DOCTOR-PATIENT-STATE RELATIONSHIP: THE PROBLEM WITH INFORMED CONSENT AND STATE MANDATED ULTRASOUNDS PRIOR TO ABORTIONS

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I. INTRODUCTION

The right of personal privacy in the United States includes the abortion decision.[1] This right to an abortion is governed by case law that protects both the state's interest in the health of the woman and that of potential life from the outset of pregnancy.[2] However, the parameters of this decision are continually changing due to state legislation that purports to make the decision well informed, but in doing so adds additional requirements that many argue violate the woman's and her physician's constitutional rights.[3]

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[1] Roe v. Wade, 410 U.S. 113, 153 (1973). "The detriment that the state would impose upon the pregnant woman by denying this choice altogether is apparent. . . . Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child . . . ."

[2] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 850 (1992). "Some of us as individuals find abortion offensive to our most basic principles of morality, but that cannot control our decision. Our obligation is to define liberty of all, not to mandate our own moral code."

[3] Tex. Med. Providers Performing Abortion Servs. v. Lakey, 806 F. Supp. 2d 942, 975 (W.D. Tex. 2011). In February of 2012, Virginia Governor Bob McDonnell introduced a bill that would require all women to undergo a vaginal ultrasound in which a wand is inserted into the woman's vagina to yield an image of the fetus before an abortion could be performed. He later dropped the bill after he was advised that it would not withstand legal scrutiny and would

First, this note will examine the Supreme Court's landmark decisions in *Roe v. Wade* and *Planned Parenthood v. Casey* and how they addressed the parameters of the abortion right, as well as issues surrounding the physician's need for a woman's informed consent before an abortion can be performed.[4] This will include the implications of the Court's opinion, when, for example, the state enacts legislation aimed at ensuring a woman's decision is mature and informed when deciding whether to terminate her pregnancy; the state may do so even if the "State expresses a preference for childbirth over abortion."[5]

Next, this note will examine the interaction between informed consent laws and the First Amendment by reviewing the relevant case law and statutes, as well as the legal impact of misleading or false information. In particular, it will address the issue of compelled speech and compelled listening. Specifically, a current argument is that certain state abortion requirements, for example, requiring a doctor to describe in detail the embryo or fetus, or asking a woman whether she would like to view an ultrasound of the embryo or fetus, violate a physician's First Amendment right against compelled speech.[6] For a patient, First Amendment issues are raised in the context of compelled listening.[7] Next, this note will examine the issue of mandatory ultrasounds as a pre-abortion requirement and different courts' analysis thereof. Lastly, this note will look at the case study of a Texas statute requiring mandatory ultrasounds to be performed before all abortion procedures and the way in which the statute

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violate constitutional rights, but stated he still supported the bill. Laura Bassett, *Bob McDonnell, Virginia Governor, Didn't Realize Ultrasound Bill Mandated Invasive Procedure*, HUFFINGTON POST, (Feb. 24, 2012, 10:34 PM), *http*://www.huffingtonpost.com/2012/02/24/va-governor-bob-mcdonnell_n_1299348.html.

[4] *Roe*, 410 U.S. at 154; *Casey*, 505 U.S. at 881, 883.

[5] *Casey*, 505 U.S. at 883.

[6] Tex. Med. Providers Performing Abortion Servs. v. Lakey, 806 F. Supp. 2d 942, 975 (W.D. Tex. 2011), *vacated in part by* Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 575 (5th Cir. 2012).

[7] Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U.L. REV. 939, 980 (2009).

was held unconstitutional by a Fifth Circuit District Court, but later reversed by the Court of Appeals.[8]

II. THE *ROE V. WADE* AND *PLANNED PARENTHOOD V. CASEY* FRAMEWORK: ABORTION RIGHTS AND INFORMED CONSENT

In the United States Supreme Court's landmark decision in *Roe v. Wade*, the Court recognized the right of personal privacy that includes a woman's right to have an abortion.[9] The Court held that this right is not unqualified and must be balanced against important state interest, such as regulation of the abortion procedure and the potential life of the fetus.[10] The Supreme Court further recognized that a state may require a woman to give her written informed consent before an abortion can be performed, as with other medical procedures.[11]

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[8] *Lakey*, 667 F.3d at 584.

[9] *Roe*, 410 U.S. at 154. Today, abortion is one of the most commonly performed clinical procedures; and, less than 0.3 percent of women undergoing legal abortion procedures sustain a serious complication. In addition, nearly half of all pregnancies in the United States each year are unintended, and four in ten of these are terminated by medically safe, legal abortions. Susanne Pichler, *Medical and Social Health Benefits Since Abortion Was Made Legal in the U.S.*, PLANNED PARENTHOOD, 2 (Nov. 2009), http://www.plannedparenthood.org/files/PPFA/ Medical_Social_ Benefits_ Abortion.pdf.

[10] *Roe*, 410 U.S. at 159. The abortion privacy right is inherently different from the right of personal privacy with respect to marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, because "[t]he pregnant woman cannot be isolated in her privacy." *Id.* "She carries an embryo and, later, a fetus[.]" *Id.* This, according to the Court, is why the right of privacy that a woman enjoys in her decision to obtain an abortion is not absolute.

[11] Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 67 (1976). This case held as constitutional a Missouri statute, which provided in relevant part that the statutory definition of viability as the point at which the fetus was "potentially able to live outside the mother's womb" was not unconstitutional and the provision requiring the physician "to exercise professional care to preserve the fetus life and health" on pain of criminal and civil liability was unconstitutional. *Id.* at 64, 82. "We could not say that a requirement imposed by the State that a prior written consent for any surgery would be

However, ten years later in *Akron v. Akron Center for Reproductive Health*, the Court struck down as unconstitutional a statute requiring a physician to provide specific information that was "designed to influence the woman's informed choice between abortion or childbirth," to a patient seeking an abortion.[12] The Court reasoned that while factual information may be supplied to a woman to help her make an informed decision, this information may not be given if its only purpose is to influence the woman's decision by convincing her to continue with her pregnancy as opposed to aborting the fetus.[13] The state therefore does not have "unreviewable authority to decide what information a woman must be given before she chooses to have an abortion."[14]

A decade later the Court changed paths in *Planned Parenthood v. Casey* by holding that a state has a valid interest in protecting the potential life of the fetus and thus can enact legislation aimed at ensuring the woman's decision is mature and informed, and may do so even when the "[s]tate expresses a preference for childbirth over abortion."[15] The court held that such a preference is constitutional because merely disclosing information cannot be considered a substantial obstacle to obtaining an abortion and therefore is not an undue burden.[16] The Court further held that the statute did not prevent the physician from exercising his or her medical judgment because

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unconstitutional. As a consequence, we see no constitutional defect in requiring it only for some types of surgery. . . ." *Id.* at 67.

[12] Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 444 (1983). "It remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, depending on her particular circumstances." *Id.* at 443.

[13] *Id.* at 444.

[14] *Id.* at 443. Requiring the physician to describe in detail the anatomical and physiological characteristics of the particular unborn child is unconstitutional, as is telling the patient that an abortion is a major medical surgery and describing numerous possible physical and psychological complications of abortion. *Id.* at 444-45.

[15] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 883 (1992).

[16] *Id.*

it did not require a physician to comply with informed consent laws so long as the physician "can demonstrate by preponderance of the evidence, that he or she reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient."[17]

In general, *Casey* rejected *Roe's* trimester framework in favor of the "undue burden" standard, which emphasized the state's interest in protecting both maternal health and potential fetal life "from the outset" of the pregnancy.[18] Thus, the *Casey* test requires the Court to decide whether a particular statute imposes an "undue burden" in the path of a woman seeking an abortion.[19] This stood opposed to *Roe's* holding that the state's interest in protecting maternal health allows regulation of the

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[17] *Casey*, 505 U.S. at 883-84 (quoting, 18 PA. CONS. STAT. § 3205 (1990)).

[18] *Casey*, 505 U.S. at 869-78. The Court held that rejecting *Roe's* trimester framework for the undue burden standard did not overrule *Roe* because the Court did not consider it to be a part of the essential holding. *Id.* at 873.

[19] *Id.* at 877. What exactly defines an "undue burden" is not clear. In upholding Pennsylvania's mandatory twenty-four hour waiting period, the Supreme Court took note of the findings by the district court that specifically stated that the waiting period posed serious burdens. *Id.* at 885-86. "The District Court found that for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others, the twenty four hour waiting period will be 'particularly burdensome.'" *Id.* at 886. (quoting Planned Parenthood of Se. Pa. v. Casey, 744 F. Supp 1323, 1352 (E.D. Pa. 1990)). The Court reasoned that this would only increase the costs of the procedure, and while the risk of delay of abortion may be "particularly burdensome," it was not a "substantial obstacle." *Id.* at 886-87. However, as the Eastern District Court noted, a twenty-four hour waiting period can be a substantial obstacle for many women for various reasons, including, the financial one: many women simply cannot afford to travel far distances and incur the costs when they must wait the extra twenty-four hours before the procedure can be performed. *Casey*, 744 F. Supp. at 1352. For women in North Dakota this is particularly burdensome because the state has only one abortion clinic. RED RIVER WOMEN'S CLINIC, http://www.redriverwomensclinic.com (last visited Jan. 5, 2012). In addition, women may lose wages for taking extra time off from work to comply with the twenty-four hour waiting period, and even worse they could lose their jobs entirely. *Casey*, 744 F. Supp. at 1352. In addition, women may place themselves in physical danger if they must hide the pregnancy and later the abortion from family members and having an extra twenty-four hour waiting period makes this even more burdensome. *Id.*

abortion procedure after the first trimester, before this time the abortion decision was left to the woman and the medical judgment of her physician.[20] In addition, *Casey* changed the time in which the state may regulate the abortion procedure to the onset of pregnancy, as opposed to the point of viability, as in *Roe*.[21]

Fifteen years later, the Court's decision in *Gonzalez v. Carhart* reaffirmed *Casey*'s holding that "the state has a significant role…in regulating the medical profession," and "[t]he government may use its voice and regulatory authority to show its profound respect for the life within the woman."[22] The question then becomes, what are the limits on the state's right to enact legislation that "expresses a preference for childbirth over abortion?"[23] When does the state go too far, stripping the woman's decision from her, because the legislation does not just promote a preference for childbirth, but rather becomes coercive?

Informed consent is required for not only abortions, but also other medical procedures, with certain limitations.[24] But, the

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[20] Roe v. Wade, 410 U.S. 113, 163 (1973).

[21] *Casey*, 505 U.S. at 872-873.

[22] Gonzalez v. Carhart, 550 U.S. 124, 157 (2007). This case held constitutional a congressional statute prohibiting "partial birth abortion" otherwise known as intact D&E "dilation & evacuation." *Id.* at 147. Intact D&E is normally performed in the second trimester of pregnancy. *Id.* at 135. The doctor dilates the cervix and then inserts surgical instruments into the uterus and maneuvers them to grab the fetus and pull it back through the cervix and vagina, in which it normally rips apart as it is removed. *Id.* Justice Ginsburg noted in her dissent that numerous physicians and nine professional associations stated in the congressional hearing for the ban that intact D&E can be a safer option for pregnant women in certain situations. *Id.* at 176 (Ginsburg, J., dissenting). She further stated that the Act does not further the government's purported interest because it "saves not a single fetus from destruction, for it targets only a *method* of performing abortion." *Id.* at 181.

[23] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 883 (1992).

[24] 61 Am. Jur. 2d Physicians, Surgeons, and Other Healers. §176 (2011).

> A physician retains a qualified privilege to withhold information on therapeutic grounds if a complete and candid disclosure of possible alternatives and consequences

degree to what constitutes informed consent differs between abortion and other procedures. Informed consent doctrine rests on the premise that it is the prerogative of the patient to choose his treatment, and that a doctor may not withhold from the patient the knowledge necessary for the exercise of that right.[25] Seemingly problematic is state legislation that requires a doctor to provide information favoring childbirth over abortion, because of the relationship that exists between a woman and her doctor.[26] This type of doctor-patient relationship is unique due to the sense of trust that develops between physician and patient, similar to the trust that forms between attorney and client.[27]

A woman may assume that if her doctor appears to prefer her to continue with her pregnancy instead of receiving an abortion, or persuades her to do so, this preference is due to the implications an abortion would have on her health. A woman who intends to have an abortion would not expect that the medical counseling she receives might be based on the political leanings of the state, instead of pure science.[28] This problem is

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> might have a detrimental effect on the physical or psychological well-being of the patient." Also, a physician need not disclose the hazards of treatment if the patient has specifically requested that he not be told. Similarly, a physician's duty to disclose is suspended if an emergency of such gravity and urgency exists that it is impractical to obtain the patient's consent, in which case consent is implied.

[25] Wilkinson v. Vesey, 295 A.2d 676, 619-20 (R.I. 1972).

[26] Susan Dorr Goold, *Trust, Distrust and Trustworthiness: Lessons from the Field,* 17 J. OF GEN. INTERNAL MED., 79, 79 (2002).

[27] *Id.* "'Trust (or distrust) occurs in a relationship. Perceptions, beliefs and expectations are directed toward the one trusted, and are not merely the outcomes one hopes will occurs via that relationship. Thus, 'I trust my doctor to take care of my illness' is not a belief about the care, but about the doctor.'" *Id.* at 80.

[28] Lauren R. Robbins, *Open Your Mouth and Say 'Ideology': Physicians and the First Amendment*, 12 U. PA. J. CONST. L. 155, 163 (2009). Courts have held that a doctor is not required to communicate dangers to a patient that a person of average sophistication would know. *Id.* at 161. For the average

heightened because of the differential power dynamic between physicians and their patients. Patients see their physicians as experts and themselves as laypeople.[29] The physician's opportunities to influence the patient are unusual because the physician is in an unnatural position of trust and confidence in regards to his or her patient.[30] The woman is then forced to make a decision that is influenced not only by science, but by a state-sponsored ideology based on the notion that abortions psychologically harm women, when no empirical evidence can confirm that as true.[31] Furthermore, allowing the state to express its opinion goes directly against the purpose of the informed consent doctrine, in that the purpose is to help the

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pregnant woman considering an abortion this would be that pregnancy, if not terminated or miscarried, eventually results in the birth of a baby. *Id.* (quoting Canterbury v. Spence, 464 F.2d 772, 788 (D.C. Cir. 1972)).

[29] Robbins, *supra* note 26, at 164. Communication between physician and patient tends to be dominated by the doctor. *Id.* (citing Debra L. Roter, Moira Stewart, Samuel M. Putnam, Mack Lipkin, William Stiles & Thomas S. Inui, *Communication Patterns of Primary Care Physicians*, 277 JAMA 350, 355 (1997) (reporting that sixty-six percent of physician visits studied were dominated by the physician, narrowly focused on biomedical concerns, and characterized by low levels of patient control over communication.)).

[30] 61 Am. Jur. 2d Physcians, Surgeons, and Other Healers. § 143 (2011).

[31] Brenda Major et al., *Report of the APA Task Force on Mental Health and Abortion*, The American Psychological Association, 4 (2008).

> The best scientific evidence published indicates that among adult women who have an unplanned pregnancy the relative risk of mental health problems is no greater if they have a single elective first-trimester abortion than if they deliver that pregnancy . . . Nonetheless, it is clear that some women do experience sadness, grief, and feelings of loss following termination of a pregnancy, and some experience clinically significant disorders, including depression and anxiety. However, the TFMHA reviewed no evidence sufficient to support the claim that an observed association between abortion history and mental health was caused by the abortion per se, as opposed to other factors.

patient come to a decision on what is best for the *patient*, not what is best for the *state's* moral feelings.

The Court in *Planned Parenthood v. Casey* wrote, "[i]n attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed."[32] The Supreme Court did state that this "fully informed" decision must be based on information that is truthful and not misleading.[33] However, legislation that favors childbirth over abortion, when abortion is a medically safe procedure, can be characterized as misleading. Furthermore, the misinformed decision to continue with a pregnancy can result in what the Court was concerned about. Specifically, a woman who realizes once the child is born that her decision to keep the child was not fully informed may undergo devastating psychological consequences.[34]

III. FIRST AMENDMENT IMPLICATIONS OF INFORMED CONSENT: COMPELLED SPEECH OR COMPELLED LISTENING?

Another pertinent consideration is how legislation concerning informed consent is affected by the rights protected by the First Amendment. Doctors may be affected by legislation that prefers childbirth to abortion because it can possibly violate a doctor's right against compelled speech under the First Amendment.[35] In addition, a patient may be affected by

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[32] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992).

[33] *Id.*

[34] *Id.*

[35]Texas Med. Providers Performing Abortion Services v. Lakey, 806 F. Supp. 2d 942, 976 (W.D. Tex. 2011) *vacated in part*, 667 F.3d 570 (5th Cir. 2012).

> At the heart of the First Amendment is the ineluctable relationship between free flow of information and a self-governing people . . . . Embodied in our democracy is the firm conviction that wisdom and justice are most likely to prevail in public decisionmaking if all

legislation that prefers childbirth to abortion because it can possibly violate a patient's right against compelled listening. [36] In understanding the physician's First Amendment right,"[t]he use of the state's power to compel someone to speak its message 'violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.'"[37] In addition, the patient's first amendment right may be violated because it can undermine an individual's right to control their own development and decision making process.[38]

In relation to abortions, doctors are therefore forced to convey a message to patients, whether by reading materials, doing ultrasounds, or having a patient hear the fetus's heartbeat. This message is one that the legislature decided is required in making an informed decision, although conveying this information is not medically necessary for the woman's health. Furthermore, compelled speech also "distorts the marketplace of ideas and democratic decision-making by misrepresenting the views of speakers forced to propound a viewpoint that is not their own."[39] The government therefore manipulates the marketplace by making its message appear more popular than it actually is, which in turn can be extremely problematic

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> ideas, discoveries, and points of view are before citizenry for its consideration. . . . Accordingly, we must remain profoundly skeptical of government claims that state action affecting expression can survive constitutional objections.

Thomas v. Bd. of Educ., 607 F.2d 1043, 1047 (2d. Cir. 1979).

[36] Corbin, *supra* note 7, at 980.

[37] *Id.* at 977. (quoting Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 573 (1995)).

[38] *Id.* at 980.

[39] *Id.* at 979. Not only is manipulating a doctor's speech when counseling a patient on whether to continue with pregnancy problematic, but an analogous example to consider is the implications of when a scientist is forced to "claim that the evidence of global warming is inconclusive."

constitutionally.[40]

The right against compelled listening is strongly grounded in the First Amendment values of autonomy, self-realization, and self-determination.[41] "When the government forces its arguments or information onto unwilling recipients, it can . . . undermine democratic decision-making by the people."[42] The right against compelled listening builds on the captive audience doctrine, in that the state violates the right against compelled listening "only when the government's message crosses over from available to required viewing."[43] Forcing a patient to listen to information that is not medically required strays from merely informing the patient of her options to something more akin to persuading her to continue carrying the fetus. This is a violation of the First Amendment because traditional free speech rights support a right against compelled listening.[44]

There is also an issue of paternalism that is raised with the First Amendment right against compelled listening. It has been held unconstitutional for the government to manipulate speech "in order to convince [people] to make beneficial decisions any more than it can censor information to prevent listeners from making poor decisions."[45] The Supreme Court has allowed a

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[40] *Id.* "The manipulation is especially problematic if the compelled speaker is a trusted or authoritative figure because it allows the government to add a patina of trustworthiness and expertise to its message."

[41] Corbin, *supra* note 7, at 980.

[42] *Id.* "More obviously, though, when the government makes a captive audience listen against its will to a government message, it runs roughshod over individuals' right to control their own development and decision-making process."

[43] *Id* at 980-81. The captive audience doctrine holds that private speakers cannot force their speech onto unwilling listeners. *Id.* at 943. The government may restrict such speech if "substantial privacy interests are being invaded in an essentially intolerable manner." *Id.* (citing Cohen v. California, 403 U.S. 15, 21 (1971)). Furthermore, for the captive audience doctrine to apply two requirements must be met. First, the audience cannot readily avoid the message and second, the audience should not have to quit the space to avoid the message. Corbin, *supra* note 7, at 943-44.

[44] Corbin, *supra* note 7, at 978.

[45] *Id.* at 1007.

degree of paternalism to permeate informed consent doctrine for abortions even though this is absent in traditional informed consent and prohibited in other speech cases.[46] Even if the government argued that the speech is intended to protect potential life, the state cannot abridge a pregnant woman's substantive due process rights before viability, nor should the state violate the woman's First Amendment right.[47]

In *Eubanks v. Schmidt*, a district court addressed a state statute that had similar provisions as the Pennsylvania statute at issue in *Casey*.[48] The statute required that the descriptive materials provided by the physicians be "[O]bjective and nonjudgmental, and shall include only accurate scientific information . . . ."[49] In addressing the physician's First Amendment rights, the court held that "[i]t is possible to convey information about ideologically charged subjects without communicating another's ideology, particularly in the context of

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[46] *Id.* at 1008 (citing Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579, 633 (2004)).

> In the First Amendment, paternalism means: a restriction on otherwise protected speech justified by the government's belief that speaking or receiving the information in the speech is not in citizens' own best interests . . . Notice that the commitment to antipaternalism in free speech doctrine is not an absolute. It could conceivably be overcome by a particularly weighty governmental interest that could only be justified by a paternalistic rationale. The Court does this by avoiding the label "paternalism" to describe the government's justification for a speech restriction, even where that justification is plainly paternalistic.

Carpenter, *supra* at 583 – 84.

[47] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992).

[48] Eubanks v. Schmidt, 126 F. Supp. 2d 451, 454 (W.D. Ky. 2000).

[49] Ky. REV. STAT. §311.725(2)(b) (1998). Even though some of the fetal development photographs included in the pamphlet were color-enhanced and others were enlarged, the court found the materials to be "truthful and not misleading." *Eubanks*, 126 F. Supp. 2d at 459.

the reasonable regulation of medical practice."[50] While the legislature passed the statute to further its preference for childbirth over abortion, because the pamphlets did not overtly display that preference, they were not seen as a violation of the First Amendment right against compelled speech, despite any implied favoritism.[51]

IV. THE MEANING OF "TRUTHFUL AND NOT MISLEADING DISCLOSURES" IN REFERENCE TO THE UNDUE BURDEN STANDARD

The next issue to resolve is whether providing a woman seeking an abortion with truthful, but perhaps misleading information because it so greatly favors childbirth, can be considered an undue burden. When the Supreme Court in *Casey* allowed the state to require doctors to provide information that "[e]xpresses a preference for childbirth over abortion," the Court also stated that "[i]f the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible."[52] The problem is that the Court never explained what would constitute "misleading" information. One could argue that hearing a fetal heartbeat would be misleading because women have a common knowledge of what a heartbeat sounds like. Therefore requiring them to listen to the fetus heartbeat could mislead them into thinking they want to carry the fetus to term because otherwise society would think they are unkind people.

The Eighth Circuit Court of Appeals followed the assumption that a false or misleading statement would be considered an undue burden.[53] In *Planned Parenthood of Minn. v. Rounds*, the Eighth Circuit Court found that the disclosure requirements in that particular case contained neither accurate nor relevant

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[50] *Id.* at 458 n.11.

[51] *Id.*

[52] *Casey*, 505 U.S. at 882.

[53] Harper Jean Tobin, *Confronting Misinformation on Abortion: Informed Consent, Deference, and Fetal Pain Laws*, 17 COLUM. J. GENDER & L. 111, 123 (2008).

information, but rather bare ideological statements.[54] The court held that "[d]isclosure requirements which hinder a woman's free and informed choice rather than assist it, would violate *Casey*."[55] However, lower courts have understood, with respect to this part of the *Casey* holding, that the crucial test is whether "a large fraction" of affected women will be obstructed from obtaining an abortion.[56] Unfortunately, what is problematic in this respect is that mandated disclosures that prefer childbirth over abortion may not affect "a large fraction" of women, therefore making them permissible under *Casey*.[57]

Inaccurate or misleading information may also be challenged under the "neglected purpose prong" of the undue burden standard.[58] This test states that an undue burden exists where "a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion."[59] Because abortion regulations are subject to rational

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[54] Planned Parenthood of Minn. v. Rounds, 467 F.3d 716, 723 (8th Cir. 2006). South Dakota had amended the disclosure requirements for informed consent to an abortion, requiring that the doctor provide a written statement to the patient two hours before an abortion informing the patient that the abortion would terminate the life of a whole, separate, unique, living human being, that the patient had an existing relationship with that unborn human being, and that the relationship enjoyed protection under the federal Constitution and under the laws of South Dakota, and that by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship would be terminated. *Id.* at 719 – 20 (citing SDCL § 34-23A-10.1). The state argued that the challenged disclosures were not ideological because they were unsupported by the scientific definition of a human being as a "living member of the species Homo sapiens." Rounds, 467 F.3d at 723 (internal quotations omitted).

[55] *Id.* at 726.

[56] Tobin, *supra* note 50, at 124.

[57] *Id.*

[58] *Id.* at 125.

[59] *Id.* at 125-26 (internal quotations omitted). The Pennsylvania abortion law in Casey stated that no physician could perform an abortion without receiving a signed statement from the woman stating she notified her spouse that she was going to have an abortion. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 887 (1992). The Court held that this was an undue burden and would likely prevent a significant number of women from obtaining an abortion,

basis review, false or misleading statements would fail because false or misleading information is not rationally related to the "substantial government interest justifying a requirement that a woman be apprised of the health risks of abortion and childbirth."[60]

The average person can understand that the purpose behind regulating physician speech is to protect the patient by preventing the expression of opinions that are inconsistent with accepted neutral standards of the medical profession. An issue arises as to whether informed consent in relation to abortion goes against this understanding by requiring speech that no longer protects the patient because it is misleading. One of the main problems in determining whether physician speech is truthful and not misleading is that "no well-developed doctrine exists to test for ideology-based regulations of physicians' speech."[61] "The challenge is to construct those regulations that advance patients' receipt of truthful information while avoiding those that silence or compel speech for purposes outside the practice of medicine."[62]

Furthermore, it is argued that the emphasis on trusting the physician's expertise is declining while medicine has become increasingly strict.[63] Linda Greenhouse, former New York Times Correspondent, observed that "[w]hile in Roe physicians were all-knowing professionals whose judgment was not to be questioned, the doctors depicted in [Gonzales v.] Carhart were so untrustworthy that the Court [had to] permit Congress to come between them and their hapless patients."[64] On the

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including those who fear for their safety and the safety of their children. *Id.* at 893-94.

[60] Tobin, *supra* note 49, at 127 (internal quotations omitted).

[61] Robbins, *supra* note 26, at 166.

[62] *Id.* "Physicians grant people 'access to a realm of shared knowledge that is neither state propaganda nor private fancy,' and it is thus crucial that their First Amendment rights not be violated with forced ideological statements." *Id.* (quoting Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 773 (1999)).

[63] *Id.* at 166.

[64] *Id.* (citing Linda Greenhouse, *How the Supreme Court Talks About Abortion: The Implications of a Shifting Discourse*, 42 SUFFOLK U. L. Rev. 41, 42 (2008)).

contrary, it is argued that "so long as the physician retains the liberty to disagree with or to undermine messages that the state may wish to communicate, the independent medical expertise of the physician is not debased."[65]

V. DOES A MANDATORY PRE-ABORTION ULTRASOUND VIEWING VIOLATE THE FIRST AMENDMENT OR THE UNDUE BURDEN STANDARD?

More recently, the issue of state-mandated ultrasounds as a requirement for women seeking abortions has been a topic of contention between pro-life and pro-choice advocates.[66] While

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[65] Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 989-90 (2007).

> The First Amendment, by contrast is not primarily concerned to protect the autonomy of those trying to decide whether to seek an abortion, but instead to preserve the integrity of physician-patient communications as a channel for the dissemination of expert knowledge. For this reason the First Amendment does not apply to information that the state provides to patients in propria persona.

Id. at 989.

[66] Ultrasound technology was originally developed "to detect icebergs and submarines in the early part of the twentieth century." Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 364 (2008). It "works by transmitting high-frequency sound waves through a body of water to detect hidden structures. The waves bounce of the structures and are converted to electrical impulses that are processed to form an image displayed on a screen." *Id.* Anthropologist Lisa Mitchell describes what commonly happens when ultrasounds are performed on pregnant women:

> The sonographer asks the woman to lie down on a table, then squirts her belly with a cool blue gel, moves a device over her abdomen, and taps at a keyboard. Suddenly, a grayish blur appears on a luminescent screen.

it is a common routine for doctors to perform an ultrasound on patients before performing an abortion, by making the ultrasound mandatory, its purpose is no longer to provide medical information to a doctor, but instead to give nonmedical information to the patient.[67] Furthermore, when an ultrasound is performed as anticipatory work for medical purposes, the patient is not usually asked if she wants to see the image.[68]

The problem with mandatory ultrasounds is that they inform women not only about the life of a fetus, but more specifically

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> Customarily during this ritual, the couple smile, laugh, and point at the screen, even though they often do not recognize anything in the blur. The sonographer taps at the keyboard again and looks closely at the grey-and-white blue. She measures part of it and calculates its age, weight and expected date of delivery. She observes the couples closely to see if they like the blur and show signs of "bonding" with it. The couple also look closely at the sonographer, anxious in case she finds something wrong with the blur. After about fifteen minutes, the blur is turned off, and the gel wiped away, and the couple are given a copy of the grayish blur to take home.

Id. at 367-68 (quoting Lisa M. Mitchell, *Baby's First Picture: Ultrasound and the Politics of Fetal Subjects*, CANADIAN J. SOC. ONLINE, 3 (2001), *http://www.cjsonline.ca/pdf/baby.pdf).*

[67] *Id.* at 380. Alabama's "Woman's Rights to Know" Act states:

> The ultrasound screening and the compulsory invitation to view the results are meant to counteract the patient's presumed reliance on information from a physician who is necessarily (from the legislative point of view) pro-choice: After all, he or she performs abortions. Mandatory ultrasound replaces a suspect source with a better informant: the fetus itself, or at least its picture.

Id. at 380.

[68] *Id.* at 381.

about the life of her fetus.[69] The purpose is to establish, or simply reinforce, the state's position that the fetus is not just "potential life," but "actual life."[70] "[T]he technology and the practice of ultrasounds have transformed the fetus from potential life to something that can have its picture taken, a trait which in our visual culture is perhaps as close to a marker of personhood as one can get."[71] Notably, "a photograph, unlike a painting or a sketch, is 'not only like its subject . . . [but is] an extension of that subject; and [therefore] a potent means of acquiring it.'"[72]

Ultrasounds differ from pamphlets that describe the development stages of the fetus and how the abortion procedure is performed because the pamphlet's information is about fetuses in general, not a visual image of the specific fetus that the woman is carrying.[73] "Ultrasound operates as a technological quickening, though it works through visual rather than somatic sensation."[74] Not only do mandatory ultrasounds force the woman to consider her own fetus as opposed to fetuses

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[69] Sanger, *supra* note 62, at 377. "This particular fetus, the visible one right there on the monitor, is not just a life, it is relative." *Id.*

[70] *Id.*

[71] *Id.* at 379. The fetus is also given a sense of personhood by some judges in Alabama who have appointed counsel to represent the fetus at bypass hearings for pregnant teenagers seeking judicial permission for an abortion without having their parents consent. *Id.* One judge said, "a guardian ad litem gives an 'unborn child' the 'opportunity to have a voice, even a vicarious one, in the decision making [process].'" *Id.* at 378 (quoting Helena Silverstein, *In the Matter of Anonymous, a Minor: Fetal Representation in Hearings to Waive Parental Consent for Abortion*, 11 CORNELL J.L. & PUB. POL'Y 69, 80 (2001)).

[72] Sanger, *supra* note 62, at 378–79 (quoting SUSAN SONTAG, ON PHOTOGRAPHY 155–56 (1977).

[73] *Id.* at 377.

[74] *Id.* at 382. "Mandatory ultrasound is meant to solidify the idea of a child so that the norms of maternal solicitude and protection begin to take hold." *Id.* at 383. Under English common law, quickening was the first recognizable movement of the fetus in utero, appearing usually from the sixteenth to eighteenth week of pregnancy. *Roe v. Wade*, 410 U.S. 113, 132 n.21 (1973). Prior to this point, the fetus was to be regarded as part of the mother, and therefore its destruction was not considered homicide. *Id.* at 134.

in general, they also disrupt a woman's control over her pregnancy, because the snapshot of the fetus is the first step a woman takes in the social experience of motherhood.[75]

State law varies in respect to ultrasound requirements. Currently, twelve states require verbal counseling or written materials to include information on accessing ultrasound services.[76] Twenty-one states regulate the provision of ultrasound by abortion providers.[77] Two states mandate that an abortion provider perform an ultrasound on each woman seeking an abortion, and require the provider to offer the woman the opportunity to view the image.[78] Nine states require that a woman be provided with the opportunity to view an ultrasound image if her provider performs the procedure as part of the preparation for an abortion.[79] Finally, five states require that a woman be provided with the opportunity to view an ultrasound image.[80] As more states enact laws mandating ultrasounds prior to abortions, constitutional attacks will most

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[75] Sanger, *supra* note 62, at 382.

> Mandatory ultrasound laws require women to participate physically in what has become a rite of full-term pregnancy: the first ultrasound. It now operates as an early step in prenatal care. By virtue of having the screening at all, women are scooped into the social category of pregnant women, however brief they intended that status to be."

Id.

[76] GUTTMACHER INSTITUTE, STATE POLICIES IN BRIEF: REQUIREMENTS FOR ULTRASOUND (2012) (The states include Georgia, Indiana, Kansas, Michigan, Missouri, Nebraska, North Carolina, Oklahoma, South Carolina, Utah, Virginia, and Wisconsin.).

[77] *Id.* (The states include Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Kansas, Louisiana, Michigan, Mississippi, Missouri, Nebraska, North Dakota, Ohio, South Carolina, South Dakota, Texas, Utah, Virginia, West Virginia.).

[78] *Id.* (The states include Louisiana and Texas.).

[79] *Id.* (The states include Arkansas, Georgia, Idaho, Michigan, Nebraska, Ohio, South, Carolina, Utah, and West Virginia.).

[80] *Id.* (The states include Indiana, Missouri, North Dakota, South Dakota, and Utah.).

likely continue to follow.

VI. WHY TEXAS HOUSE BILL NO. 15 WAS FOUND UNCONSTITUTIONAL BY THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

A Texas bill titled Texas House Bill Number 15 was struck down on August 11, 2011 as unconstitutional, because several portions of the Act were held to be unconstitutionally vague and in violation of the First Amendment by compelling physicians and patients to engage in government mandated speech and expression.[81]

A. THE PROVISIONS OF HOUSE BILL NO. 15

The act amended Chapter 171 of the Texas Health and Safety Code to require the following as prerequisites for a woman's informed and voluntary consent to an abortion:

> (1) the physician who is to perform the abortion, or a certified sonographer agent thereof, must perform a sonogram on the pregnant woman; (2) the physician must display the sonogram images, "in a quality consistent with current medical practice," such that the pregnant woman may view them; (3) the physician must provide, "in a manner understandable to a layperson," a verbal explanation of the results of the sonogram images, including a variety of detailed descriptions of the fetus or embryo; and (4) the physician or certified sonographer agent must "make . . . audible the heart auscultation for the pregnant woman to hear, if present, in a quality consistent with current medical practice and provide[], in a manner understandable to a layperson, a simultaneous verbal explanation of the heart

[81] Tex. Med. Providers Performing Abortion Serv. v. Lakey, 806 F. Supp. 2d 942, 947–48 (W.D. Tex. 2011), *vacated in par*t, 667 F.3d 570 (5th Cir. 2012).

auscultation."[82]

The Act also addresses the issue of timing of the sonogram: "If a woman certifies she lives 100 or more miles away from an abortion provider, she may satisfy the informed consent prerequisites two hours prior to an abortion; otherwise, the Act requires they be satisfied twenty-four hours in advance."[83] "The Act further amends the Texas Health and Safety Code by adding Section 171.0122 which allows women to 'opt out' of viewing the sonogram images or hearing the heart-beat, but requires all women to receive the detailed verbal description of the sonogram images mandated by that Section, except in cases of sexual assault, incest, or other limited circumstances."[84] Section 171.012(a)(5) was further amended to require the woman to sign a specific form before receiving an abortion.[85] Additionally, under the newly added section 171.0121, this form must be placed in the woman's medical records, and "be retained by the facility performing the abortion for at least seven years."[86]

Lastly, the Act and current Texas law contain compliance, enforcement, and penalty provisions relating to informed consent.[87] This includes "mandating inspection of abortion facilities 'at random, unannounced, and reasonable times as necessary to ensure compliance' with the informed consent provisions of Chapter 171."[88] Secondly, it includes requiring mandatory disciplinary actions, refusal to issue a medical license, and non-renewal of a medical license for failing to

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[82] *Id.* at 948 (quoting H.B. 15, Sec. 2).

[83] *Id.*

[84] *Id.* Limited circumstances include any "violation of the Penal Code that has been reported to law enforcement authorities or that has not been reported because she has a reason that she declines to reveal because she reasonably believes that to do so would put her at risk of retaliation resulting in serious bodily injury." V.T.C.A., Health & Safety Code § 171.0122 (West 2011).

[85] *Lakey*, 806 F. Supp. 2d at 948.

[86] *Id.*

[87] *Id.*

[88] *Id.*

comply with the Act.[89] Lastly, "existing Texas law makes it a misdemeanor offense for a physician to intentionally perform an abortion in violation of the informed consent provisions of Chapter 171."[90]

B. THE PLAINTIFFS' EIGHT CLAIMS AGAINST HOUSE BILL 15

Plaintiffs' complaint asserted eight claims:

> (1) The Act is unconstitutionally vague; (2) the Act compels physicians to engage in government-mandated speech, in violation of the First and Fourteenth Amendments; (3) the act violates the First and Fourteenth Amendments by requiring patients to submit to such speech, regardless of whether it is wanted or medically necessary; (4) the Act unconstitutionally discriminates on the basis of sex, in violation of the Equal Protection Clause of the Fourteenth Amendment; (5) the Act unconstitutionally discriminates between abortion providers and other medical facilities, in violation of the Equal Protection Clause; (6) the Act unconstitutionally discriminates between women who live within 100 miles of an abortion provider, and those who live 100 or more miles away from an abortion provider, in violation of the Equal Protection Clause; (7) the Act violates women's Fourteenth Amendment right to bodily integrity by requiring them to submit to ultrasounds procedures which are neither typical nor medically necessary; and (8) the Act violates the Fourth and Fourteenth Amendments by subjecting abortion facilities to random unannounced, and warrantless searches.[91]

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[89] *Id.*

[90] *Id.*

[91] *Lakey*, 806 F. Supp. 2d at 949.

C. THE PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

The Plaintiffs challenged the Act on eight grounds, but base their request for a preliminary injunction on four: Equal Protection, subjecting pregnant women to unwanted speech, vagueness, and compelling speech of physicians and patients.[92]

1. Equal Protection

Plaintiffs assert that the Act violates the Equal Protection Clause given that "'no rational relationship exists between the Act's singling out of abortion providers and patients and the Act's imposition of intrusive burdens on medical practice.'"[93] However, the court found that this argument lacked merit because *Romer v. Evans* specifically states that, "'[i]n the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous.'"[94] Therefore, the argument failed because "'the State has a legitimate interest from the outset of pregnancy in protecting the health of the woman and the life of the fetus,'" as laid out in *Casey*.[95] The court then went on to conclude "if the Texas Legislature wishes to prioritize an

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[92] *Id.* at 956. Additionally, the court stated:

> A preliminary injunction is only appropriate if Plaintiffs demonstrate: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction is not issued; (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted; and (4) that the grant of an injunction will not disserve the public interest."

Lakey, 806 F. Supp. 2d at 957 (citing Byrum v. Landreth, 566 F.3d 442, 445 (5th Cir. 2009)).

[93] *Id.* at 957 (quoting Pls.' Supp. Br. [#41] at 9).

[94] *Id.* (quoting Romer v. Evans, 517 U.S. 620, 632 (1996)).

[95] *Id.* (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 846 (1992)).

ideological agenda over the health and safety of women, the Equal Protection Clause does not prevent it from doing so under these circumstances."[96]

2. Subjecting Women to Unwanted Speech

The plaintiffs argued the Act "'violates the First and Fourteenth Amendments by subjecting abortion patients to visual, verbal, and auditory depictions of the fetus that they do not want, and do not consent to receive, and that are not part of the accepted ethical process of informed consent.'"[97] The plaintiffs relied on the Supreme Court's decision in *Hill v. Colorado* that held, "[t]he unwilling listener's interest in avoiding unwanted communication has been repeatedly identified in our cases. It is an aspect of the broader 'right to be let alone' that one of our wisest Justices characterized as 'the most comprehensive of rights and the right most valued by civilized men.'"[98] However, the court did not agree with the Plaintiffs. While intuitively logical, *Hill* did not support Plaintiffs' argument because the limits to the government's power to impose whatever message it desires seem fairly

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[96] *Id.* at 957–58. "The Act's onerous requirements will surely dissuade or prevent many competent doctors from performing abortions, making it significantly more difficult for pregnant women to obtain abortions." *Id.* at 957.

[97] *Lakey*, 806 F. Supp. 2d at 958 (quoting Pls.' Mot. [#18] at 8). V.T.C.A., Health & Safety Code § 171.0122 (West 2011) further provides that neither the physician nor the pregnant woman is subject to penalty if the woman chooses to opt out so long as a proper waiver form is executed. V.T.C.A., Health & Safety Code § 171.0122 (2011).

[98] *Lakey*, 806 F. Supp. 2d at 958 ((quoting Hill v. Colorado, 530 U.S. 703, 716–17 (2000) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)). "[W]e have continued to maintain that 'no one has a right to press even "good" ideas on an unwilling recipient.' None of our decisions has minimized the enduring importance of 'a right to be free from persistent importunity, following and dogging' after an offer to communicate has been declined." *Hill*, 530 U.S. at 718 (quoting Rowan v. United States Post Office Dept., 397 U.S. 728, 738 (1970)). "In *Hill*, the Supreme Court considered a Colorado statute that regulated speech-related conduct within 100 feet of the entrance to a health care facility, and specifically prohibited people from approaching within eight feet of another person, without the person's consent, for the purpose of engaging in various forms of speech." *Lakey*, 806 F. Supp. 2d at 958–59.

undefined.[99]

3. Constitutional Vagueness

The court found three provisions of the Act to be unconstitutionally vague.[100] First, "'the physician who is to perform the abortion' is unclear as it relates to both multi-physician procedures and unplanned physician substitutions."[101] Second, the conflict between sections 171.012(a)(4) and 171.0122 of the Health and Safety Code "creates unconstitutionally impermissible uncertainty regarding what will, and what will not, subject a physician or a pregnant woman to liability."[102]

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[99] *Id.* at 959.

[100] *Id.* at 968 (internal citation omitted). "'A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement.'" *Id.* at 959 (quoting *Hill*, 530 U.S. at 732). The Court went on to state:

> Some form of injunctive relief is appropriate as to these sections, but the Court is mindful it should tread especially lightly in areas of state law, neither enjoining more broadly than is required to address the constitutional deficiencies, nor acting as a substitutive legislator by rewriting suspect provisions as the Court sees fit.

Id. at 969.

[101] *Id.* at 968 (quoting V.T.C.A., Health & Safety Code § 171.012(a)(4) (West 2011)).

[102] *Lakey*, 806 F. Supp. 2d at 968. V.T.C.A., Health & Safety Code Ann. § 171.012(a)(4) states:

> (a) Consent to an abortion is voluntary and informed only if . . .
> (4) before any sedative or anesthesia is administered to the pregnant woman and at least 24 hours before the abortion or at least two hours before the abortion if the pregnant woman waives this requirement by certifying that she currently lives 100 miles or more from the nearest abortion provider that is a facility licensed under Chapter 245 or a facility that performs more than 50 abortions in any 12-month period:
> (A) the physician who is to perform the abortion or an

Lastly, the scope of the physician's duty to provide paternity and child support information to women who choose not to get abortions was also found to be unconstitutionally vague.[103]

> agent of the physician who is also a sonographer certified by a national registry of medical sonographers performs a sonogram on the pregnant woman on whom the abortion is to be performed;
> (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; and
> (D) the physician who is to perform the abortion or an agent of the physician who is also a sonographer certified by a national registry of medical sonographers makes audible the heart auscultation for the pregnant woman to hear, if present, in a quality consistent with current medical practice and provides, in a manner understandable to a layperson, a simultaneous verbal explanation of the heart auscultation[.]

Section 171.0122 of the Health and Safety Code governs the viewing of printed materials and sonogram images as well as the hearing of heart auscultations and the parameters in which a woman may opt out of these requirements.

[103] *Lakey*, 806 F. Supp. 2d at 968*;* V.T.C.A., Health & Safety Code § 171.0123 (West 2011) specifically states:

> If, after being provided with a sonogram and the information required under this subchapter, the pregnant woman chooses not to have an abortion, the physician or an agent of the physician shall provide the pregnant woman with a publication developed by the Title IV-D agency that provides information about paternity establishment and child support, including: (1) the steps necessary for unmarried parents to establish legal paternity; (2) the benefits of paternity establishment for children; (3) the steps necessary to obtain a child support order; (4) the benefits of establishing a legal parenting order; and (5) financial and legal responsibilities of parenting.

4. Compelled Speech

The plaintiffs argued that the Act was using physicians "as puppets to convey government-mandated speech (visual, verbal, and auditory) to a patient who does not wish to receive that information and who does not believe it material to her decision."[104] Therefore, "[t]his mandated speech falls outside accepted medical practice for informed consent and requires physicians to violate basic tenets of medical ethics. This unprecedented intrusion on a physician's relationship with a patient in a private medical setting violates the First Amendment."[105]

The court looked at various Supreme Court cases that articulated the right of speech within the First Amendment. For instance, the court cited *Wooley v. Maynard*, in which the Supreme Court wrote, "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."[106] Furthermore, "[o]utside the commercial context, 'content-based regulations of speech are presumptively invalid.'"[107]

The provisions of the Act that compelled speech by physicians were subject to strict scrutiny.[108] Therefore, the defendants were required to prove that the compelled speech portions of the Act furthered a compelling government interest and were narrowly tailored to achieve that interest.[109] However, the defendants were never able to identify a compelling government interest, and rather argued that the plaintiffs' entire

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[104] *Lakey*, 806 F. Supp. 2d at 969 (quoting Pls.' Mot. [#18] at 5–6).

[105] *Id.*

[106] *Id.* (quoting Wooley v. Maynard, 430 U.S. 705, 714 (1977)).

[107] *Id.* (quoting Davenport v. Washington Educ. Ass'n, 551 U.S. 177, 188 (2007)).

[108] *Id.* at 970 ("[T]he speech between physician and patient, taken as a whole, implicates a variety of medical, ethical, legal, practical, and commercial concerns. Because these concerns are all closely related, the Court finds any commercial speech involved is 'inextricably intertwined' with the non-commercial components, such that strict scrutiny is appropriate.").

[109] *Lakey*, 806 F. Supp. 2d at 970.

compelled speech challenge was foreclosed by the Supreme Court's decision in *Casey*.[110] For this reason, the court's analysis was based entirely on the reasoning of *Casey*.[111]

In analyzing *Casey*, the court stated there are three points, which cut against the defendants' argument.[112] First, the Supreme Court's discussion was made "in the context of a constitutional challenge based upon a woman's Fourteenth Amendment Due Process right to an abortion, not a First Amendment challenge."[113] Second, although *Casey* refers to the government's interest in potential life as "'important,'" "'substantial,'" and "'legitimate,'" it does not characterize it as "'compelling.'"[114] Therefore, while *Casey* approved of some state regulations where physicians are required to give pregnant women the option of receiving certain kinds of information, "it did not however, give governments *carte blanche* to force physicians to deliver, and force women to consider, whatever information the government deems appropriate."[115]

Lastly, and most importantly, the court stated that the Act's requirements are far more burdensome and less medically relevant than the requirements of *Casey*.[116] For example, the Act

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[110] *Id.*

[111] *Id.*

[112] *Id.* at 972.

[113] *Id.* (emphasis omitted).

[114] *Id.*

[115] *Lakey*, 806 F. Supp. 2d at 972 (emphasis in original).

[116] *Id.* The Supreme Court summarized the requirements of *Casey* as follows:

> Except in a medical emergency, the statue requires that at least 24 hours before performing an abortion a physician inform the woman of the nature of the procedure, the health risks of the abortion and of childbirth, and the 'probable gestational age of the unborn child.' The physician or a qualified non-physician must inform the woman of the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion. An abortion may not be performed

required a physician to give a detailed description of the embryo or fetus, while the Pennsylvania statute only required a physician to inform a pregnant woman of the probable gestational age of the fetus.[117] In addition, the Act required physicians to provide additional information such as descriptions of "the presence of cardiac activity" and "presence of external members and internal organs" in the fetus or embryo.[118] However, the court held that these disclosures were not relevant to any compelling government interest, and whatever relevance they did have was diminished by the disclosures that were already required under Texas law.[119] Furthermore, the court stated that while the government has the power to license and regulate a profession, the defendants were incorrect in arguing that this power forecloses any challenge to compelled speech in a professional setting.[120]

Next, the court addressed the unconstitutionality of compelling patient speech. The Act "requires a pregnant woman to complete and sign a specified election form that certifies her understanding of the Act's various requirements."[121] The court was particularly troubled by one piece of the required certification that stated:

> I understand that I am required by law to hear an explanation of the sonogram images unless I certify in writing to one of the following:
>
> (1) I am pregnant as a result of sexual assault,

> unless the woman certifies in writing that she has been informed of the availability of these printed materials and has been provided them if she chooses to view them.

Id. at 970 (quoting *Casey*, 505 U.S. at 881 (1992)).

[117] *Id.* at 972. Texas law already required a physician to inform a pregnant woman of the "probable gestational age" of the fetus. V.T.C.A., Health & Safety Code § 171.012(a)(1)(C) (West 2011).

[118] *Id.* at 974 (internal citation and quotation marks omitted).

[119] *Id.*

[120] *Lakey*, 806 F. Supp. 2d at 973.

[121] *Id.* at 974.

> incest, or other violation of the Texas Penal Code that has been reported to law enforcement authorities or that has not been reported because I reasonably believe that doing so would put me at risk of retaliation resulting in serious bodily injury;
>
> (2) I am a minor and obtaining an abortion in accordance with judicial bypass procedures under chapter 33, Texas Family Code;
>
> (3) My fetus has an irreversible medical condition or abnormality, as identified by reliable diagnostic procedures and documented in my medical file.[122]

The court stated there is no particularly powerful state interest "to justify compelling speech of this sort, nor is the Act sufficiently tailored to advance such an interest."[123] "The Court need not belabor the obvious by explaining why, for instance, women who are pregnant as a result of sexual assault or incest may not wish to certify that fact in writing, particularly if they are too afraid of retaliation to even report the matter to police."[124] The court was furthered troubled by the newly added Section 171.0121, which required that a copy of the certification be placed in the woman's permanent medical file and the facility performing the abortion keep a copy in their records for at least seven years.[125] The court went on to write, "Given the nature of the certification and the Act's retention requirements, it is difficult to avoid the troubling conclusion the Texas Legislature either wants to permanently brand women who choose to get abortions, or views these certifications as potential evidence to be used against physicians and women."[126]

The court discussed the net result of the provisions required by the Act.[127] First, "a physician is required to say

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[122] *Id.* (quoting H.B. 15, Sec. 2 par. (6)).

[123] *Id.*

[124] *Id.*

[125] *Id.* at 974–75.

[126] *Lakey*, 806 F. Supp. 2d at 975.

[127] *Id.*

things and take expressive actions with which the physician may not ideologically agree, and which the physician may feel are medically unnecessary[.]"[128] Secondly, "the pregnant woman must not only passively receive this potentially unwanted speech and expression, but must also actively participate—in the best case by simply signing an election form, and in the worst case by disclosing in writing extremely personal, medically irrelevant facts[.]"[129] Lastly, "the entire experience must be memorialized in records that are, at best, semi-private."[130] The court found no sufficiently weighty government interest to support such compulsion.[131]

The court held that what differed between the provisions in *Casey* and the Act in this case was the provision's lack of medically relevant information.[132] In *Casey*, the physicians were required to tell the woman of the risks inherent in abortion, inform her of available alternatives, and facilitate access to additional information if the woman wished to review it before making her decision.[133] The reasoning behind these provisions related to the woman's health and her options. However, the Act in this case compelled physicians to advance an "ideological agenda with which they may not agree, regardless of any medical necessity, and irrespective of whether the pregnant women wish to listen."[134] It was for this reason that the *Lakey* defendants failed to prove that the Act furthered a compelling government interest or that it was narrowly tailored to advance that interest.[135]

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[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Lakey*, 806 F. Supp. 2d at 975.

[133] *Id.*

[134] *Id.*

[135] *Id.*

VII. WHY TEXAS HOUSE BILL NO. 15 WAS FOUND UNCONSTITUTIONAL BY THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS LATER REVERSED BY THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

On January 10, 2012, the United States Court of Appeals for the Fifth Circuit vacated the district court's findings, holding the appellees failed to establish a substantial likelihood of success on any of the claims on which the injunction was granted, and thereby vacating the preliminary injunction.[136] First, the appellate court looked at the appellee's First Amendment argument.[137] The court writes that the "required disclosures of a sonogram, fetal heartbeat, and their medical descriptions are the epitome of truthful, non-misleading information."[138] The court notes that these are simply more graphic and scientifically up-to-date than the disclosures that were required in *Casey*, which included "the gestational age of the fetus and printed material showing a baby's general prenatal development stages."[139] However, because *Casey* allows the state to regulate medical practice by deciding that information about fetal development is "'relevant'" to a woman's decision-making, the court held that these Texas statute requirements were not violations of the First Amendment.[140]

In addition, the appellate court found no First Amendment constitutional issue with the Act's written consent

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[136] Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570 (5th 2012).

[137] *Id.* at 574.

[138] *Id.* at 577–78. "The point of informed consent laws is to allow the patient to evaluate her condition and render her best decision under difficult circumstances. Denying her up to date medical information is more of an abuse to her ability to decide than providing the information." *Id.* at 579.

[139] *Id.* at 578.

[140] *Id.*

form.[141] The Act requires a pregnant woman to certify in writing her understanding that:

> (1) Texas law requires an ultrasound prior to obtaining an abortion, (2) she has the option to view the sonogram images, (3) she has the option to hear the fetal heartbeat, and (4) she is required to hear the medical explanation of the sonogram unless she falls under the narrow exceptions to this requirement.[142]

The court wrote, "[t]o invalidate the written consent form as compelled speech would potentially subject to strict scrutiny a host of other medical-consent requirements."[143] Therefore, the informed-consent certification does not constitutionally differ from informed-consent certifications in general.[144]

The appellate court further found no problem with the written consent provision that required a victim of rape or incest to certify her status as a victim in order to avoid the description of the sonogram.[145] While the court said the consent form may be a debatable choice of policy, it did not transgress the First Amendment as a form of compelled speech.[146] "If the State could properly decline to grant any exceptions to the informed-consent requirement, it cannot create an inappropriate burden on free speech rights where it simply conditions an exception on a woman's admission that she falls within it."[147]

The court then addressed the appellee's arguments that the disclosure requirements are "'qualitatively different'" from the

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[141] *Id.*

[142] Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 578 (5th Cir. 2012).

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.*

disclosure requirements in *Casey*.[148] The appellees first stated the "disclosure of the sonogram and fetal heartbeat are 'medically unnecessary' to the woman and therefore beyond the standard practice of medicine within the state's regulatory powers."[149] The court wrote that the appellees contended that anything more than stating the gestational age of the fetus goes beyond *Casey* and is advocacy by the state.[150] Furthermore, the appellees argued that while *Casey* "only required the physician to make certain materials about childbirth and the fetus 'available,'" here the physician was required to do more by explaining the results of the sonogram and fetal heartbeat.[151] Additionally, the woman was required to listen to the sonogram results.[152] However, the court stated the facts of *Casey* did not represent "a constitutional ceiling for regulation of informed consent to abortion," but rather a "set of general principles to be applied to the states' legislative decisions."[153] Furthermore, the court stated that "while the statute's method of delivering the information is direct and powerful," that does not make it unconstitutional under *Casey*.[154]

The court also noted that the appellees failed to demonstrate that any provisions of the Act were actually constitutionally vague.[155] "'[T]he void-for-vagueness doctrine' requires states

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[148] Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 578 (W.D. Tex. 2012).

[149] *Id.*

[150] *Id.* at 578–79.

[151] *Id.* at 579.

[152] *Id.* (The court stated that the provisions of sonograms and hearing the fetal heartbeat are routine measures in pregnancy medicine today and are viewed as "medically necessary" for pregnant women today.).

[153] *Id.*

[154] Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 579 (5th Cir. 2012) ("The point of informed consent laws is to allow the patient to evaluate her condition and render her best decision under difficult circumstances. Denying her up to date medical information is more of an abuse to her ability to decide than providing the information.").

[155] *Id.* at 583–84. "'The degree of vagueness that the Constitution tolerates . . . depends in part on the nature of the enactment,' with greater tolerance for

articulate a proscription 'with sufficient definiteness that ordinary people can understand what conduct is prohibited' while providing enough objective metrics that it 'does not encourage arbitrary and discriminatory enforcement.'"[156] The court did not find vagueness in the three portions of the Act that the district court held were vague.[157] First, the appellate court did not find "the physician who is to perform the abortion" as vague because it held it "reasonable to construe the law grammatically as allowing compliance by the physician who 'intends' or 'is intended' to perform, even if unforeseen circumstances result in the abortion's actually being performed by a substitute."[158]

Next, the appellate court also failed to see any vagueness with how sections §171.012(a)(4) and §171.0122 worked together as pointed out by the district court .[159] The appellate court held that the district court's analysis of section (a)(4) ignored that the "physician's unconditional obligations are merely to display images so they *may* be viewed, to provide an *understandable* explanation, and to *make audible* the auscultation."[160] The Circuit Court contrasted that to requiring the physician to "ensure that the woman *views* the images, that she *understands* the explanation, or that she *listens* to the auscultation."[161] The

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statutes imposing civil penalties and those tempered by scienter requirements." *Id.* at 580 (quoting Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498–99 (1982)).

[156] *Id.* at 580. (quoting Gonzales v. Carhart, 550 U.S. 124, 149 (2007)) "We must remember 'the elementary rule that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'" *Id.* at 581 (quoting *Gonzalez*, 550 U.S. at 153.

[157] Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 581–84 (5th Cir. 2012).

[158] *Id.* at 581 ("The State asserts that most abortions are performed by a single physician, and that in the rare circumstances where more than one physician is involved, compliance by any physician or combination of physicians satisfies the requirements of H.B. 15.").

[159] *Id.* at 583–84.

[160] *Id.* at 583 (emphasis in original).

[161] *Id.*

court went on to state that "the legislature had every right to maintain the integrity of the mandated disclosures and displays by relieving a physician of liability for non-compliance 'solely' when the pregnant woman" refuses the physician's verbal explanation, sonogram images, or heart auscultation.[162]

Lastly, the court found no constitutional issue with the Act's requirement of providing printed materials.[163] The district court stated that while the Act did not need to impart to a physician how to comply with their duty, it failed to inform them of what they must do to comply with the Act.[164] The district court specifically enjoined the state from penalizing a physician, "criminally or otherwise" for failing to provide printed materials "where the physician does not know whether the woman has chosen to have an abortion."[165] However, the appellate court found the provision to be fairly flexible in "permitting either a physician or his or her designated agent to disseminate the required materials."[166] The appellate court noted that the district court and the appellees focused on the potential problem of the physician not knowing whether a woman has chosen to have an abortion, and therefore being uncertain of whether to furnish the material if the woman fails to show up or misses an appointment.[167] Furthermore, the court states that "[n]o

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[162] Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 583(5th Cir. 2012).

[163] *Id.* at 584. Section 171.0123 provides that:

> If, after being provided with a sonogram and the information required under this subchapter, the pregnant woman chooses not to have an abortion, the physician or an agent of the physician shall provide the pregnant woman with a publication developed by [the relevant State agency] that provides information about paternity establishment and support . . . .

TEX. HEALTH & SAFETY CODE ANN. § 171.0123 (West 2011).

[164] *Lakey*, 667 F.3d at 584.

[165] *Id.*

[166] *Id.*

[167] *Id.*

extreme burden is placed on the physician, nor is the woman harmed if she receives the printed matter, whether or not she had an abortion."[168]

VII. CONCLUSION

As stated previously, the parameters of the abortion decision are continually changing due to state legislation that purports to make the decision well informed, but in doing so adds additional requirements that many argue violate the woman's, and her physician's, constitutional rights. *Roe v. Wade* lays out the right to the abortion decision, and *Planned Parenthood v. Casey* currently dictates the issue of undue burden, as well as the informed consent doctrine. Issues remain today in relation to "truthful, misleading" disclosures with respect to abortion and their effect on the woman's right to choose.[169] While states are allowed to enact legislation to ensure a woman's decision is informed, the state's ability to express a preference for childbirth over abortion while doing so is problematic.

When the District Court for the Western District of Texas held unconstitutional the provisions of the Texas statute entitled Texas House Bill Number 15 on August 11, 2011, pro-choice supporters were ecstatic. Holding the ultrasound requirement as not only vague, but a violation of the First Amendment right against compelled speech, was quite a victory. However, the excitement was short lived when as noted, the appellate court reversed the district court findings on January 10, 2012, holding the Act constitutional in every way.

What is most disturbing about this statute, along with other statutes that mandate ultrasounds or descriptions of the fetus, is how patients are blind to the source of the information they receive. When a doctor asks the patient if she wants to view the fetus or hear the heartbeat, she will most likely be confused by the inquiry. As the state intended, she may begin to feel that the doctor wants her to continue the pregnancy, because morally she is convinced that doing so is the right decision to make. The doctor, whom she trusts to inform her of all the information

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[168] Texas Med. Providers Performing Abortion Servs. V. Lakey, 667 F.3d 570, 584 (5th Cir. 1012).

[169] Casey, *supra* note 2, at 838.

needed to make the decision that is best for her, is now telling her what is best for her fetus.

The average woman knows what an ultrasound looks like and knows if she views her own ultrasound it will look roughly the same. These statutes ignore the autonomy of the patient and physician to engage in a relationship that is medically appropriate and without political ideology. However, as long as courts, such as the Fifth Circuit, continue using a lenient standard of review as to the state's interest, such statutes will be upheld as constitutional.