
ARTICLES

DOCTOR, DOCTOR, GIVE ME THE NEWS: FIRST AMENDMENT EMPOWERS DISPLAY AND DESCRIBE REQUIREMENTS FOR PURPOSES OF INFORMED CONSENT AND COMMERCIAL SPEECH

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A woman has recognized rights under the Constitution to obtain an abortion, but she also has a right to personal autonomy. To preserve this right, the state must regulate the disclosures regarding an abortion procedure to ensure the patient is getting the information needed to make an informed decision about what happens to her body during an abortion. As history shows, courts have dealt with abortions with care by honoring the woman's autonomy. As the right to choose to get an abortion is fundamental, the right of the woman to be apprised of all of the facts and all of the risks associated with the procedure is equally as fundamental when looking at our nation's history. One of the ways to advocate for the woman's right to an abortion and to consent to what happens to her body is to uphold the constitutionality of the display and describe requirements and grant the power to compel disclosures in this context to the state.

There is a circuit split between the Fourth, Eighth, Fifth, and Sixth Circuits over the constitutionality of the display and describe

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requirements of their respective states. The Fourth Circuit has held that the display and describe requirement violates the physician's First Amendment rights by compelling the physician to disclose an ideological message. Whereas the Eighth, Fifth, and Sixth Circuits have upheld the requirements on the basis that they are medically necessary and thereby do not infringe on the constitutional rights of the physicians. The Supreme Court has denied review and subsequently, the answer is not clear. Abortion is a prevalent topic and upholding the display and describe statutes on constitutional grounds is vital to ensuring the continuing evolution of abortion litigation and legislation toward a more cohesive and unified approach.

The Supreme Court has held that a woman has the right to obtain an abortion and the state may not enact regulations that place an undue burden on that right. However, the state has the authority to reasonably regulate physician speech because the state has an interest in human life and maintaining the standards in the medical industry. The state may not compel a speaker to disclose an ideological message, but the state can compel the physician to apprise the patient of the risks and the alternatives, if any, of a medical procedure in order to obtain informed consent from the patient. The Fourth, Eighth, Fifth, and Sixth circuits disagree on the constitutionality of the display and describe requirements that North Carolina, South Dakota, Texas, and Kentucky, respectively, have enacted.

This Article is the first to advocate for the woman's right to be informed and to consent to the surgical procedure, and it urges the Supreme Court to resolve the circuit split and hold the display and describe requirements of the states' abortion statutes as not violating the physician's First Amendment right to free speech. All physicians are required to reveal information in order for the patient to give informed consent. Resultantly, displaying the ultrasound and explaining what the ultrasound depicts is medically necessary to obtain the woman's informed consent. Therefore, this does not violate the physician's constitutional rights. This speech is commercial speech because it is speech involved in a commercial transaction and is subject to reasonable regulations. Individuals can differ on their beliefs regarding abortion and still agree that the woman has a right to know and consent to what happens to her body. This Article is not divisive; it protects to the woman's right to an abortion, her right of access to information, and her right of personal autonomy.

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I. INTRODUCTION

By the age of 45, 24% of women in the United States will obtain an abortion.¹ In 2015, 638,169 abortions were reported to the Center for Disease Control from 49 reporting areas.² Although this is a 2% decrease from previous years,³ abortions are not uncommon and therefore need to be subject to regulations within the bounds of the Constitution and the standards set out in *Planned Parenthood v. Casey*.

Abortion legislation and litigation are ever-changing. If the Supreme Court were to overturn *Roe v. Wade* tomorrow, the abortion regulations would have to come wholly from the states, which would take substantial time.⁴ The evolution of abortion regulations will take time to perfect, one step at a time. As Charmaine Yoest, the President of Americans United For Life, states, "if, as a team, you can't move the ball on the ground yard by yard, you're in trouble."⁵ Contrary to popular belief, the majority of Americans believe that abortion should be legal in some circumstances, even if they are split on the moral practices.⁶ As Gloria Steinem suggests, no one is pro-abortion.⁷ The main question in abortion legislation and litigation is "not pro-abortion or anti-abortion, the question is who makes the decision: a woman and her physician, or the government."⁸

Since the United States Supreme Court's seminal decision in *Roe v. Wade*, states have enacted numerous abortion statutes, ranging in

¹ *Induced Abortion in the United States*, GUTTMACHER INST. (2019), https://www.guttmacher.org/sites/default/files/factsheet/fb_induced_abortion.pdf.

² Tara C. Jatlaoui et. al., "Abortion Surveillance – United States, 2015", CTRS. FOR DISEASE CONTROL: MMWR (Nov. 23, 2018), https://www.cdc.gov/mmwr/volumes/67/ss/ss6713a1.htm?s_cid=ss6713a1.

³ *Id.*

⁴ B. Jessie Hill, *Will the Supreme Court Overturn Roe v. Wade? And if It Does, What Happens to Abortion Rights?*, CONVERSATION (Aug. 2, 2018, 6:37 AM), <https://theconversation.com/will-the-supreme-court-overturn-roe-v-wade-and-if-it-does-what-happens-to-abortion-rights-99248>.

⁵ Olga Khazan, *Planning the End of Abortion*, ATLANTIC (July 16, 2015), <https://www.theatlantic.com/politics/archive/2015/07/what-pro-life-activists-really-want/398297>.

⁶ *Id.*

⁷ Alanna Vagianos, *Gloria Steinem: Nobody Wakes up and Says 'I Think I'll Have an Abortion'*, HUFFPOST (May 17, 2017, 1:18 PM), https://www.huffpost.com/entry/gloria-steinem-nobody-wakes-up-and-says-i-think-ill-have-an-abortion_n_591c748be4b0a7458fa4eb0e.

⁸ *Id.*

content of codifying, regulating, and limiting when and where a woman can get an abortion.⁹ Since July of 2011, over 450 regulations have been enacted by states, most of which include a display and describe requirement or a requirement that physicians speak to the individuals before performing the procedure.¹⁰ Generally, this requirement mandates that physicians display the sonographic image of the fetus to the mother and describe in detail what they are seeing and what the picture represents.¹¹

The Supreme Court has held that a woman has the right to obtain an abortion and individual states may not enact regulations that place an undue burden on that right.¹² However, each state has the authority to reasonably regulate physician speech because the state has an interest in human life and maintaining the standards in the medical industry.¹³ The state may not compel a speaker to disclose an ideological message, but the state can compel the physician to apprise the patient of the risks and the alternatives, if any, of a medical procedure in order to obtain informed consent from the patient.¹⁴ The Fourth, Eighth, Fifth, and Sixth circuits disagree on the constitutionality of the display and describe requirements that North Carolina, South Dakota, Texas, and Kentucky, respectively, have enacted.¹⁵

The language of the requirements varies, but the provisions have the same purpose—to inform the patient of the risks of an abortion so the patient can make an informed decision about the operation affecting her body.¹⁶ Informed consent dates back to before World War II, and the Court has routinely held that in order to obtain informed consent, the doctor must disclose all information that is

⁹ *An Overview of Abortion Laws*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws> (last updated Nov. 1, 2020).

¹⁰ *See State Facts About Abortion: Texas*, GUTTMACHER INST. (2020), <https://www.guttmacher.org/sites/default/files/factsheet/sfaa-tx.pdf>.

¹¹ *State Ultrasound Requirements in Abortion Procedures*, KFF (May 1, 2019), <https://www.kff.org/womens-health-policy/state-indicator/ultrasound-requirements>.

¹² *See Roe v. Wade*, 410 U.S. 113, 153 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992).

¹³ *Id.* at 153–54.

¹⁴ *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 734–35 (8th Cir. 2008); *see also Canterbury v. Spence*, 464 F.2d 772, 782–83, 787–88 (D.C. Cir. 1972).

¹⁵ *See Stuart v. Camnitz*, 774 F.3d 238, 250 (4th Cir. 2014); *Rounds*, 530 F.3d at 738; *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 580 (5th Cir. 2012); *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 424 (6th Cir. 2019).

¹⁶ *See State Ultrasound Requirements in Abortion Procedures*, *supra* note 11.

"material" to the patient's decision.¹⁷ No bright line rule exists as to what exactly is "material" and what exactly is required to be disclosed because the standard used is that of a reasonable patient, and consequently, several disputes have developed over what information needs to be disclosed.¹⁸

The woman has recognized rights under the Constitution to obtain an abortion, but she also has a right to personal autonomy.¹⁹ In order to preserve this right, the state must regulate the disclosures a woman receives prior to an abortion to ensure that she is getting the information needed to make an informed decision about what happens to her body.²⁰ The Court has decided cases related to abortion with care and awareness of the woman's right to personal autonomy.²¹ Just as the right to choose to have an abortion is important, the right of the woman to be apprised of *all* of the facts and *all* of the risks associated with the procedure is equally as important.²² One of the ways to advocate for this right is to uphold the constitutionality of the display and describe requirements and grant the state the power to compel disclosures in this context.

The Court has held that the state cannot compel speech onto a speaker that is a religious, political, or ideological opinion.²³ Consequently, a circuit split exists between the Fourth, Eighth, Fifth, and Sixth Circuits.²⁴ The Fourth Circuit has held that the display and describe requirement violates the physician's First Amendment rights by compelling the physician to disclose an ideological message.²⁵ Comparatively, the Eighth, Fifth, and Sixth Circuits have upheld the requirements on the basis that they are medically necessary and

¹⁷ Bryan Murray, *Informed Consent: What Must a Physician Disclose to a Patient?*, 14 AM. MED. ASS'N J. ETHICS 563, 563, 565 (2012).

¹⁸ *Id.* at 564–66.

¹⁹ *Roe v. Wade*, 410 U.S. 113, 170 (1973).

²⁰ *Id.* at 165.

²¹ *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992).

²² *Karlin v. Foust*, 188 F.3d 446, 473 (7th Cir. 1999).

²³ *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

²⁴ *See generally* *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir. 2008); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012); *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421 (6th Cir. 2019).

²⁵ *Camnitz*, 774 F.3d at 242.

thereby do not infringe on the constitutional rights of physicians.²⁶ The Supreme Court has denied certiorari and has not clarified the discrepancy between the circuit courts.²⁷ Abortion is a prevalent topic and upholding the statutes on constitutional grounds is vital to ensuring the continuing evolution of abortion litigation and legislation toward a more cohesive and unified approach towards honoring the personal autonomy of a woman and sanctity of life.

In 2014, the Fourth Circuit struck down a provision that required a physician to display the sonogram and describe exactly what it showed before a woman could obtain an abortion.²⁸ The Fourth Circuit held that this provision pushed the state's ideological message onto the doctor and thus violated the physician's freedom of speech.²⁹ However, the Eighth, Fifth, and Sixth Circuits have upheld similar provisions holding that the statements relayed truthful, non-misleading information that is relevant to a patient's decision.³⁰ Both the Eighth and Fifth Circuits held that the provision requiring a physician to describe what is portrayed in the sonogram is not ideological in nature, but informative to the patient's decision to have an abortion.³¹ Similarly, the Sixth Circuit upheld Kentucky's statute requiring a physician to perform an ultrasound, display the image, and explain what the image depicts before performing the abortion.³² The court held that Kentucky's statute was similar to the Pennsylvania statute in *Planned Parenthood v. Casey* and that it provided "truthful, non-misleading, and relevant information aimed at informing a patient about her decision to abort unborn life," thus leading the Sixth Circuit to uphold the provision on constitutional grounds.³³ North Carolina, after the Fourth Circuit opinion, filed a petition for a writ of certiorari to the Supreme Court of the United States, which was subsequently denied. None of the other states have appealed beyond the circuit court decision.³⁴

²⁶ *Rounds*, 530 F.3d at 735; *Lakey*, 667 F.3d at 579–80; *Beshear*, 920 F.3d at 439.

²⁷ *Camnitz*, 774 F.3d at 238.

²⁸ *Id.* at 242.

²⁹ *Id.*

³⁰ *Rounds*, 530 F.3d at 738; *Lakey*, 667 F.3d at 580; *Beshear*, 920 F.3d at 424.

³¹ *Rounds*, 530 F.3d at 735; *Lakey*, 667 F.3d at 577.

³² *Beshear*, 920 F.3d at 424.

³³ *Id.* at 435.

³⁴ *See id.* at 421; *Lakey*, 667 F.3d 570; *Rounds*, 530 F.3d 724.

This Article is the first to advocate that the Supreme Court should resolve the circuit split and hold that the display and describe requirement of a state's abortion statute does not violate the physician's First Amendment right to free speech. Because a physician is required to inform the patient of the risks of the procedure in order for the patient to give informed consent, this content is medically necessary and therefore does not violate the physician's constitutional rights.³⁵ In the alternative, this speech is commercial speech as it is used in a commercial transaction, and therefore is subject to reasonable regulations.³⁶ Individuals can differ in their beliefs regarding abortion and still agree that the woman has a right to know and consent to what happens to her body. This Article is not anti- or pro-abortion; it both advocates for the woman and protects her right of access to information and her right of personal autonomy while also advocating for the physicians' duty to obtain fully informed consent.

This Article analyzes the display and describe requirement of an abortion statute through the lens of the First Amendment and the physician's freedom of speech. Part II provides a background and overview of the woman's right to an abortion, the First Amendment and medically necessary speech in the context of informed consent, and circuit court jurisprudence and the discrepancy in current circuit court decisions. Part III urges the Court to hold that the display and describe requirement is constitutional as abortion procedures are subject to informed consent regulations, the requirement is not an ideological message, and the compelled disclosures are medically necessary. Lastly, the disclosures are commercial speech and are subject to reasonable state regulations under *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio* and *Planned Parenthood v. Casey*.³⁷

II. OVERVIEW OF WOMEN'S RIGHTS, PHYSICIAN SPEECH REGULATIONS, AND STATE APPROACHES TO ABORTION STATUTES

The Supreme Court has held that a woman has the right to obtain an abortion and the state may not enact regulations that place

³⁵ Murray, *supra* note 17, at 563.

³⁶ See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992).

³⁷ See *Zauderer*, 471 U.S. at 637; *Casey*, 505 U.S. at 884.

an undue burden on that right.³⁸ However, the state has the authority to regulate physician speech reasonably because the state has an interest in human life and maintaining medical industry standards.³⁹ The state may not compel a speaker to disclose an ideological message, but the state can compel the physician to apprise the patient of the risks and the alternatives, if any, of a medical procedure in order to obtain informed consent from the patient.⁴⁰ The Fourth, Eighth, Fifth, and Sixth Circuits disagree on the constitutionality of the display and describe requirements that North Carolina, South Dakota, Texas, and Kentucky, respectively, have enacted.⁴¹ The Courts differ on whether the requirement is pushing the state's ideological message onto the physician or whether the requirement is in pursuit of informed consent and is medically necessary to achieve informed consent.⁴²

A. *Planned Parenthood v. Casey and the Right to Personal Autonomy*

A woman's right to obtain an abortion was first established in *Roe v. Wade*.⁴³ Although recognizing this right, the Supreme Court acknowledged that the right is not absolute.⁴⁴ The right to obtain an abortion is subject to state regulations that further the state's interest in ensuring health, maintaining medical standards, and protecting potential life.⁴⁵

After *Roe*, many states enacted legislation that placed restrictions on the woman, physician, and procedures surrounding abortion.⁴⁶ Challenges to these restrictions made their way into the court system, and in *Planned Parenthood v. Casey*, the Supreme Court once again

³⁸ *Roe v. Wade*, 410 U.S. 113, 166 (1973); *Casey*, 505 U.S. at 837.

³⁹ *Roe*, 410 U.S. at 163–64.

⁴⁰ *Canterbury v. Spence*, 464 F.2d 772, 782–85 (D.C. Cir. 1972).

⁴¹ See *Stuart v. Camnitz*, 774 F.3d 238, 256 (4th Cir. 2014); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 726 (8th Cir. 2008); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 583 (5th Cir. 2012); *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 442 (6th Cir. 2019).

⁴² *Camnitz*, 774 F.3d at 253; *Rounds*, 530 F.3d at 726; *Lakey*, 667 F.3d at 580; *Beshear*, 920 F.3d at 442.

⁴³ 410 U.S. at 166.

⁴⁴ *Id.* at 163.

⁴⁵ *Id.* at 163–64.

⁴⁶ *An Overview of Abortion Laws*, *supra* note 9.

addressed abortion in the United States.⁴⁷ *Casey* upheld *Roe* and recognized the right of the woman to have an abortion before viability, the right of the state to regulate abortions after viability, and the interest of the state in protecting the life of the woman and the potential life of the fetus.⁴⁸ The Supreme Court overruled the framework set out in *Roe*, instead opting for what is now known as the "undue burden test."⁴⁹ The Court defined undue burden as a "state regulation [that] has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."⁵⁰

In addition to developing the undue burden test, the Court further held that the physician-patient discourse at issue was speech that the state could regulate and thus, could compel disclosures, provided they are a part of the practice of medicine.⁵¹ The Court reasoned that the physician's right not to speak is implicated; however, the compelled disclosures are a part of the practice of medicine, are not protected under the First Amendment, and are subject to reasonable licensing and regulations implemented by the state.⁵² As such, the Court in *Casey* decided to bypass the First Amendment analysis.⁵³

B. Regulations of Physician Speech upheld by the Supreme Court

As recognized in *Roe* and upheld in *Casey*, some regulations of abortions are permissible.⁵⁴ In keeping with this concept, the Court has routinely recognized that regulations on physician speech related to abortion are also constitutional.⁵⁵ The Court in *Zauderer* has upheld regulations of commercial speech by recognizing the state's authority to prevent false, deceptive, or misleading commercial speech.⁵⁶

⁴⁷ 505 U.S. 833, 844 (1992).

⁴⁸ *Id.* at 871.

⁴⁹ *See id.* at 881.

⁵⁰ *Id.* at 877.

⁵¹ *Id.* at 884.

⁵² *Id.*

⁵³ *See id.*

⁵⁴ *See* *Rust v. Sullivan*, 500 U.S. 173, 203 (1991); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 80 (1976).

⁵⁵ *See Sullivan*, 500 U.S. at 173; *Danforth*, 428 U.S. at 52; *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

⁵⁶ *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

Several cases have required the states, and subsequently the Supreme Court, to address the issue of whether regulations, both abortion related and not, violate the First Amendment rights of the physician.⁵⁷

While the Court has recognized that an individual has the right to speak freely while also possessing the right not to speak, the Court has held that physician speech as part of the practice of medicine is not afforded absolute protection, and the regulations of physician speech have been upheld under the First Amendment.⁵⁸ In *Canterbury v. Spence*, a patient underwent a laminectomy to repair a ruptured disc.⁵⁹ The plaintiff did not object nor ask any questions after being told that he needed the procedure.⁶⁰ The physician performed the surgery, and after the procedure was over, the plaintiff's mother signed a consent form.⁶¹ During recovery, the plaintiff fell on the way to the bathroom and was paralyzed from the waist down.⁶² The plaintiff brought a medical malpractice action against the physician and the hospital.⁶³ The court held that a physician has a duty to disclose all of the risks a reasonable patient would find significant in making a decision to undergo surgery.⁶⁴

The court reasoned that instead of using a reasonable physician standard, the viewpoint that should be evaluated is one of the reasonable patient.⁶⁵ The standard of a reasonable patient is one that looks at what information a reasonable patient in similar circumstances would need in order to give informed consent.⁶⁶ The court recognized that the "patient's right of self-decision shapes the boundaries of the duty to reveal."⁶⁷

⁵⁷ See *Sullivan*, 500 U.S. at 173; *Danforth*, 428 U.S. at 52.

⁵⁸ See *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972); Anna M. Taruschio, *The First Amendment, The Right Not to Speak and the Problem of Government Access Statutes*, 27 *FORDHAM URB. L.J.* 1001, 1001 (2000) (explaining that in addition to recognizing a right to speak freely, the Court also recognizes a right not to speak).

⁵⁹ 464 F.2d at 777.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 785.

⁶⁵ *Id.* at 787.

⁶⁶ *Id.* at 786.

⁶⁷ *Id.*

The Court in *Canterbury* designed and implemented informed consent to protect patients by making sure the patient has the information necessary to make an informed choice; however, no bright-line rule exists in determining what information is necessary and therefore should be disclosed to the patient.⁶⁸ According to *Canterbury*, each patient must "be apprised of the nature of the treatment, along with any corresponding risks."⁶⁹

In *Wooley v. Maynard*, the Court held that the state cannot compel speech that is a religious, political, or ideological opinion from a speaker.⁷⁰ However, the Court held in *Wooley* that the disclosures would be permitted if they were factual and not controversial.⁷¹ Although the First Amendment prohibits states from favoring "some viewpoints or ideas at the expense of others," and therefore the state cannot compel speech onto a speaker,⁷² the Court has vested the state with broad authority to regulate the content of physician-patient discourse about any medical subject.⁷³

In *Maher v. Roe*, the Court held that the state has discretion in regulating abortions in pursuit of a value that favors childbirth over abortion.⁷⁴ As a result, the Court in *Rust v. Sullivan* held that state regulations that prohibit counseling, encouraging, promoting, or advocating for abortion as a method of family planning, are constitutional.⁷⁵ Thus, the Court endorsed the proposition that the state may promote its viewpoint by censoring the speech of publicly funded speakers, including physicians.⁷⁶

As made clear in *Planned Parenthood of Central Missouri v. Danforth*, the state's ability to censor publicly funded speakers is not

⁶⁸ *Id.* at 772.

⁶⁹ *See id.*; *see also* *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990); *Harrison v. United States*, 284 F.3d 293, 298 (1st Cir. 2002).

⁷⁰ 430 U.S. 705 (1977).

⁷¹ *Id.*

⁷² *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (noting that viewpoint regulation is rooted in the concern for the audience that the public's consideration of issues will be skewed if government is permitted to support one position).

⁷³ Paula Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice*, 74 B.U. L. REV. 201, 219 (1994).

⁷⁴ 432 U.S. 464, 473-74 (1977).

⁷⁵ 500 U.S. 173, 185-87, 192-94 (1991).

⁷⁶ *See id.* at 192-94.

without limitation.⁷⁷ While upholding the idea that the state can legitimately require physicians to convey information to patients to ensure informed consent, the Court held that the state may not impose speech restrictions that are ideological in nature and intended to influence patients' decision making.⁷⁸

In distinguishing informed consent requirements from those which violate the doctor's freedom of speech, the Court held in *National Institute of Family and Life Advocates v. Becerra* that the requirement of a doctor to obtain informed consent is "firmly entrenched in American tort law."⁷⁹ The Court recognized that a persuasive reason could be identified in order to treat professional speech differently and as though it is exempt from First Amendment principles.⁸⁰ But, ultimately, the Court held that statutes that "facilitate informed consent to a medical procedure" tend to fall on the conduct side of the First Amendment line because they apply "only as part of the *practice* of medicine, subject to reasonable licensing and regulation by the state."⁸¹

In *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, an attorney's newspaper advertisement stated that if the criminal defendant was convicted, or if a plaintiff did not recover, the client would owe no legal fees.⁸² The Ohio Disciplinary Counsel brought a complaint alleging that the advertisements violated the Ohio Disciplinary Rules.⁸³ The attorney's defense was based on the unconstitutionality of the Ohio Disciplinary Rules in restricting his speech in advertisements.⁸⁴ The Court held that these statements made in the advertisements were commercial speech and that the state has the authority to prevent false, deceptive, or misleading commercial speech.⁸⁵ In recognizing the protections on commercial speech, the Court in *Zauderer* held that although the disclosure requirements might

⁷⁷ 428 U.S. 52, 65–75 (1976).

⁷⁸ *See id.*

⁷⁹ 138 S. Ct. 2361, 2373 (2018) (quoting *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 269 (1990)).

⁸⁰ *Id.* at 2375.

⁸¹ *Id.* at 2373 (emphasis added) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992)).

⁸² 471 U.S. 626, 629–30, 651 (1985).

⁸³ *Id.* at 631–34.

⁸⁴ *Id.* at 634.

⁸⁵ *Id.* at 637–38, 655.

implicate the speaker's First Amendment rights, a speaker's rights are protected as long as the requirements are reasonably related and in pursuit of the state's interest in protecting consumers from deception.⁸⁶ The Court recognized that unjustified or unduly burdensome requirements violate the First Amendment by essentially eliminating the rights of the speaker to engage, or not engage, in commercial speech.⁸⁷ The Court analyzed the state's intent and found that the compelled disclosures in question were factual and uncontroversial information regarding the attorney's services.⁸⁸

C. State's Approaches to Display and Describe Requirements

Many states have abortion statutes with some sort of display and describe requirement—they all vary, but they are all present.⁸⁹ Generally, this requirement mandates that physicians display the sonographic image of the fetus to the mother and describe in detail what she is seeing and what the picture represents.⁹⁰ States have various types of this requirement. For example, South Dakota does not require that the physician display the sonogram, but the physician must supply a statement saying that the patient is terminating a life and human being.⁹¹ Texas, Kentucky, and North Carolina have statutes stating that the sonogram must be displayed and a descriptive statement must be made.⁹²

1. North Carolina

North Carolina's statute, which has been struck down, provides that the doctor must:

- (1) Perform an obstetric real-time view of the unborn child on the pregnant woman;

⁸⁶ *Id.* at 651.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *See Requirements for Ultrasound*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/requirements-ultrasound> (last updated Nov. 1, 2020) (illustrating that 26 states have some sort of display and describe requirement).

⁹⁰ *See, e.g.*, KY. REV. STAT. § 311.727 (2017); N.C. GEN. STAT. § 90-21.85 (2019); S.D. CODIFIED LAWS § 34-23A-52 (2019); TEX. HEALTH & SAFETY CODE § 171.012(a)(4) (2019).

⁹¹ Section 34-23A-52 (sonogram); S.D. CODIFIED LAWS § 34-23A-10.1(1)(b) (physician statement).

⁹² Section 171.012(a)(4)(B)-(C); Section 90-21.85(a)(1)-(4); Section 311.727(2)(a)-(c).

(2) Provide a simultaneous explanation of what the display is depicting, which shall include the presence, location, and dimensions of the unborn child within the uterus and the number of unborn children depicted. The individual performing the display shall offer the pregnant woman the opportunity to hear the fetal heart tone. The image and auscultation of fetal heart tone shall be of a quality consistent with the standard medical practice in the community. If the image indicates that fetal demise has occurred, a woman shall be informed of that fact;

(3) Display the images so that the pregnant woman may view them;

(4) Provide a medical description of the images, which shall include the dimensions of the embryo or fetus and the presence of external members and internal organs, if present and viewable.⁹³

2. South Dakota

South Dakota enacted a bill that required the physician to supply a written statement that states:

(b) That the abortion will terminate the life of a whole, separate, unique, living human being;

(c) That the pregnant woman has an existing relationship with that unborn human being and that the relationship enjoys protection under the United States Constitution and under the laws of South Dakota;

(d) That by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship will be terminated.⁹⁴

3. Texas

Texas' Abortion Statute, which was upheld by the Fifth Circuit, has a display and describe requirement for doctors that requires the physician to display the sonogram images so that the pregnant woman may view them. The Texas Statute requires the following:

(B) the physician who is to perform the abortion displays the sonogram images in a quality consistent with current medical practice in a manner that the pregnant woman may view them;

(C) the physician who is to perform the abortion provides, in a manner understandable to a layperson, a verbal explanation of the results of the sonogram images, including a medical description of the dimensions of the embryo or fetus, the presence of cardiac activity, and the presence of external members and internal organs.⁹⁵

⁹³ Section 90-21.85(a)(1)-(4).

⁹⁴ Section 34-23A-10.1(1)(b)-(d).

⁹⁵ Section 171.012(a)(4)(B)-(C).

4. Kentucky

The Kentucky statute is similar to that of Texas; however, it includes provisions that Texas has not enacted yet.⁹⁶ The Kentucky statute requires that:

(2) Prior to a woman giving informed consent to having any part of an abortion performed, the physician who is to perform the abortion or a qualified technician to whom the responsibility has been delegated by the physician shall:

(a) Perform an obstetric ultrasound on the pregnant woman;

(b) Provide a simultaneous explanation of what the ultrasound is depicting, which shall include the presence and location of the unborn child within the uterus and the number of unborn children depicted and also, if the ultrasound image indicates that fetal demise has occurred, inform the woman of that fact;

(c) Display the ultrasound images so that the pregnant woman may view the images;

(d) Auscultate the fetal heartbeat of the unborn child so that the pregnant woman may hear the heartbeat if the heartbeat is audible;

(e) Provide a medical description of the ultrasound images, which shall include the dimensions of the embryo or fetus and the presence of external members and internal organs, if present and viewable.⁹⁷

D. Circuit Split Regarding the Display and Describe Requirements

Some states have implemented regulations that require the physician to display and describe the ultrasound to the patient before performing an abortion.⁹⁸ Generally, this regulation requires that physicians display the sonographic image of the fetus to the mother and describe in detail what the image depicts.⁹⁹ While the types of this requirement vary from state to state,¹⁰⁰ the purpose is to allow for the physician to relay the information necessary in order to obtain fully informed consent from the patient.¹⁰¹

⁹⁶ Compare *id.*, with KY. REV. STAT. § 311.727(2)(a)–(e) (2017).

⁹⁷ Section 311.727(2)(a)–(e).

⁹⁸ *Id.*; N.C. GEN. STAT. § 90-21.85 (2019); Section 17L012(a)(4)(B)–(C).

⁹⁹ Section 90-21.85(a)(1)–(4); Section 17L012(a)(4)(B)–(C); Section 311.727(2)(a)–(e).

¹⁰⁰ Section 90-21.85(a)(1)–(4); Section 17L012(a)(4)(B)–(C); Section 311.727(2)(a)–(e).

¹⁰¹ Section 90-21.85(a)(1)–(4); Section 17L012(a)(4)(B)–(C); Section 311.727(2)(a)–(e).

As of 2014, the circuit courts are split on whether the display and describe requirement is constitutional under the First Amendment.¹⁰² The Fourth, Eighth, Fifth, and Sixth Circuits have decided differently on this issue, further reiterating that this issue is one that needs to be resolved by the Supreme Court of the United States.¹⁰³

1. Fourth Circuit Invalidates North Carolina's Requirement

In 2014, the Fourth Circuit Court of Appeals answered the question that the Eighth and Fifth Circuits had already answered: whether the speech-and-display statute violated the physician's freedom of speech under the First Amendment.¹⁰⁴ The North Carolina statute required physicians to display and describe the ultrasound, but the woman has the option to look away and not listen.¹⁰⁵ The physicians brought suit and alleged that the statute violated their constitutional rights.¹⁰⁶ The Fourth Circuit agreed and struck down the provision as unconstitutional.¹⁰⁷

¹⁰² See *Stuart v. Camnitz*, 774 F.3d 238, 250 (4th Cir. 2014); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 726 (8th Cir. 2008); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 578 (5th Cir. 2012); *EMW Women's Surgical Ctr. P.S.C. v. Beshear*, 920 F.3d 421, 439 (6th Cir. 2019).

¹⁰³ *Compare Camnitz*, 774 F.3d at 250 (holding the display and describe requirement as unconstitutional), *with Rounds*, 530 F.3d at 726 (holding the display and describe requirement as constitutional), *Lakey*, 667 F.3d at 578 (holding the display and describe requirement as constitutional), *and Beshear*, 920 F.3d at 439 (holding the display and describe requirement as constitutional).

¹⁰⁴ See *Camnitz*, 774 F.3d at 250.

¹⁰⁵ *Id.* at 243 (citing § 90-21.85(a)(1)–(4)). North Carolina's statutes provides that the physician must:

- (1) Perform an obstetric real-time view of the unborn child on the pregnant woman;
- (2) Provide a simultaneous explanation of what the display is depicting, which shall include the presence, location, and dimensions of the unborn child within the uterus and the number of unborn children depicted. The individual performing the display shall offer the pregnant woman the opportunity to hear the fetal heart tone. The image and auscultation of fetal heart tone shall be of a quality consistent with the standard medical practice in the community. If the image indicates that fetal demise has occurred, a woman shall be informed of that fact;
- (3) Display the images so that the pregnant woman may view them;
- (4) Provide a medical description of the images, which shall include the dimensions of the embryo or fetus and the presence of external members and internal organs, if present and viewable.

Section 90-21.85(a)(1)–(4).

¹⁰⁶ *Camnitz*, 774 F.3d at 244.

¹⁰⁷ *Id.* at 250.

North Carolina argued that the interest in protecting fetal life and a woman's health, both physical and psychological, is substantial and that the means to achieve that interest is the display and describe statute.¹⁰⁸ The court recognized that this interest had been reiterated time and time again, is important and profound, and is derived from the state's general interest in protecting and promoting respect for life. The state's interest has been recognized in abortion decisions without fail.¹⁰⁹

The Fourth Circuit declined to apply the undue burden standard and ultimately decided that the statute was stretching too far, thereby infringing on physicians' freedom of speech.¹¹⁰ The court found that the statute "simultaneously threaten[ed] harm to the patient's psychological health, interfer[ed] with the physician's professional judgment, and compromise[ed] the physician-patient relationship."¹¹¹ The court believed that the statute had no other purpose but to use the physician to push the state's interest onto the patients in order to coerce them to choose childbirth over abortion.¹¹²

2. Eighth, Fifth, and Sixth Circuits Validate the Requirements of South Dakota, Texas, and Kentucky

The Eighth Circuit evaluated South Dakota's statute that required physicians to provide information to the patient regarding the abortion procedure and certify that they believed the patient understood the information.¹¹³ Planned Parenthood brought suit alleging that this

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*; see, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007); *Greenville Women's Clinic v. Bryant*, 222 F.3d 157, 165–66 (4th Cir. 2000); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871 (1992).

¹¹⁰ *Camnitz*, 774 F.3d at 249.

¹¹¹ *Id.* at 250.

¹¹² *Id.*

¹¹³ *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 726–27 (8th Cir. 2008); see also S.D. CODIFIED LAWS § 34-23A-10.1(b)–(d) (2020). South Dakota enacted a bill that required the physician to supply a written statement that states:

- (b) That the abortion will terminate the life of a whole, separate, unique, living human being;
- (c) That the pregnant woman has an existing relationship with that unborn human being and that the relationship enjoys protection under the United States Constitution and under the laws of South Dakota;
- (d) That by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship will be terminated.

Section 34-23A-10.1(b)–(d).

requirement violated the physician's constitutional right to free speech.¹¹⁴ The allegation targeted the provisions requiring a physician to provide statements, in writing, to the patient, informing the woman that the abortion would terminate a life.¹¹⁵

Planned Parenthood argued that the statements violated the First Amendment because they forced physicians to push the state's ideological message onto the patient, as opposed to disclosing information that is necessary to obtain informed consent.¹¹⁶ The court disagreed, however, and relied on *Casey* by stating that a state has the "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."¹¹⁷ Most importantly, the court recognized that the state has a significant role and interest in maintaining the integrity of the medical profession.¹¹⁸

The Fifth Circuit was called upon to analyze the Texas display and describe requirement, whereby the Fifth Circuit relied on the Eighth Circuit's interpretation and ultimately deciding the same way.¹¹⁹ The court relied on *Planned Parenthood Minn., N.D., S.D., v. Rounds* and echoed the interpretation of *Planned Parenthood v. Casey*, allowing for the proof of only a legitimate state interest to regulate speech in the medical profession in order to overcome the challenge.¹²⁰ The court held that the state's informed consent laws are permissible if they do not place an undue burden on the patient and are truthful, non-misleading, and relevant disclosures.¹²¹ The court held that the display of the sonogram and heart auscultation followed by

¹¹⁴ *Rounds*, 530 F.3d at 727.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 735.

¹¹⁸ *Id.* at 734–35.

¹¹⁹ See *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012); see also TEX. HEALTH & SAFETY CODE § 171.012(4)(B)–(C) (2019) ("[T]he physician who is to perform the abortion displays the sonogram images in a quality consistent with current medical practice in a manner that the pregnant woman may view them [, and] the physician who is to perform the abortion provides, in a manner understandable to a layperson, a verbal explanation of the results of the sonogram images, including a medical description of the dimensions of the embryo or fetus, the presence of cardiac activity, and the presence of external members and internal organs....").

¹²⁰ *Lakey*, 667 F.3d at 576–77.

¹²¹ *Id.*

the subsequent description of both were truthful, non-misleading, and medically necessary.¹²²

Further, in the Sixth Circuit case of *Women's Surgical Center, P.S.C. v. Beshear*, an abortion clinic and its three physicians brought action against the state alleging that Kentucky's informed consent statute violated the physicians' First Amendment protection against compelled speech.¹²³ The Kentucky statute requires physicians to perform an ultrasound prior to beginning the abortion procedure, display the image, and describe, in the physician's own words, what the image depicts.¹²⁴ The physician must also examine the heartbeat of the fetus through a stethoscope, but if the patient requests, the physician may turn off the volume.¹²⁵

The Sixth Circuit relied on *Casey* and the Supreme Court's holding that the explanation of the abortion is relevant, if not dispositive, to the patient's decision to abort, and held that Kentucky's statute provides relevant information.¹²⁶ The court stated that this information gives the patient more "knowledge of the unborn life"

¹²² *Id.* at 577.

¹²³ 920 F.3d 421, 424 (6th Cir. 2019).

¹²⁴ *Id.*; see also KY. REV. STAT. § 311.727 (2017). The Kentucky statute is similar to that of Texas, however, it has more provisions that Texas has not enacted yet. Kentucky's statute is as follows:

(2) Prior to a woman giving informed consent to having any part of an abortion performed, the physician who is to perform the abortion or a qualified technician to whom the responsibility has been delegated by the physician shall:

- (a) Perform an obstetric ultrasound on the pregnant woman;
- (b) Provide a simultaneous explanation of what the ultrasound is depicting, which shall include the presence and location of the unborn child within the uterus and the number of unborn children depicted and also, if the ultrasound image indicates that fetal demise has occurred, inform the woman of that fact;
- (c) Display the ultrasound images so that the pregnant woman may view the images;
- (d) Auscultate the fetal heartbeat of the unborn child so that the pregnant woman may hear the heartbeat if the heartbeat is audible;
- (e) Provide a medical description of the ultrasound images, which shall include the dimensions of the embryo or fetus and the presence of external members and internal organs, if present and viewable.

Section 311.727(2)(a)–(e).

¹²⁵ *Beshear*, 920 F.3d at 424.

¹²⁶ *Id.* at 426.

and "the effect of an abortion procedure."¹²⁷ Lastly, the court recognized that although "this information might persuade a woman to change her mind[, that] does not render it suspect under the First Amendment. It just means that it is pertinent to her decision-making."¹²⁸

Overall, the Supreme Court has upheld regulations of abortion on the grounds that they are reasonable and necessary in order for the physician to obtain informed consent; however, the dispute in the circuit courts is whether the display and describe requirement is *necessary*.¹²⁹ The precedent set forth by the previously discussed cases does not provide clarity and the issue should be analyzed to provide protection to the autonomy the woman has over her body.

III. DISPLAY AND DESCRIBE REQUIREMENT IS PERMITTED UNDER THE FIRST AMENDMENT

Women have a recognized right under the Constitution to obtain an abortion and also have a right to personal autonomy.¹³⁰ To preserve and balance these rights, the state must regulate the disclosures to ensure that women are getting the information needed to make an informed decision.¹³¹ Just as the right to choose to get an abortion is significant, the right of the woman to be apprised of *all* of the facts and *all* of the risks associated with the procedure is equally significant.¹³² One of the ways to advocate for this right is to uphold the constitutionality of the display and describe requirements and grant states the power to compel disclosures in this context.¹³³ Upholding the constitutionality of these requirements does not take anything away from the woman's right to an abortion; it simply ensures that her right to access information and her personal autonomy are not

¹²⁷ *Id.* at 430.

¹²⁸ *Id.*

¹²⁹ *See id.* at 421; *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir. 2008); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012).

¹³⁰ *See Roe v. Wade*, 410 U.S. 113 (1973).

¹³¹ *See Camnitz*, 774 F.3d 238; *Rounds*, 530 F.3d 724; *Lakey*, 667 F.3d 570; *Beshear*, 920 F.3d 421.

¹³² *Karlin v. Foust*, 188 F.3d 446, 473 (7th Cir. 1999).

¹³³ *See generally Camnitz*, 774 F.3d 238; *Rounds*, 530 F.3d 724; *Lakey*, 667 F.3d 570; *Beshear*, 920 F.3d 421.

infringed upon by not being informed of the risks and ramifications before she makes the decision to obtain an abortion.¹³⁴

This Article urges the Supreme Court to resolve the circuit split and hold that the display and describe requirement does not violate the physician's First Amendment right to free speech for the following reasons. First, abortion procedures should be subject to informed consent regulations.¹³⁵ Second, the compelled disclosures in question are necessary to obtain informed consent.¹³⁶ The speech is not an ideological message because it portrays a factual depiction of the fetus and is consequently medically necessary to obtain informed consent.¹³⁷ Third, the speech is considered commercial speech under *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*¹³⁸ and is subject to reasonable regulations by the state under *Planned Parenthood v. Casey*.¹³⁹

A. All Medical Procedures are Subject to Informed Consent – Abortion Should Not Be An Exception

Abortion should be subject to informed consent laws because it is a medical procedure, an invasive surgery, and is not any different from other medical procedures that are subject to informed consent laws.¹⁴⁰ For a healthy and effective physician-patient relationship, trust and communication are considered to play a vital role.¹⁴¹ Regulations

¹³⁴ See generally *Camnitz*, 774 F.3d 238; *Rounds*, 530 F.3d 724; *Lakey*, 667 F.3d 570; *Beshear*, 920 F.3d 421.

¹³⁵ See *infra* Section III.A.

¹³⁶ See *infra* Section III.B.

¹³⁷ See *infra* Section III.B.

¹³⁸ See 471 U.S. 626 (1985); *infra* Section III.C.

¹³⁹ See 505 U.S. 833, 882–84 (1992); *infra* Section III.C.

¹⁴⁰ See *Surgery*; MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/surgery> (last updated Nov. 13, 2020); *Canterbury v. Spence*, 464 F.2d 772, 780–82 (D.C. Cir. 1972).

¹⁴¹ See Sidney T. Bogardus, Jr. et al., *Perils, Pitfalls, and Possibilities in Talking About Medical Risk*, 281 JAMA 1037 (1999), <https://jamanetwork.com/journals/jama/fullarticle/189120>; Scott A. Bull et al., *Discontinuation of Use and Switching of Antidepressants: Influence of Patient-Physician Communication*, 288 JAMA 1403 (2002), <https://jamanetwork.com/journals/jama/fullarticle/195304>; Paul S. Ciechanowski et al., *The Patient-Provider Relationship: Attachment Theory and Adherence to Treatment in Diabetes*, 158 AM. J. PSYCHIATRY 29 (2001), <https://ajpp.psychiatryonline.org/doi/pdf/10.1176/appi.ajp.158.1.29>; Moira A. Stewart, *Effective Physician-Patient Communication and Health Outcomes: A Review*, 152 CANADIAN MED. ASS'N J. 1423 (1995), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1337906/pdf/cma.j00069-0061.pdf>.

on physician speech ensure patients that they are getting the entirety of the information that they need to know in order to go through with a procedure and understand what the procedure entails.¹⁴² Informed consent is required when any medical procedure is performed, and an abortion should not be an exception.¹⁴³ Informed consent is required when getting Botox or a medical-grade facial and when undergoing a more grave procedure.¹⁴⁴ Having an abortion is a "surgery" as defined by Merriam Webster and could result in serious repercussions.¹⁴⁵ There are no other instances, other than in emergencies, in which a physician is not required to obtain informed consent to perform a surgery on a patient.¹⁴⁶ All surgery carries risks, especially "invasive" surgery, which is defined as inserting an instrument into the body.¹⁴⁷ A first trimester abortion "starts with a metal rod to open [a woman's] cervix and the insertion of a tube to vacuum the baby and other tissue out of [her] uterus."¹⁴⁸ Because an abortion starts by inserting an instrument into the body, a first trimester abortion is classified as an invasive surgery and should be subject to informed consent.¹⁴⁹

Disclosing this information does not interfere with the woman's right to choose because she is more equipped to make the decision after the disclosure. Americans in general believe that abortion is rare—that is not true.¹⁵⁰ There are more abortions a year in the United States than either appendectomies or hysterectomies.¹⁵¹ Both

¹⁴² Nat'l Inst. Family and Life Advocates v. Becerra, 138 S. Ct. 2361, 2371–73 (2018).

¹⁴³ See *Canterbury*, 464 F.2d at 780–82.

¹⁴⁴ See Murray, *supra* note 17, at 563 (discussing application of the reasonableness standard for informed consent post-*Canterbury*).

¹⁴⁵ See Karima Sajadi-Ernazarova & Christopher Martinez, *Abortion Complications*, STATPEARLS (Nov. 18, 2020, 8:57 AM), <https://statpearls.com/kb/viewarticle/17037/>; *Surgery*, *supra* note 140.

¹⁴⁶ Murray, *supra* note 17.

¹⁴⁷ See *Considering Abortion? Know the Facts*, FOUND. LIFE, <https://foundationsof-life.org/facts-about-abortion/> (last visited Nov. 18, 2020); see also Sajadi-Ernazarova & Martinez, *supra* note 145.

¹⁴⁸ *Considering Abortion? Know the Facts*, *supra* note 147.

¹⁴⁹ *Id.*

¹⁵⁰ See, e.g., Jatlaoui et al., *supra* note 2.

¹⁵¹ See *Number of All-Listed Procedures for Discharges from Short-Stay Hospitals, By Procedure Category and Age: United States, 2010*, CTRS. FOR DISEASE CONTROL (2010), https://www.cdc.gov/nchs/data/nhds/4procedures/2010pro4_numberprocedureage.pdf; Sajadi-Ernazarova & Martinez, *supra* note 145.

appendectomies and hysterectomies have requirements that the physician disclose the risks and factual information regarding the procedure, and abortion should not be different.¹⁵² This requirement does not take away from a woman's right to choose to have an abortion; instead, it endorses the woman's right of access to information and personal autonomy and informs her of the consequences before she makes the decision to exercise her right to have an abortion.

Patients who are not educated in abortion procedures are not likely to understand fully what the procedure entails and how it is going to be performed.¹⁵³ Sociology of decision-making has determined that a person "behave[s] in terms of expected modes of action within his status and sphere of influence."¹⁵⁴ Patients are likely not educated in abortion procedures and do not know the extent of the surgery.¹⁵⁵ Patients are influenced by physicians and what physicians say, but that could arguably be because of patients' lack of knowledge in this particular field.¹⁵⁶ It would not be called *informed* consent if the physician did not equip the patient with the information necessary to give the requisite consent.¹⁵⁷

There is evidence that visual cues are more effective for an individual receiving the information.¹⁵⁸ The human brain is mainly an "image processor" because the majority of our frontal cortex is devoted to vision.¹⁵⁹ The effective use of visuals improves comprehension and enhances retrieval.¹⁶⁰ Thus, showing a patient an image of the ultrasound with a corresponding description enhances the probability that she will understand what is going on versus her reading a pamphlet or hearing the physician apprise her of the risks imaging.¹⁶¹ Displaying

¹⁵² See Murray, *supra* note 17, at 565.

¹⁵³ See, e.g., *id.* at 563.

¹⁵⁴ A.K. Basu, *A Theory of Decision-Making*, 1 J. SOC. & SOC. WELFARE (1973).

¹⁵⁵ See, e.g., Murray, *supra* note 17, at 563.

¹⁵⁶ *Id.*

¹⁵⁷ See *Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir. 1972); see also *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990); *Harrison v. United States*, 284 F.3d 293, 298 (1st Cir. 2002).

¹⁵⁸ Haig Kouyoumdjian, *Learning Through Visuals: Visual Imagery in the Classroom*, PSYCHOL. TODAY (July 20, 2012), <https://www.psychologytoday.com/us/blog/get-psyched/201207/learning-through-visuals>.

¹⁵⁹ *Id.*; Susan Hagen, *The Mind's Eye*, 74 ROCHESTER REV. 32, 35 (2012).

¹⁶⁰ See Kouyoumdjian, *supra* note 158.

¹⁶¹ See *id.*

and describing the ultrasound is a more effective way to ensure that the patient is getting the information that she needs to make an informed decision.¹⁶²

B. Display and Describe Requirement Communicates Factual Information

The display and describe requirement is not an ideological message because it is not compelling speech in pursuit of a state's interest.¹⁶³ An ideological message has been defined as a state exercising its discretion and attempting to push a certain message or ideal on a person.¹⁶⁴ A state's exercise of its discretion is restricted by the First Amendment.¹⁶⁵ States have an interest in the protection and preservation of human life—evident by the fact that homicide is treated as a serious crime, and one can be charged with a criminal offense for assisting in suicide.¹⁶⁶ While states have an interest in preserving human life, the display and describe requirement is not in pursuit of that interest.¹⁶⁷ Instead, the requirement ensures patients give fully informed consent, which is deeply rooted in United States history.¹⁶⁸ The Supreme Court has held that a state is not required to "remain neutral in the face of an informed and voluntary decision by a physically able adult."¹⁶⁹ It is nearly impossible to obtain a consent worthy of being informed unless the physician first illuminates the options and the perils for the patient's use when making her decision.¹⁷⁰

¹⁶² See, e.g., *id.*

¹⁶³ See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 270–71 (1990); *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (addressing the standard to determine whether a compelling state interest exists).

¹⁶⁴ See *Wooley v. Maynard*, 430 U.S. 705, 716–17 (1977).

¹⁶⁵ *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (noting that viewpoint regulation is partially rooted in the audience-based concern that the public's consideration of issues will be skewed if government is permitted to throw its weight behind one position).

¹⁶⁶ See *Cruzan*, 497 U.S. at 280.

¹⁶⁷ See *id.* at 280–81.

¹⁶⁸ *Becerra*, 138 S. Ct. at 2373 (quoting *Cruzan*, 497 U.S. at 269).

¹⁶⁹ *Cruzan*, 497 U.S. at 280.

¹⁷⁰ See Allan H. McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549, 586–97 (1959) (discussing the reasoning underpinning a physician's duty to fully inform their patient of all relevant facts regarding treatment).

Yes, the Court has held that an individual has the right to refrain from speaking about religious, political, or ideological causes; however, the Court has narrowly held that the First Amendment protects the right of individuals to refuse to foster an idea they find morally objectionable.¹⁷¹ The sonographic image is not one that is morally objectionable because the image is a factual representation of the fetus, and the subsequent description is based in fact.¹⁷²

The ultrasound is not an image that is shocking to the conscience in a way that would elicit a response.¹⁷³ An ultrasound is an accurate depiction of what exactly is going on inside the patient's uterus.¹⁷⁴ Similar to a gallbladder surgery, where an ultrasound is displayed before the surgery is performed, the physician will explicitly state what is depicted by the ultrasound and what is going to happen during surgery and recovery, while also informing the patient of the risks.¹⁷⁵ Contrast this with images that might be deemed ideological—diseased lungs on a cigarette package¹⁷⁶ or a mangled fetus on a pro-life protester's poster. These images depict messages that are intended to elicit a response from the audience in hopes of changing the audience's mind.¹⁷⁷ Showing smokers a picture of diseased lungs, which may or may not happen to the smoker, is intended to make smokers change their mind and not buy the cigarettes.¹⁷⁸ A picture of a mangled fetus on a poster outside of an abortion clinic is also not a

¹⁷¹ *Wooley v. Maynard*, 430 U.S. 705, 715 (1977).

¹⁷² *Ultrasound Imaging*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/radiation-emitting-products/medical-imaging/ultrasound-imaging> (last updated Aug. 28, 2020).

¹⁷³ See *Shocks the Conscience*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/shocks_the_conscience (last visited Nov. 18, 2020).

¹⁷⁴ See *Pelvic Ultrasound*, JOHNS HOPKINS MED.: HEALTH, <https://www.hopkinsmedicine.org/health/treatment-tests-and-therapies/pelvic-ultrasound> (last visited Nov. 18, 2020).

¹⁷⁵ See *Gallstones*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/gallstones/diagnosis-treatment/drc-20354220> (last visited Nov. 18, 2020); see also *General Ultrasound*, RADIOLOGYINFO.ORG FOR PATIENTS, <https://www.radiologyinfo.org/en/info.cfm?pg=genus> (last visited Nov. 18, 2020).

¹⁷⁶ See James F. Thrasher et al., *Images in Cigarette Warning Labels: How Should They Warn?*, 15 AM. MED. ASS'N J. ETHICS 704 (2013).

¹⁷⁷ See *id.*; see also *FDA Proposes New Required Health Warnings with Color Images for Cigarette Packages and Advertisements to Promote Greater Public Understanding of Negative Health Consequences of Smoking*, U.S. FOOD & DRUG ADMIN. (Aug. 15, 2019), <https://www.fda.gov/news-events/press-announcements/fda-proposes-new-required-health-warnings-color-images-cigarette-packages-and-advertisements-promote> [hereinafter *Health Warnings*].

¹⁷⁸ *Health Warnings*, *supra* note 177.

factual representation of an abortion; the protestor's purpose is to deter the patient.¹⁷⁹ An ultrasound does not rise to the level of shock that a picture of a mangled fetus or diseased lungs create. Both are opinionated messages that do not reveal scientifically backed facts, and would likely be considered ideological messages.¹⁸⁰

In the display and describe requirement, the physician simply is stating factually what the image is depicting in order for the patient to fully understand the procedure.¹⁸¹ In fulfilling this requirement, the physician will likely describe the development of the fetus, the position of the fetus, the gender of the fetus, defects of the fetus, if any, and how the abortion procedure will be performed.¹⁸² To obtain informed consent to a first-trimester abortion, the physician would have to describe where the tube would be inserted and how the vacuum would remove the fetus.¹⁸³

Images in jury trials are often controversial, but admissible for the jury to make an informed decision.¹⁸⁴ The jury is entitled to see exactly what the crime scene and the murder victim looked like in order to make their determination of guilt.¹⁸⁵ To ensure that the jury makes an informed decision, the judge often rules that these pictures, although gruesome, are necessary in order for the jury to make the decision beyond a reasonable doubt.¹⁸⁶ A reasonable patient likely wants to make the decision of a surgical procedure sans doubt or regret.

The state is permitted to exercise its discretion when deciding what disclosures are necessary for informed consent.¹⁸⁷ Several states have decided that displaying the ultrasound and describing the image

¹⁷⁹ CELESTE MICHELLE CONDIT, *DECODING ABORTION RHETORIC: COMMUNICATING SOCIAL CHANGE* 92–93 (1990).

¹⁸⁰ See *Health Warnings*, *supra* note 177.

¹⁸¹ N.C. GEN. STAT. § 90-21.85 (2019); TEX. HEALTH & SAFETY CODE § 171.012(a)(4)(B)–(C) (2019); S.D. CODIFIED LAWS § 34-23A-10.1(1) (2020).

¹⁸² See *Surgical Abortion (First Trimester)*, UCSF HEALTH, <https://www.ucsf-health.org/treatments/surgical-abortion-first-trimester> (last visited Nov. 18, 2020).

¹⁸³ See *id.*

¹⁸⁴ Stanley L. Morris, *The Admissibility of Photographs of the Corpse in Homicide Cases*, 7 WM. & MARY L. REV. 137, 137–38 (1966).

¹⁸⁵ See *id.*

¹⁸⁶ See *Commonwealth v. Novak*, 150 A.2d 102 (Pa. 1959); see also *Alcorta v. State*, 294 S.W.2d 112 (Tex. Crim. 1956).

¹⁸⁷ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992).

is necessary to inform the patient.¹⁸⁸ While some states have decided that a strictly oral message to the patient is adequate, others have decided that a written description is adequate—it is ultimately up to the states.¹⁸⁹ It is not constitutionally required that the physician display the ultrasound; however, it is also not *un*constitutional to require the physician to disclose this information.¹⁹⁰ The state has the duty to ensure the safety of its people and it has discretion of the statutes and regulations enacted in pursuit of that duty.¹⁹¹ If a state decides that the display and describe requirement is necessary to obtain informed consent, the decision of the state should not be questioned sans an arbitrary violation of a constitutional right.

C. *The Disclosures are Medically Necessary*

The Supreme Court has held that the physician is required to relay medically necessary information to the patient;¹⁹² however, the debate between the circuit courts is whether these disclosures are medically necessary.¹⁹³ The display and describe requirement is medically necessary because the physician is under an obligation to communicate information to patients in order for them to make an informed decision.¹⁹⁴ Without disclosing this information, the physician will not be obtaining *fully* informed consent, thus violating the rights of the patient.¹⁹⁵ The Court has further held the information must be truthful, non-misleading, and relevant.¹⁹⁶ The display and describe requirements meet these criteria.

¹⁸⁸ N.C. GEN. STAT. § 90-21.85(a)(1)–(4) (2019); TEX. HEALTH & SAFETY CODE § 171.012(b)–(c) (2019).

¹⁸⁹ Section 90-21.85(a)(4); Section 171.012(b)–(c); S.D. CODIFIED LAWS § 34-23A-10.1(1) (2020).

¹⁹⁰ See *generally* *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724 (8th Cir. 2008); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012); *EMW Women’s Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421 (6th Cir. 2019).

¹⁹¹ See *Police Power*; BLACK’S LAW DICTIONARY (11th ed. 2019).

¹⁹² See *Casey*, 505 U.S. at 885.

¹⁹³ See *Camnitz*, 774 F.3d at 238; *Rounds*, 530 F.3d at 724; *Lakey*, 667 F.3d at 570; *Beshear*, 920 F.3d at 421.

¹⁹⁴ See *Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir. 1972); *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 269 (1990); *Harrison v. United States*, 284 F.3d 293, 298 (1st Cir. 2002).

¹⁹⁵ See *Canterbury*, 464 F.2d at 780; *Cruzan*, 497 U.S. at 261; *Harrison*, 284 F.3d at 298.

¹⁹⁶ *Casey*, 505 U.S. at 882.

1. Physician Under Obligation to Communicate Information with Patient

A physician is required to communicate the necessary information to a patient before performing any medical procedure—it does not matter the graveness of the procedure.¹⁹⁷ Informed consent goes back to pre-World War II in that patients have a right to determine what may be done to their bodies.¹⁹⁸ The Supreme Court has held that fundamental rights go towards the essence of an individual's being. Every individual has a right to self-autonomy evident by several cases, and specifically, women have a right to reproductive autonomy.¹⁹⁹ Informed consent is hard to define, and courts have typically erred on the side of what a reasonable patient would want to know in a similar situation.²⁰⁰ In the abortion context, the ultrasound image and subsequent description of the image are pertinent in order for a reasonable patient to consent fully to the treatment.²⁰¹

Another example of professionals under an obligation to communicate with their client is an attorney. Licensed attorneys are required to get consent from their client before proceeding in a settlement or other objectives in litigation.²⁰² Just as an attorney cannot agree to settle a civil case or agree to a plea in a criminal case without consent from the client, the physician cannot perform a surgery without full consent from the patient.²⁰³ A physician's duty to disclose information is arguably more important and relevant than an attorney's because physicians are dealing with a person's body. A physician is under a duty to inform the patient completely and coherently of the risks that might affect a patient's treatment decisions, just as an attorney has to disclose the factual nature of a settlement or plea and apprise clients of their options.²⁰⁴

¹⁹⁷ Murray, *supra* note 17, at 565.

¹⁹⁸ *Schloendorff v. Society of N.Y. Hosp.*, 105 N.E. 92 (N.Y. 1914).

¹⁹⁹ See *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Schloendorff*, 105 N.E. 92.

²⁰⁰ See *Canterbury*, 464 F.2d at 780.

²⁰¹ See *generally id.* ("The average patient has little or no understanding of the medical arts, and ordinarily has only his physician to whom he can look for enlightenment with which to reach an intelligent decision.").

²⁰² See, e.g., TEX. DISCIPLINARY RULES OF PROF'L CONDUCT r. 1.02 (a)(2) (2019).

²⁰³ See *Canterbury*, 464 F.2d at 782.

²⁰⁴ See Murray, *supra* note 17, at *passim*.

In obtaining informed consent, the physician must disclose the information about the procedure without inserting their opinion into the disclosure.²⁰⁵ The lack of regulated disclosures, which is the solution if the display and describe requirement is deemed unconstitutional, could arguably be an ideological message in and of itself. Some physicians are in the business of performing abortions; performing abortions is what they do every day.²⁰⁶ It is contrary to their business to display the ultrasounds and subsequently describe the image because the patient then has the option, after being informed of what the procedure entails and the risks involved, to change her mind and decide not to go through with the abortion. In this case, the physician loses the money and the business of the patient, which is adverse to the profits of the clinic. The physician's lack of disclosure could be ideological in that it could be seen as pushing a message from the physicians that they are pro-abortion and not neutral, as required.²⁰⁷ In requiring the physician to display and describe, the state, which is not required to stay neutral under *Cruzan*,²⁰⁸ is essentially counter-acting the physician's interest in maintaining a business and protecting the patient's right to personal autonomy. The silence of the physician and subsequent lack of disclosure could arguably be the physician's opinion, which would make the nondisclosure an ideological message.

Furthermore, the physician-patient relationship relies solely on trust, and without the physician disclosing the full information, the patient is not being informed of her options. Without being informed of her options, the patient could consent to something involuntarily, which would in turn completely change the relationship between the physician and the patient.²⁰⁹ Involuntary consent can be avoided by ensuring that the physician is disclosing the truthful information completely and coherently.²¹⁰

²⁰⁵ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992); *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2373 (2018).

²⁰⁶ See *Becerra*, 138 S. Ct. at 2374–75 (discussing a brief history of medical disclosure, or lack thereof, as a means of pushing a physician's ideology on a patient, and how clinics who solely perform abortions could be hurt by a required medical disclosure related to options outside of the medical procedure sought).

²⁰⁷ See *Casey*, 505 U.S. at 882–84; *Becerra*, 138 S. Ct. at 2373.

²⁰⁸ 497 U.S. 261, 280 (1990); *accord* *Rust v. Sullivan*, 500 U.S. 173, 185–87 (1991).

²⁰⁹ See sources cited *supra* note 141.

²¹⁰ See discussion *supra* Section II.B.

Allowing for a First Amendment challenge to succeed, thereby holding that the display and describe requirement violates the physician's freedom of speech, puts the physician's constitutional rights above that of the patient. The patient has the right to consent to what is done to her body, and it is not a persuasive argument to say that the physician's freedom of speech, or constitutional right to not have to comply with compelled speech, should be above the patient's right to consent to treatment and/or surgery. This Article echoes *Casey's* argument in that requiring informed consent in an abortion context "does not underlie or override the abortion right[.]" meaning that requiring the physician to disclose the information does not undermine the woman's constitutional right to obtain an abortion; it just complies with the constitutionally rooted idea of informed consent.²¹¹ Allowing for a First Amendment challenge to succeed favors the physicians and their rights, which consequently takes away the woman's right to personal autonomy, and further, her dignity.

The woman's right to an abortion is not implicated by the display and describe requirement because requiring physicians to disclose this information is acting only to inform the patient, not to coerce her. This requirement protects the other constitutional rights of the woman—her right to choose what is done to her body, her personal autonomy, and her right to receive information.

2. It is Difficult to Obtain Informed Consent Without These Disclosures and Would Result in Liability for Medical Malpractice

If the physician does not display and describe the ultrasound, the woman's consent cannot be *fully* informed. In order for patients to understand fully what they are going to undergo whenever they elect to get an abortion, the physician must completely and coherently provide information to the patient.²¹² In other instances when a patient undergoes a procedure in which something is removed or added to the body, the physician must wholly explain the procedure and the recovery, along with the likely and unlikely consequences to the

²¹¹ 505 U.S. at 838.

²¹² See *Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir. 1972); see also *Cruzan*, 497 U.S. at 261; *Harrison v. United States*, 284 F.3d 293, 298 (1st Cir. 2002).

patient.²¹³ When patients get their gallbladder removed, the physician provides an ultrasound image and discusses how the procedure will be performed and what the patients' options are in relation to the surgery.²¹⁴ If a patient were to get their gallbladder removed and the physician did something during surgery that the patient did not consent to, this would give rise to either a battery claim or a medical malpractice claim, and in some instances, both.²¹⁵ There should not be a difference when it comes to abortion requirements for informed consent. A woman cannot fully consent to a procedure about which she knows very little. Although *Akron* and *Thornburgh* were overruled by *Casey*, those decisions, alongside *Danforth*, all recognize that the woman must be apprised of the health risks of abortion and childbirth.²¹⁶ If the state does not require physicians to disclose the information to the patient, the patient is likely to enter into the procedure without knowing fully what the procedure entails.

Of the women that receive an abortion in a given year, 21% of them believe their abortion did more harm than good.²¹⁷ Most women who struggle with significant emotional, physical, and spiritual consequences wish that they had been apprised of all of the facts regarding the abortion procedure and its inherent risks.²¹⁸ Being apprised of all of the facts and risks that are associated with an abortion before obtaining an abortion is likely to provide the patient with relief in the long term because she will have made a decision after being informed of all the necessary information.²¹⁹

A study done by professors at the University of California, San Francisco, shows that very few patients change their mind about the

²¹³ See *Canterbury*, 464 F.2d at 780; *Cruzan*, 497 U.S. at 261; *Harrison*, 284 F.3d at 298–99.

²¹⁴ *Gallbladder Removal*, PRIVIA MED. GROUP, <http://www.advancedsurgery.net/services/gallbladder-removal/> (last visited Nov. 18, 2020).

²¹⁵ *Informed Consent*, JUSTIA, <https://www.justia.com/injury/medical-malpractice/informed-consent/> (last updated Sept. 2018); *Mohr v. Williams*, 104 N.W. 12, 15–16 (Minn. 1905); *Cobbs v. Grant*, 502 P.2d 1 *passim* (Cal. 1972).

²¹⁶ See *Casey*, 505 U.S. at 882.

²¹⁷ Daniel Christiansen, *Researchers Discover Abortion Regret Is Not a Myth*, CARE NET: ABUNDANT LIFE BLOG (July 19, 2016), <https://www.care-net.org/abundant-life-blog/researchers-discover-abortion-regret-is-not-a-myth>.

²¹⁸ *Considering Abortion? Know the Facts*, *supra* note 147.

²¹⁹ *Id.*

abortion once they have seen the ultrasound;²²⁰ however, this study shows that this requirement is needed to obtain fully informed consent. Some of the patients are going into the clinic to obtain an abortion, but once they have been informed of all the rights, risks, and consequences, they do change their mind.²²¹ Once the patients are fully informed of the development of the fetus and exactly how the abortion will be performed, they decide not to go through with the abortion, demonstrating that the requirement is medically necessary for the patient to give *fully* informed consent.

Informed consent does not vary by patient in any circumstance regardless of what the patient knows or does not know.²²² The physician must disclose the same information to all patients regardless of whether they give consent before the disclosures.²²³ Every patient has a right to be told what the procedure entails and what the risks are, and the physician cannot disclose the information on a discretionary basis, meaning the physicians cannot choose what to disclose based on the patient at hand.²²⁴

From a strictly legal standpoint, allowing for a First Amendment challenge on display and describe requirements to succeed diminishes the patient's right to sue for medical malpractice. If the physician is not required to disclose this information, the patient has no grounds for a medical malpractice claim.²²⁵ The Supreme Court decision that the disclosures are not medically necessary and therefore violate the physician's constitutional rights would render medical malpractice liability of abortion providers essentially void.²²⁶ Allowing for this challenge also puts the physician's rights above the patient by taking

²²⁰ Mary Gatter et al., *Relationship Between Ultrasound Viewing and Proceeding to Abortion*, 123 OBSTETRICS & GYNECOLOGY 81 (2014); Ushma D. Upadhyay et al., *Evaluating the Impact of a Mandatory Pre-Abortion Ultrasound Viewing Law: A Mixed Methods Study*, PLOS ONE (July 26, 2017), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0178871>.

²²¹ Gatter et al., *supra* note 220.

²²² See *Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir. 1972); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261 (1990); *Harrison v. United States*, 284 F.3d 293, 298 (1st Cir. 2002).

²²³ See *Canterbury*, 464 F.2d at 780; *Cruzan*, 497 U.S. at 261; *Harrison*, 284 F.3d at 298.

²²⁴ See *Canterbury*, 464 F.2d at 780; *Cruzan*, 497 U.S. at 261; *Harrison*, 284 F.3d at 298.

²²⁵ B. Sonny Bal, *An Introduction to Medical Malpractice in the United States*, PMC (Nov. 26, 2008), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2628513/>.

²²⁶ See *id.*

away the ability of the patient to recover because the abortion provider will not have any liability under medical malpractice law.

3. The Disclosures are Truthful, Non-misleading, and Relevant

The information at question with display and describe requirements is truthful, non-misleading, and relevant under *Planned Parenthood v. Casey*, and therefore it does not violate the physician's First Amendment right to free speech.²²⁷ There is not much debate on whether the statements are truthful because the physician has a duty to the patient. An assumption exists that the physician is complying with the requirement to tell the patient the truth in obtaining informed consent.²²⁸ The patient has a reasonable expectation that the physician will be truthful and disclose the necessary information.

The display of the ultrasound is non-misleading because it is factual by nature. Nothing indicates that the physicians are disclosing information that is leading the patient to believe something that is not factual. The statutes provide that the physicians are required to state in their own words what the ultrasound is depicting, and as this is factual information, it is not misleading.²²⁹ The information is not intended to persuade the patient to get the abortion; it is to inform the patient.

Contrast the ultrasound with the diseased lung images that are put on the cigarette packages in order to persuade the user to stop smoking.²³⁰ The diseased lung images were removed because the images did not depict factual information and were deemed ideological.²³¹ However, the Surgeon General's warning has been on a pack of cigarettes since 1966, updated in 1984, and it has not been removed because it advises the user of the risks associated with smoking, which is required by statute.²³² The Surgeon General's warning is different from the picture of the diseased lungs because the warning is advising of the possible risks that are associated with smoking, whereas the picture of the lungs is not based in fact and is designed to deter

²²⁷ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992).

²²⁸ See sources cited *supra* note 141.

²²⁹ N.C. GEN. STAT. § 90-21.85(a)(4) (2019); TEX. HEALTH & SAFETY CODE § 171.012(a)(4)(B)–(C) (2019); S.D. CODIFIED LAWS § 34-23A-52 (2019); KY. REV. STAT. § 311.727(1)(b) (2017).

²³⁰ Thrasher et al., *supra* note 176.

²³¹ *Id.*

²³² *Health Warnings*, *supra* note 177.

the smoker from buying the pack of cigarettes. An ultrasound is comparable to the warning as it is advising the patient of the risks, and it is not altered in any way to persuade the patient one way or the other.

The ultrasound is relevant because the image that the patient sees depicts the fetus and what the procedure entails in relation to the fetus. The mother is not the only being that is affected by this treatment, and therefore seeing the fetus before going through with the procedure is relevant to make the decision to abort a fetus.

D. The Display and Describe Requirement is Commercial Speech and is Subject to Regulations by the State

In the alternative, if the Court does not find the speech to be medically necessary, the Court needs to recognize that the speech of the physician is commercial speech and is subject to reasonable regulations.²³³ The display and describe requirement is considered commercial speech which is subject to regulations and has less protections under the First Amendment.²³⁴

In *Planned Parenthood v. Casey*, the Court established that physician speech as a part of the practice of medicine, whether viewed as a commercial speech or not, is subject to reasonable licensing and regulation by the State, which includes providing the information required by the display and describe requirements.²³⁵ The disclosure requirements arguably implicate the physician's right not to speak; however, because disclosing the information is pertinent to obtaining informed consent to an abortion procedure, this speech is part of the practice of medicine and, therefore, the state is permitted to implement regulations that require the physician to disclose this information.²³⁶ The display and describe requirements mandate the physician to disclose factual information and show a factual representation of the fetus to the patient.²³⁷ These requirements are reasonable in order for the physician to obtain fully informed consent.

²³³ See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

²³⁴ See *Zauderer*, 471 U.S. at 626.

²³⁵ 505 U.S. at 838.

²³⁶ *Id.*

²³⁷ See, e.g., KY. REV. STAT. § 311.727 (2017); N.C. GEN. STAT. § 90-21.85 (2019); S.D. CODIFIED LAWS § 34-23A-10.1 (2020); TEX. HEALTH & SAFETY CODE § 171.012 (2019).

Commercial speech is speech that is intended to elicit a commercial transaction.²³⁸ There is something to be said about how the physician's speech in the context of abortion is used in a business transaction. The patient is there for an abortion, and physicians are there to perform the abortion. The physicians have a business interest in the abortion in that they are performing the surgery, as part of their practice, and their speech is commercial in character.²³⁹ Because the physician's speech is commercial speech, the Court has ruled that it is afforded less protections under the First Amendment and is subject to the State compelling the disclosures if the physician's "rights are adequately protected [and] as long as [the] disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."²⁴⁰ An abortion patient is a "consumer" because the patient is technically consuming services as a result of an economic transaction, whether that be out of pocket, insurance, or state funding.²⁴¹ The state has an interest in protecting the rights of a woman both as a consumer and a patient, and therefore, these disclosures should not be subject to heightened First Amendment scrutiny.

An example of commercial speech is advertising for a law firm. The statements made in the advertisement are considered commercial speech; however, if the client decides to do business with the law firm, the legal advice and counsel are not considered commercial speech and are afforded more protection under the First Amendment.²⁴² The switch from commercial speech to non-commercial speech occurs because once the client has retained the attorney, the attorney is no longer eliciting a commercial transaction—he or she already has completed it. The display and describe requirement is commercial speech because the patient is listening to the information and deciding whether she wants to go through with the procedure, just as a client listens to an advertisement and decides to retain an attorney. Once the patient decides to get the abortion, the speech is likely no longer commercial speech, and therefore would be subject to First Amendment challenges. However, before the decision is made, the speech is commercial and therefore not subject to the challenges that arise

²³⁸ *Zauderer*, 471 U.S. at 637.

²³⁹ *Id.* at 637.

²⁴⁰ *Id.* at 651.

²⁴¹ *See Consumer*; MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/consumer> (last updated Nov. 8, 2020).

²⁴² *See Zauderer*, 471 U.S. at 629–30.

under the First Amendment, but is subject to the state compelling the disclosures.

In conclusion, abortion procedures should be subject to informed consent regulations.²⁴³ Further, the compelled disclosures in question are necessary to obtain informed consent.²⁴⁴ The speech is not an ideological message because it portrays a factual depiction of the fetus and is consequently medically necessary to obtain informed consent.²⁴⁵ Third, the speech is commercial speech under *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*²⁴⁶ and is subject to reasonable regulations by the state under *Planned Parenthood v. Casey*.²⁴⁷

IV. CONCLUSION

Roe v. Wade established the woman's right to an abortion, while also recognizing the right is not absolute.²⁴⁸ *Planned Parenthood v. Casey* developed an undue burden test for abortion regulations and held that speech in the context of physician-patient discourse is subject to the reasonable regulations of the state.²⁴⁹ Most importantly, the Supreme Court has upheld regulations of the state and echoed *Casey's* holding that the informed consent statutes and regulations are not subject to protections under the First Amendment.²⁵⁰

The split between the Fourth, Eighth, Fifth, and Sixth Circuits has made it clear that clarification is needed to resolve this discrepancy.²⁵¹ Because some courts have found that the requirement is constitutional, but others have decided otherwise, the Supreme Court needs to step in and resolve the issue. Over 450 regulations have

²⁴³ See discussion *supra* Section III.A.

²⁴⁴ See discussion *supra* Section III.B.

²⁴⁵ See discussion *supra* Section III.B.

²⁴⁶ 471 U.S. at 626; see discussion *supra* Section III.C.

²⁴⁷ 505 U.S. 833, 882–84 (1992); see discussion *supra* Section III.C.

²⁴⁸ 410 U.S. 113, 164–65 (1973).

²⁴⁹ See 505 U.S. at 874–75.

²⁵⁰ See, e.g., *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2373 (2018); *Rust v. Sullivan*, 500 U.S. 173, 203 (1991); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 65 (1976).

²⁵¹ See, e.g., *Stuart v. Camnitz*, 774 F.3d 238, 242 (4th Cir. 2014); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 738 (8th Cir. 2008); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 580 (5th Cir. 2012); *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 434 (6th Cir. 2019).

been enacted since 2011, most of which include this requirement, meaning that this issue is likely going to be litigated in other courts unless the Supreme Court grants the writ of certiorari.²⁵² This Article urges the Supreme Court to resolve the circuit split and hold that the display and describe requirement does not violate the physician's First Amendment right to free speech for the following reasons.

First, abortion procedures should be subject to informed consent regulations. They are a medically invasive procedure, and as other invasive procedures are subject to regulations, abortion should be too. Second, it is nearly impossible to obtain informed consent without these disclosures because the woman is not apprised of the risks. The compelled disclosures are not an ideological message because they portray a factual depiction of the fetus, and, consequently, are medically necessary to the woman's decision—whether or not that decision is to have an abortion. Alternatively, the speech is commercial speech under *Zauderer* because the speech is in pursuit of a commercial transaction and is afforded less protection under the First Amendment.²⁵³ Under *Casey*, speech in this context is subject to reasonable regulations by the state because it is part of the practice of medicine and the State has an interest in maintaining the integrity of the medical profession.²⁵⁴

The main question in abortion litigation is who gets to make the decision to obtain an abortion, the woman or the State.²⁵⁵ The woman has recognized rights under the Constitution to obtain an abortion, but she also has a right to personal autonomy. In order to preserve this right, the state must regulate the disclosures to ensure that she is getting the information needed to make an informed decision about what happens to her body. Just as the right to choose to get an abortion is fundamental, the right of the woman to be apprised of *all* of the facts and *all* of the risks associated with the procedure is equally as important. One of the ways to advocate for this right is to uphold the constitutionality of the display and describe requirements and grant the states the power to compel disclosures in this context.

²⁵² *State Facts about Abortion: Texas*, *supra* note 10.

²⁵³ See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985).

²⁵⁴ See *Casey*, 505 U.S. at 881–84.

²⁵⁵ *Vagianos*, *supra* note 7.