclosure requirements that a state can impose on physicians performing abortions. The decision states that North Carolina's statute "resembles neither traditional informed consent nor the variation" upheld in *Casey* because it "impos[es] additional burdens on the physicians' free speech." (Pet. App. 24a) And the decision maintains that the display-and-describe requirement "treads far more heavily on the physicians' free speech rights" (Pet. App. 28a) particularly because the requirement "interferes with the physician's professional judgment" by "failing to include a therapeutic privilege exception." (Pet. App. 29a) As previously detailed (Reply to BIO, *supra* at 8-9), the Fourth Circuit's decision places significant

importance on what it describes as an improper statutory constraint on "the physician's professional judgment and the patient's autonomous decision about what information she wants." (Pet. App. 33a)

This expansive conceptualization of the First Amendment rights of physicians finds no support in *Casey* or elsewhere. The First Amendment does not require a state to recognize a "therapeutic privilege exception" under which a physician may decline to disclose truthful information, relevant to a serious medical procedure. *Casey* instructs that a state may require information to be made available "to ensure that a woman apprehend the full consequences of her decision," 505 U.S. at 882, and declares that "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." *Id*. at 883. Contrary to the position of the Fourth Circuit, the state's legitimate interest in the regulation of the practice of medicine is not subordinate to a physician's asserted right to determine "what the individual patient would subjectively wish to know." (Pet. App. 25a)

Nor may the asserted infringement on the physician's First Amendment rights be quantified by

reference to the claimed physical and psychological effects of the disclosure requirements on their patients. That inappropriately includes as part of the First Amendment inquiry matters not at issue here concerning any possible undue burden on a woman's right to abortion arising from the display-and-describe requirement. (Pet. 18-19) Respondents offer no defense of the Fourth Circuit's misplaced reliance on *Hill v. Colorado*, 530 U.S. 703 (2000), for its claim that the proper First Amendment inquiry takes into account "the effect of the regulation on the intended recipient of the compelled speech." (Pet. App. 21a) There is no proper basis to claim that a physician can assert the interests of patients to prevent the state from requiring specific disclosures in furtherance of a medical procedure.

Prior decisions establish that the state may reasonably and appropriately enact mandatory disclosure requirements in furtherance of the regulation of the practice of medicine. And "[t]he law need not give abortion doctors unfettered choice in the course of their medical practice." *Gonzales*, 550 U.S. at 163. The State may advance its legitimate interests through the required disclosure of truthful and relevant information because "[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." *Casey*, 505 U.S. at 877.

There is an express, fundamental conflict between the Fourth Circuit and the Fifth and Eighth Circuits as to the constitutionality of mandatory disclosure requirements prior to an abortion. The question squarely presented in this petition – whether North Carolina's display-and-describe statute violates the First Amendment rights of abortion providers – warrants review by this Court.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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May 2015

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