No. 14-1150

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

GRETCHEN S. STUART, MD, on behalf of herself and her patients seeking abortions; JAMES R. DINGFELDER, MD, on behalf of himself and his patients seeking abortions; DAVID A. GRIMES, MD, on behalf of himself and his patients seeking abortions; AMY BRYANT, MD, on behalf of herself and her patients seeking abortions; SERINA FLOYD, MD, on behalf of herself and her patients seeking abortions; DECKER & WATSON, INC., d/b/a Piedmont Carolina Medical Clinic; PLANNED PARENTHOOD OF CENTRAL NORTH CAROLINA; A WOMEN'S CHOICE OF RALEIGH, INC.; PLANNED PARENTHOOD HEALTH SYSTEMS, INC.; TAKEY CRIST, on behalf of himself and his patients seeking abortions; TAKEY CRIST, M.D., P.A., d/b/a Crist Clinic for Women,

***Plaintiffs-Appellees*,**

v.

PAUL S. CAMNITZ, MD, in his official capacity as President of the North Carolina Medical Board and his employees, agents and successors; ROY COOPER, in his official capacity as Attorney General of North Carolina and his employees, agents and successors; ALDONA ZOFIA WOS, in her official capacity as secretary of the North Carolina Department of Health and Human Services and her employees, agents and successors; JIM WOODALL, in his official capacity as District Attorney for Prosecutorial District 15B and his employees, agents and successors; LEON STANBACK, in his official capacity as District Attorney for Prosecutorial District 14 and his employees, agents and successors; DOUGLAS HENDERSON, in his official capacity as District Attorney for Prosecutorial District 18 and his employees, agents and successors; BILLY WEST, in his official capacity as District Attorney for Prosecutorial District 12 and his employees, agents and successors; C. COLON WILLOUGHBY, JR., in his official capacity as District Attorney for Prosecutorial District 10 and his employees, agents and successors; BENJAMIN R. DAVID, in his official capacity as District Attorney for Prosecutorial District 5 and his employees, agents and successors; ERNIE LEE, in his official capacity as District Attorney for Prosecutorial District 4 and his employees, agents and successors; JIM O'NEILL, in his official capacity as District Attorney for Prosecutorial District 21 and his employees, agents and successors,

***Defendants-Appellants*.**

On Appeal from the United States District Court
for the Middle District of North Carolina
at Greensboro

BRIEF OF APPELLANTS

ROY COOPER
North Carolina Attorney General

John F. Maddrey
Solicitor General

Gary R. Govert
Assistant Solicitor General

I. Faison Hicks
Special Deputy Attorney General

NC DEPARTMENT OF JUSTICE
Post Office Box 629
Raleigh, North Carolina 27602-0629
Telephone: (919) 716-6900
jmaddrey@ncdoj.gov

Counsel for Appellants

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 14-1150 Caption: Stuart v. Huff

Pursuant to FRAP 26.1 and Local Rule 26.1,

Janice Huff, MD, in her official capacity as President of North Carolina Medical Board
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/John F. Maddrey Date: March 6, 2014

Counsel for: Defendants-Appellants

CERTIFICATE OF SERVICE

****

I certify that on March 6, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Diana O. Salgado
Planned Parenthood Federation of America
10th Floor
434 West 33rd Street
New York, NY 10001-0000

s/John F. Maddrey
(signature)

March 6, 2014
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 14-1150 Caption: Stuart v. Huff

Pursuant to FRAP 26.1 and Local Rule 26.1,

Roy Cooper, in his official capacity as Attorney General of North Carolina
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/John F. Maddrey Date: March 6, 2014

Counsel for: Defendants-Appellants

CERTIFICATE OF SERVICE

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Planned Parenthood Federation of America
10th Floor
434 West 33rd Street
New York, NY 10001-0000

s/John F. Maddrey (signature) March 6, 2014 (date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 14-1150 Caption: Stuart v. Huff

Pursuant to FRAP 26.1 and Local Rule 26.1,

Lanier M. Cansler, in his official capacity as Secretary of the NC DHHS
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/John F. Maddrey Date: March 6, 2014

Counsel for: Defendants-Appellants

CERTIFICATE OF SERVICE

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New York, NY 10001-0000

s/John F. Maddrey
(signature)

March 6, 2014
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 14-1150 Caption: Stuart v. Huff

Pursuant to FRAP 26.1 and Local Rule 26.1,

Jim Woodall, in his official capacity as District Attorney for PD#15B
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/John F. Maddrey Date: March 6, 2014

Counsel for: Defendants-Appellants

CERTIFICATE OF SERVICE

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Diana O. Salgado
Planned Parenthood Federation of America
10th Floor
434 West 33rd Street
New York, NY 10001-0000

s/John F. Maddrey
(signature)

March 6, 2014
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 14-1150 Caption: Stuart v. Huff

Pursuant to FRAP 26.1 and Local Rule 26.1,

Tracey E. Cline, in her official capacity as District Attorney for PD#14
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/John F. Maddrey Date: March 6, 2014

Counsel for: Defendants-Appellants

CERTIFICATE OF SERVICE

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Planned Parenthood Federation of America
10th Floor
434 West 33rd Street
New York, NY 10001-0000

s/John F. Maddrey
(signature)

March 6, 2014
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 14-1150 Caption: Stuart v. Huff

Pursuant to FRAP 26.1 and Local Rule 26.1,

Douglas Henderson, in his official capacity as District Attorney for PD#18
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/John F. Maddrey Date: March 6, 2014

Counsel for: Defendants-Appellants

CERTIFICATE OF SERVICE

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Diana O. Salgado
Planned Parenthood Federation of America
10th Floor
434 West 33rd Street
New York, NY 10001-0000

s/John F. Maddrey
(signature)

March 6, 2014
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 14-1150 Caption: Stuart v. Huff

Pursuant to FRAP 26.1 and Local Rule 26.1,

Billy West, in his official capacity as District Attorney for PD#12
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/John F. Maddrey Date: March 6, 2014

Counsel for: Defendants-Appellants

CERTIFICATE OF SERVICE

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Diana O. Salgado
Planned Parenthood Federation of America
10th Floor
434 West 33rd Street
New York, NY 10001-0000

s/John F. Maddrey
(signature)

March 6, 2014
(date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

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No. 14-1150 Caption: Stuart v. Huff

Pursuant to FRAP 26.1 and Local Rule 26.1,

C. Colon Willoughby, Jr., in his official capacity as District Attorney for PD#10
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/John F. Maddrey Date: March 6, 2014

Counsel for: Defendants-Appellants

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New York, NY 10001-0000

s/John F. Maddrey
(signature)

March 6, 2014
(date)

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No. 14-1150 Caption: Stuart v. Huff

Pursuant to FRAP 26.1 and Local Rule 26.1,

Benjamin David, in his official capacity as District Attorney for PD#5
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/John F. Maddrey Date: March 6, 2014

Counsel for: Defendants-Appellants

CERTIFICATE OF SERVICE

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s/John F. Maddrey
(signature)

March 6, 2014
(date)

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No. 14-1150 Caption: Stuart v. Huff

Pursuant to FRAP 26.1 and Local Rule 26.1,

Ernie Lee, in his official capacity as District Attorney for PD#4
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/John F. Maddrey Date: March 6, 2014

Counsel for: Defendants-Appellants

CERTIFICATE OF SERVICE

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Planned Parenthood Federation of America
10th Floor
434 West 33rd Street
New York, NY 10001-0000

s/John F. Maddrey
(signature)

March 6, 2014
(date)

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

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No. 14-1150 Caption: Stuart v. Huff

Pursuant to FRAP 26.1 and Local Rule 26.1,

Jim O'Neill, in his official capacity as District Attorney for PD#21
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: s/John F. Maddrey Date: March 6, 2014

Counsel for: Defendants-Appellants

CERTIFICATE OF SERVICE

****

I certify that on March 6, 2014 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Diana O. Salgado
Planned Parenthood Federation of America
10th Floor
434 West 33rd Street
New York, NY 10001-0000

s/John F. Maddrey
(signature)

March 6, 2014
(date)

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JURISDICTIONAL STATEMENT

Plaintiffs, various physicians and health care providers, filed suit under 42 U.S.C. § 1983 in the United States District Court for the Middle District of North Carolina challenging the constitutionality of certain provisions of North Carolina's "Woman's Right to Know Act," which is codified at N.C.G.S. §§ 90-21.80 through 90-21.92. Defendants are various state officials named solely in their official capacity. The District Court had jurisdiction pursuant to 28 U.S.C. § 1331.

The District Court granted Plaintiffs' motion for a preliminary injunction as to N.C.G.S. § 90-21.85 on First Amendment grounds, but allowed the remainder of the Act to go into effect. (J.A. 143-44) The parties later moved for summary judgment, and the District Court granted in part and denied in part each motion. On January 17, 2014, the District Court ruled that N.C.G.S. § 90-21.85 violates the First Amendment, and entered a Permanent Injunction and Judgment prohibiting the implementation or enforcement of that statute. (J.A. 859-60) Defendants timely filed a Notice of Appeal on February 17, 2014. (J.A. 861-63) This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

I. Whether the District Court erred by permanently enjoining the implementation or enforcement of N.C.G.S. § 90-21.85.

II. Whether the District Court erroneously ruled that N.C.G.S. § 90-21.85 violates Plaintiffs' First Amendment rights.

STATEMENT OF THE CASE

On July 28, 2011, "An Act to Require a Twenty-Four-Hour Waiting Period and the Informed Consent of a Pregnant Woman Before an Abortion May Be Performed" became law when the North Carolina General Assembly overrode a gubernatorial veto. 2011 N.C. Sess. Laws 405. The Act amended Chapter 90 of the North Carolina General Statutes to add an article entitled the "Woman's Right to Know Act," with an effective date 90 days after it became law. N.C.G.S. §§ 90-21.80 through 90-21.92 (2013). (J.A. 72-78)

The Act provides that no abortion shall be performed upon a woman without her voluntary and informed consent, and sets forth specific conditions for informed consent that must be satisfied except in the case of a medical emergency. N.C.G.S. § 90-21.82. The Act specifies that voluntary and informed consent to an abortion requires that, at least twenty-four hours prior to the abortion, a physician or qualified professional must inform the woman, by telephone or in person, of several facts regarding the abortion and must tell her that prior to the abortion she will be given an

opportunity to view a sonogram display in real time and listen to the fetus's heart tone. N.C.G.S. § 90-21.82(1)(e).

The Act also provides that, except in the case of a medical emergency, at least four hours before the abortion, a physician or a qualified technician working with the physician must perform an obstetric sonogram of the fetus and display real-time images so that the pregnant woman may view them. N.C.G.S. § 90-21.85(a)(1)-(3). While conducting the sonogram, the physician or technician must provide an explanation of the display, including the location and number of fetuses or embryos, the dimensions of each embryo or fetus and the presence of external members and internal organs if present and viewable. N.C.G.S. § 90-21.85(a)(2), (4). The provider must also offer the woman the opportunity to hear the fetal heart tone. N.C.G.S. § 90-21.85(a)(2). The Act specifically provides that the woman is not required to look at the images or listen to the description. N.C.G.S. § 90-21.85(b).

Other provisions of the Act include: an explicit prohibition on criminal penalties for violations (N.C.G.S. § 90-21.85(a)); an authorization of civil liability for damages only for performing an abortion in knowing or reckless violation of the statute or attempting to perform an abortion in willful violation of the statute (N.C.G.S. § 90-21.88(a)); an injunction only for willful violations of the statute (N.C.G.S. § 9021.88(b)); and an authorization for providers subjected to frivolous

actions or actions brought in bad faith to recover costs, including attorney's fees (N.C.G.S. § 90-21.88(b)).[1]

Plaintiffs' original Complaint, filed on September 29, 2011, asserted six claims for relief. (J.A. 67-28) Eventually, their Third Amended Complaint for Injunctive and Declaratory Relief, deemed filed on September 25, 2012, narrowed their challenge to First Amendment, due process, and vagueness claims. (J.A. 258-86) Plaintiffs challenge two portions of the Act: (1) the "Informed Consent to Abortion" requirement, N.C.G.S. § 90-21.82 (J.A. 268-70 ¶¶38-44; Third Amended Complaint at 11-13); and (2) the "Display of Real-Time View" requirement, N.C.G.S. § 90-21.85 (J.A. 270-72 ¶¶45-51; Third Amended Complaint at 13-15).

On the parties' cross motions for summary judgment, the District Court concluded that what it labeled as the "speech-and-display" provision of the Act was unconstitutional. (J.A. 858; Memorandum Opinion and Order ("MDO") at 42) The court characterized as "content-based" and "not sufficiently narrowly tailored" the Act's requirement that health care providers deliver what the court called "information in support of the state's philosophic and social position discouraging abortion and encouraging childbirth." (J.A. 818; MDO at 2) The court further held

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[1] *See further* Paul Stam, *Woman's Right to Know Act: A Legislative History*, 28:1 ISSUES IN LAW & MEDICINE 3 (2012).

that the State had not established that N.C.G.S. § 90-21.85 "directly advances a substantial state interest in regulating health care" such that "it does not survive heightened scrutiny." (J.A. 818; MDO at 2) Based on its ruling that "Section 90-21.85 of the North Carolina General Statutes violates the First Amendment," the District Court enjoined and prohibited Defendants from implementing or enforcing that statute. (J.A. 859 ¶1)

The District Court denied relief on Plaintiffs' vagueness claim, finding that the Act imposes no criminal penalties and adopting agreed-upon savings constructions to eliminate any alleged vagueness in specified terms. (J.A. at 859-60 ¶2). Additionally, the District Court declined to reach the due process claim on the grounds that the issues presented were moot. (J.A. 860 ¶3)[2]

SUMMARY OF ARGUMENT

The District Court erroneously enjoined the implementation of N.C.G.S. § 90-21.85. The legislation represents an appropriate regulation of a medical procedure, and is properly entitled to a presumption of constitutionality, especially in the context of a pre-enforcement, facial challenge. The court should not have shifted the burden to the State to justify the necessity or wisdom of the statute but instead should have

[2] In a separate Order, the District Court granted in part and denied in part Plaintiffs' motion to strike certain declarations submitted in connection with the affiants' unsuccessful motion to intervene. (J.A. 807-16)

required the plaintiffs to establish that the legislation was invalid under a rational basis standard of review. Prior decisions of the United States Supreme Court establish that legislation regulating the practice of medicine is subject to rational basis review, and two federal appellate courts have applied those decisions to First Amendment challenges to recently enacted state statutes involving informed consent to an abortion. The statute at issue here passes rational basis review because it furthers numerous substantial state interests. Requiring the provision of truthful and relevant information to women considering an abortion is consistent with the State's legitimate interest in promoting respect for life and reducing the risk that a woman may elect an abortion without being fully informed.

The District Court also erroneously ruled that N.C.G.S. § 90-21.85 violated the Plaintiffs' First Amendment rights. Any compelled speech resulting from the statutorily required disclosures must be considered within the context of State regulation of the practice of medicine. Under the professional speech doctrine, such regulation does not contravene the First Amendment when it is rationally related to a legitimate state interest. The information that this statute requires to be disclosed is factual, truthful, and relevant, and therefore is not properly categorized as compelled ideological speech. And even if N.C.G.S. § 90-21.85 is reviewed under a heightened scrutiny or strict scrutiny standard, the challenged disclosure

requirements are constitutional because they are narrowly tailored to advance various compelling state interests.

STANDARD OF REVIEW

A District Court's award of summary judgment is reviewed de novo. *Greater Baltimore Ctr. For Pregnancy Concern, Inc. v. St. Brigid's Roman Catholic Congregation Inc*., 721 F.3d 264, 284 (4th Cir. 2013) (en banc). That decision will be affirmed only if, taking the evidence and all reasonable inferences drawn therefrom in the light most favorable to the non-moving party, no material facts are disputed and the moving party is entitled to judgment as a matter of law. *Moore-King v. County of Chesterfield*, 708 F.3d 560, 566 (4th Cir. 2013).

ARGUMENT

I. THE DISTRICT COURT ERRED BY PERMANENTLY ENJOINING THE IMPLEMENTATION OR ENFORCEMENT OF N.C.G.S. § 90-21.85.

This case concerns legislation impacting various important constitutional principles. In a general sense, it involves both the individual rights of women to maintain control over their bodies and their lives, as well as the public interest, as articulated by elected representatives, in policies and procedures that promote respect for life, including life of the unborn. More specifically, this case involves the intersection of free speech rights and the state's role in delineating the requirements

for informed consent to a serious and irreversible medical procedure. The issues presented are profound, emotionally charged, and not generally susceptible to easy or obvious resolution to the satisfaction of all.

The leading precedents on the primary issues presented in this case are the United States Supreme Court decisions in *Planned Parenthood of SE Pa. v. Casey*, 505 U.S. 833 (1992), and *Gonzales v. Carhart*, 550 U.S. 124 (2007). The holdings in these cases control the analysis of the competing arguments and inform the rulings to be made by courts adjudicating matters involving legislative enactments in this area of the law. As recently observed by the United States Court of Appeals for the Fifth Circuit:

> A trio of widely-known Supreme Court decisions provides the framework for ruling on the constitutionality [of Texas legislation pertaining to the regulation of abortions]. In *Roe v. Wade*, the Court held that the Fourteenth Amendment's concept of personal liberty encompasses a woman's right to end a pregnancy by abortion. *Roe v. Wade*, 410 U.S. 113, 153 (1973). In *Casey*, the Court reaffirmed what it regarded as *Roe's* "essential holding," the right to abort before viability, the point at which the unborn life can survive outside of the womb. *Casey*, 505 U.S. at 870, 878. Before viability, the State may not impose an "undue burden," defined as any regulation that has the purpose or effect of creating a "substantial obstacle" to a woman's choice. *Id*. at 874, 878. In *Gonzales*, the Court added that abortion restrictions must also pass rational basis review. *Gonzales*, 550 U.S. at 158 (holding that the State may ban certain abortion procedures and substitute others provided that "it has a rational basis to act, *and* it does not impose an undue burden" (emphasis added)).

Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott, No. 13-51008, 2014 U.S. App. LEXIS 5696, at *15-16 (5th Cir., Mar. 27, 2014). And the guidance set forth in *Casey* has subsequently been declared as controlling by the Court in *Gonzales*:

> We assume the following principles for the purposes of this opinion. Before viability, a State "may not prohibit any woman from making the ultimate decision to terminate her pregnancy." It also may not impose upon this right an undue burden, which exists if a regulation's "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." On the other hand, "[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose."

Gonzales, 550 U.S. at 146 (citations omitted).

Proper consideration of the relevant constitutional precepts demonstrates that the legislation at issue here should not have been declared unconstitutional.

A. The District Court Decision Does Not Provide a Proper Basis to Override the Presumption of Constitutionality of Lawfully Enacted Legislation.

It is well-established that legislative bodies have plenary power to enact regulatory requirements in furtherance of the policy goals of the state so long as such legislation is consistent with the Constitution. "The necessity or wisdom of legislation, of course, is a decision committed to the peoples' elected representatives

and thus beyond the purview of the courts – apart from the constitutionality of the law." *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 579 n.7 (5th Cir. 2012).

Additionally, "[a] statute is presumed constitutional and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Heller v. Doe*, 509 U.S. 312, 320 (1993) (citations and quotations omitted). Furthermore, "statutes should be construed whenever possible so as to uphold their constitutionality." *United States v. Vuitch*, 402 U.S. 62, 70 (1971). And, "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Gonzales*, 550 U.S. at 153-54 (citation and quotation omitted). These concepts properly apply to the matters at issue here. "[T]he burden of proving the unconstitutionality of abortion regulations falls squarely on the plaintiffs." *Abbott*, 2014 U.S. App. LEXIS 5696, at *37 (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997)).

Nor should courts overlook the appropriate concepts applicable to a pre-enforcement, facial challenge to legislation regulating the manner in which abortion services are performed. Indeed, this Court has rejected a facial challenge that "d[id] not present a sufficiently frequent circumstance to render the [statute] wholly unconstitutional for all circumstances." *Richmond Med. Ctr. for Women v. Herring*,

570 F.3d 165, 169 (4th Cir. 2009) (en banc). "[I]n the abortion context, . . . facial challenges should not be entertained except where the challenged statute 'will operate as a substantial obstacle to a woman's choice to undergo an abortion' 'in a large fraction of the cases in which [the statute] is relevant.'" *Id*. at 171 (citing *Casey*, 505 U.S. at 895).

Furthermore, "[t]he latitude given facial challenges in the First Amendment context is inapplicable here. Broad challenges of this type impose 'a heavy burden' upon the parties maintaining the suit." *Gonzales*, 550 U.S. at 167. Here, the District Court erred in shifting the burden to the state to justify the basis for its legislation and granting relief on the basis of Plaintiffs' facial challenge.

B. Rational Basis Review Should Have Been Applied.

The District Court erroneously ruled that "strict" or "heightened" scrutiny should be applied to the Act. The facial challenge should instead have been analyzed under a rational basis review.

> The government may use its voice and its regulatory authority to show its profound respect for the life within the woman. . . . Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.

Gonzales, 550 U.S. at 157-58 (citations omitted).

The State is well within its power to regulate the medical profession when it determines that certain information is necessary as part of the informed consent process. *Casey*, 505 U.S. at 882 (information about the fetus "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."). Moreover, the Supreme Court has found the concept self-evident in the specific context presented here.

> Whether to have an abortion requires a difficult and painful moral decision. While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow.

Gonzales, 550 U.S. at 159 (citations omitted).

No documented legislative history or weight of evidence is required to justify the purpose of particular legislation, as a state legislature can rely upon any available information. As the Supreme Court held in *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 314-15 (1993):

> On rational-basis review, a classification in a statute . . . comes to us bearing a strong presumption of validity . . . and those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it. Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the

> legislature. . . . [A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. . . . Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.

(citations and quotations omitted).

1. *Casey* Requires Courts to Apply Rational Basis Review to Laws That Regulate the Practice of Medicine.

The petitioners in *Casey* challenged a Pennsylvania informed consent law that imposed numerous obligations on abortion-performing physicians. That statute required doctors to inform the woman of the nature of the procedure, the health risks of abortion, the "probable gestational age of the unborn child," and the availability of materials describing the fetus. The petitioners attacked Pennsylvania's informed consent statute as a violation of both the First Amendment and the "right of privacy." *See Casey*, Br. of Pets., 1992 WL 551419, at *50. On the First Amendment, the petitioners cited *Wooley v. Maynard*, 430 U.S. 705 (1977), accused the informed consent law of "forc[ing] the physician to communicate the state's ideology," and insisted that strict scrutiny must apply. *Casey*, Br. of Pets., 1992 WL 551419 at *53-54. The petitioners also cited *Riley v. National Federation of the Blind of NC, Inc.*, 487 U.S. 781 (1988), and argued that the compelled speech doctrine "is not

confined to speech with an ideological viewpoint." *Casey*, Br. of Pets., 1992 WL 551419, at *54 n.85.

The *Casey* joint opinion first rejected petitioners' "right of privacy" claims, holding that due process allows states to compel disclosures of "truthful, nonmisleading information" that are relevant to the abortion procedure. 505 U.S. at 882. Then the opinion succinctly disposed of the compelled speech claim:

> All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, *see Wooley v. Maynard*, 430 U.S. 705 (1977), but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, *cf. Whalen v. Roe*, 429 U.S. 589, 603 (1977). We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.

Id. at 884 (internal parallel citations omitted). The Court rejected petitioners' request to apply strict scrutiny, holding instead that states may impose reasonable regulations on physicians' speech. This directly-on-point holding compels the application of rational-basis review to Plaintiffs' First Amendment claim.[3]

[3] Four other Justices similarly upheld the compelled disclosures in Pennsylvania's abortion law as "rationally related to the State's interest in assuring that a woman's consent to an abortion be a fully informed decision." *See Casey*, 505 U.S. at 967 (Rehnquist, C.J., dissenting).

The fact that the Act mandates disclosures that extend beyond those required by the Pennsylvania law cannot change the standard of review. *Casey* squarely holds that challenges to laws that regulate "the practice of medicine" are subject only to rational basis review. Additionally, as noted above, some of the information required by the Pennsylvania statute was similarly focused on the fetus, but that did not affect the standard of review. *See Casey*, 505 U.S. at 881. The *Casey* court specifically explained that "informed choice need not be defined in such narrow terms that all considerations of the effect on the fetus are made irrelevant" and noted that providing such information helped ensure that the woman would "apprehend the full consequences of her decision." *Casey*, 505 U.S. at 883. Indeed, the *Casey* court said it could not be doubted that "most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision." *Id*. at 882.

2. Recent Decisions by Other Appellate Courts Apply Rational Basis Review in Upholding Informed Consent Provisions.

The Court of Appeals for the Fifth Circuit recently denied a nearly identical First Amendment-based challenge to a Texas ultrasound statute, finding that *Casey's* holding precluded the application of strict scrutiny:

> The plurality response to the compelled speech claim is clearly not a strict scrutiny analysis. It inquires into neither compelling interests nor narrow tailoring. The three sentences with which the Court disposed of the First Amendment claims are, if anything, the antithesis of strict

> scrutiny. Indeed, the plurality references *Whalen v. Roe*, in which the Court had upheld a regulation of medical practice against a right to privacy challenge. 429 U.S. 589, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977).

Lakey, 667 F.3d at 575.

Following the guidance set forth in *Casey* and *Gonzales*, the *Lakey* court reached four conclusions: (1) informed consent laws that do not impose an undue burden on the woman's right to have an abortion are permissible if they require truthful, nonmisleading, and relevant disclosures; (2) such laws are part of the state's reasonable regulation of medical practice and do not compel "ideological" speech that triggers First Amendment strict scrutiny; (3) "relevant" informed consent may entail not only the physical and psychological risks to the expectant mother facing this "difficult moral decision," but also the state's legitimate interests in "protecting the potential life within her;" and (4) the possibility that such information "might cause the woman to choose childbirth over abortion" does not render the provisions unconstitutional. *Lakey*, 667 F.3d at 576. Applying these principles, the court vacated the district court's preliminary injunction and allowed the Texas ultrasound statute to take effect.

The Court of Appeals for the Eighth Circuit, sitting en banc, has construed *Casey* and *Gonzales* in the same way. That Court upheld an informed consent provision pursuant to *Casey*:

> [W]hile the State cannot compel an individual simply to speak the State's ideological message, it can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion, even if that information might also encourage the patient to choose childbirth over abortion.

Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 734-35 (8th Cir. 2008) (en banc). *See also Planned Parenthood Minn. v. Rounds*, 686 F.3d 889, 893 (8th Cir. 2012) (en banc).

The District Court's rejection of rational basis as the standard of review cannot be reconciled with the relevant decisions of the United States Supreme Court or other appellate courts. Indeed, the District Court eschewed any detailed discussion or analysis, saying little more than "*Lakey* and *Rounds* are wrongly decided." (J.A. 852; MDO at 36) As shown below, application of the proper standard of review demonstrates that the Act is constitutional.

C. The Act Passes Rational Basis Review.

Fairly considered, the Act furthers numerous substantial state interests, including "the legitimate end of ensur[ing] that a woman apprehend the full consequences of her decision," *Casey*, 505 U.S. at 882; the State's interest in promoting life, *Gonzales*, 550 U.S. at 145; and the State's interest in promoting women's psychological health, *Casey*, 505 U.S. at 882. The Act requires physicians

to provide "truthful and nonmisleading information" that is relevant to a patient's decision. As such, it is rationally related to a legitimate state interest because "[t]he State has an interest in ensuring so grave a choice is well informed. It is self-evident that a mother who comes to regret her choice to abort must struggle with grief more anguished and sorrow more profound when she learns, only after the event, what she once did not know." *Gonzales*, 550 U.S. at 159-60. Indeed, the Supreme Court has held that these legitimate state interests are sufficient to sustain a legislative enactment where "[i]t is a reasonable inference that a necessary effect of the regulation and the knowledge it conveys will be to encourage some women to carry the infant to full term, thus reducing the absolute number of late-term abortions." *Gonzales*, 550 U.S. at 160. And the District Court expressly acknowledged that "[t]he state's interests in protecting fetal health and insuring voluntary and informed consent are valid state interests." (J.A. 840; MDO at 24)

The following summary of the appropriate function of a reviewing court under the rational basis test was articulated in a recent decision concerning legislation in Texas requiring physicians preforming abortions to have admitting privileges at a local hospital:

> Nothing in the Supreme Court's abortion jurisprudence deviates from the essential attributes of the rational basis test, which affirms a vital principle of democratic self-government. . . Under rational basis review,

> courts must presume that the law in question is valid and sustain it so long as the law is rationally related to a legitimate state interest. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). As the Supreme Court has often stressed, the rational basis test seeks only to determine whether any conceivable rationale exists for an enactment.

Abbott, 2014 U.S. App. LEXIS 5696, at *27 (5th Cir., March 27, 2014). Furthermore, "[t]he court may not replace legislative predictions or calculations of probabilities with its own, else it usurps the legislative power." *Id.*, at *28-29 (citing *Heller*, 509 U.S. at 319 (stating that rational basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices")). And,

> there is no least restrictive means component to rational basis review. *Heller*, 509 U.S. at 321 (holding that courts must accept a legislature's generalizations under rational basis review "even when there is an imperfect fit between means and ends" or where the classification "is not made with mathematical nicety.").

Abbott, 2014 U.S. App. LEXIS 5696, at *29.

The consequences of the District Court's refusal to utilize a rational basis analysis are evident in its repeated statements that the State has failed to satisfy extreme standards so as to justify the challenged statutory provision. For instance, contrary to the proper standard of review, the District Court asserted that "the state has not provided any evidence to dispute Plaintiffs' evidence that the compelled speech can be medically harmful in a variety of situations." (J.A. 844 n.37; MDO at 26) The court also criticized the State for "the lack of empirical evidence for the

supposed health interests put forth," (J.A. 850-51) and for the alleged impingement on "professional norms in the medical field, without empirical justification." (J.A. 851; MDO at 35) The District Court even discredits the State's rationale for the legislation because "the information is not necessary or relevant to **every** woman's decision." (J.A. 853; MDO at 37 (emphasis supplied)).

Here, as was the case in *Gonzales*, Plaintiffs "have not demonstrated that the Act, as a facial matter, is void for vagueness or that it imposes an undue burden on a woman's right to abortion." *Gonzales*, 550 U.S. at 168. Furthermore, there is no entitlement to relief because Plaintiffs "have not demonstrated that the Act would be unconstitutional in a large fraction of relevant cases." *Gonzales*, 550 U.S. at 167-68.

II. THE DISTRICT COURT ERRED IN RULING THAT THE ACT VIOLATES PLAINTIFFS' FIRST AMENDMENT RIGHTS.

The terms of the Act relate solely to the manner in which a specific medical procedure can be lawfully administered. As such, they involve matters within the purview of the legislative prerogative to regulate the practice of medicine. The challenged provisions of the Act in no way compel Plaintiffs or anyone else to speak publicly about any issue, to adopt or espouse any ideology, or limit how they counsel or advise patients under their care and supervision. The distinction between speech incidental to conduct in the context of a regulated profession and speech as part of

public discourse and debate about a significant social, moral, and legal issue is critical to the proper First Amendment analysis of the legislation at issue here.

Governments frequently compel speech as part of their authority to regulate professions. Public officials must recite an oath of office. Doctors must report gunshot wounds and suspected child abuse to the authorities. Doctors and pharmacists must provide mandatory disclosures when dispensing prescription medication, including information describing possible adverse side effects and potential serious health consequences that may result from taking the medication. Lawyers must make mandatory truth-in-lending disclosures in real estate transactions. And schoolteachers must teach the curriculum required by state education officials. None of this violates the Constitution, and none of this has been subjected to strict scrutiny under the First Amendment. *See, e.g., Whalen v. Roe*, 429 U.S. 589, 598 (1977) (applying rational basis review to a statute requiring pharmacists to file reports with state authorities when they fill prescriptions for certain drugs).

Similarly, various aspects of government regulation of abortion practices compel speech from physicians. In some states, doctors who perform abortions must notify minors' parents, *H. L. v. Matheson*, 450 U.S. 398 (1981); respond specifically to patients' questions, *Rounds*, 530 F.3d at 735; or report every abortion performed to state officials, *Casey*, 505 U.S. at 900 (joint opinion). And informed consent laws

require providers to furnish specified information to women seeking abortions. *See Casey*, 505 U.S. at 881. While each of these laws compels speech from doctors who perform abortions, they are not properly subjected to strict scrutiny analysis.

A. The State's Authority to Regulate the Practice of Medicine Applies in the Abortion Context.

Pursuant to Supreme Court precedent, the State has the power to compel the speech at issue as part of its regulation of the medical profession. *Casey* establishes that *Whalen's* rational-basis test applies whenever laws compel abortion providers to transmit truthful, non-misleading information to their patients.

> The only reasonable reading of *Casey's* passage is that physicians' rights not to speak are, when "part of the practice of medicine, subject to reasonable licensing and regulation by the State[.]" This applies to information that is "truthful," "nonmisleading," and "relevant . . . to the decision" to undergo an abortion. *Casey*, 505 U.S. at 882.

Lakey, 667 F.3d at 575. Additionally, "[t]he law need not give abortion doctors unfettered choice in the course of their medical practice." *Gonzales*, 550 U.S. at 163. This is because, as the Ninth Circuit has recently observed, "it is well recognized that a state enjoys considerable latitude to regulate the conduct of its licensed health care professionals in administering treatment." *Pickup v. Brown*, 740 F.3d 1208, 1230 (9th Cir. 2014). "[T]he First Amendment does not prevent a state from regulating treatment even when that treatment is performed through speech alone." *Id*. at 1230.

The "considerable latitude" to regulate licensed professionals in administering treatment was addressed in this Court's recent decision in *Moore-King*, discussing the "professional speech doctrine." Where a requirement falls within the scope of permissible occupational regulation under the professional speech doctrine, it does not abridge an individual's First Amendment freedom of speech. *Moore-King*, 708 F.3d at 570.

"[T]he relevant inquiry to determine whether to apply the professional speech doctrine is whether the speaker is providing personalized advice in a private setting to a paying client or instead engages in public discussion and commentary." *Id*. at 569. And,

> [u]nder the professional speech doctrine, the government can license and regulate those who would provide services to their clients for compensation without running afoul of the First Amendment. . . . And a state's regulation of a profession raises no First Amendment problem where it amounts to "generally applicable licensing provisions" affecting those who practice the profession.

Id.

Consistent with the concepts articulated by this Court in *Moore-King* is the recent decision by the Ninth Circuit in *Pickup*, declaring that "the First Amendment tolerates a substantial amount of speech regulation within the professional-client relationship that it would not tolerate outside of it." 740 F.3d at 1228. The *Pickup*

court observed that "[m]ost, if not all, medical and mental health treatments require speech, but that fact does not give rise to a First Amendment claim when the state bans a particular treatment." *Id*. at 1229. The Court held that the California legislation at issue was "subject to deferential review just as are other regulations of the practice of medicine," *id*. at 1231, and that it was "subject to only rational basis review and must be upheld if it bears a rational relationship to a legitimate state interest." *Id*. (citing *Casey*, 505 U.S. at 884).

B. Any Compelled Speech Arising from the Act is Attributable to Appropriate Regulation of Professional Conduct.

Plaintiffs allege that N.C.G.S. § 90-21.85 violates their rights under the First Amendment by forcing them to deliver unwanted, government-mandated speech that they assert falls outside of accepted and ethical standards and practices for medical informed consent. (J.A. 282 ¶¶ 86-87; Third Amended Complaint at 25) As shown above, this broad, unfocused assertion does not withstand analysis. Nothing in the requirements set forth in the Act regulating the manner in which abortions are to be conducted amounts to government-mandated ideological speech. Instead, it is properly viewed as a requirement for the provision of truthful, relevant information. It is properly within the scope of the state's appropriate regulatory authority for, as recognized by the Supreme Court, "[i]n *Casey* the controlling opinion held an

informed-consent requirement in the abortion context was 'no different from a requirement that a doctor give certain specific information about any medical procedure.'" *Gonzales*, 550 U.S. at 163 (citing *Casey*, 505 U.S. at 884).

1. The provision of truthful information is required by the procedure mandated in N.C.G.S. § 90-21.85.

The patient disclosures required by the Act are comprised of specific factual information. There is no government-mandated script,[4] and no advocacy of any moral position of any kind. As found by the Fifth Circuit when upholding the Texas ultrasound statute, "[t]he required disclosures of a sonogram, the fetal heartbeat, and their medical descriptions are the epitome of truthful, non-misleading information." *Lakey*, 667 F.3d at 577-78. Furthermore, "[t]hey are not different in kind, although more graphic and scientifically up-to-date, than the disclosures discussed in *Casey* – probable gestational age of the fetus and printed material showing a baby's general prenatal development stages." *Id*. at 578.

Nor are the procedures and disclosures required by the Act unprecedented. As noted by the District Court, "[s]ince 1994, the North Carolina Department of Health

[4] This Court recently upheld a District Court's decision not to preliminarily enjoin a County's requirement that limited service pregnancy resource centers post a sign making the specific disclosure that "the Center does not have a licensed medical professional on staff." *Centro Tepeyac v. Montgomery County*, 722 F.3d 184, 186 (4th Cir. 2013) (en banc). The District Court had ruled that the compelled statement "in neutral language states the truth." *Id.* at 190.

and Human Services has required by regulation an ultrasound for any patient who is scheduled for an abortion procedure. *See* 10A N.C. Admin. Code 14E.0305(d)." (J.A. 822-23) Pre-existing statutory requirements for informed consent provide that health care "[p]roviders must also give patients information sufficient to give a reasonable person 'a general understanding of the procedures or treatments and of the usual and most frequent risks and hazards inherent in the proposed procedures or treatments.'" (J.A. 824 (quoting N.C.G.S. § 90-21.13(a)(2)); MDO at 8) Apparently, in the District Court's view, a requirement that health care providers supply information sufficient to allow "a general understanding" of a medical procedure does not present the First Amendment concerns presented by the provision challenged by Plaintiffs.

This seeming paradox – disallowance of truthful, specific information relevant to a patient's informed consent to a medical procedure – was discussed in *Lakey*. The court recognized that striking the required "display and describe" provision of the Texas legislation would mean that the patient would be prevented from receiving additional information relevant to her decision, and therefore ruled that "[d]enying her up to date medical information is more of an abuse to her ability to decide than providing the information." *Lakey*, 667 F.3d at 579. The court found no basis for the claim that "[r]equiring any more information about the fetus amounts to advocacy by

the state," rejecting the challengers' apparent position "that the facts of *Casey* represent a constitutional ceiling for regulation of informed consent to abortion, not a set of principles to be applied to the states' legislative decisions." The court concluded that "the statute's method of delivering this information is direct and powerful, but the mode of delivery does not make a constitutionally significant difference from the 'availability' provision in *Casey*." *Id*.

2. The information required to be disclosed is not ideological.

Neither the motivation behind the Act, nor its effect, renders the required speech "ideological." Indeed, the holdings in *Casey* and *Gonzales* preclude application of this pejorative label because they make clear that laws like the one at issue here "do not fall under the rubric of compelling 'ideological' speech that triggers First Amendment strict scrutiny." *Lakey*, 667 F.3d at 576. This conclusion is reinforced when the case relied on by the District Court here in support of its injunction, *Wooley*, is properly analyzed. As noted by the Fifth Circuit:

> The speech in *Wooley* was the statement of a point of view that the plaintiff found "morally, ethically, religiously and politically abhorrent." The distinction the Court there sought to employ was between factual information and moral positions or arguments. Though there may be questions at the margins, surely a photograph and a description of its features constitute the purest conceivable expression of "factual information."

Lakey, 667 F.3d at 577 n.4 (citation omitted). The court observed that any impact on the woman's decision about whether to have an abortion as a result of the sonogram is fairly characterized as "a function of the combination of her new knowledge and her own 'ideology' ('values' is a better term), not of any 'ideology' inherent in the information she has learned about the fetus." *Id.*

The Act requires the taking and displaying of a sonogram and a verbal description by the doctor of the exam results. These medically accurate descriptions are inherently truthful and non-misleading, not an ideology. The requirement that they be made part of a regulated procedure performed by a licensed medical professional does not violate the First Amendment rights of the abortion provider. The District Court erroneously ruled that "the heightened scrutiny applicable to commercial speech restrictions provides a good model for evaluating restrictions on professional speech." (J.A. 838-39; MDO at 22-23) Proper recognition of the State's established regulatory responsibilities, as analyzed in the context of the professional speech doctrine, should have resulted in the application of a rational basis standard of review for the challenged provisions of the Act.

C. The Act Withstands a Proper Heightened Scrutiny Analysis.

Even if N.C.G.S. § 90-21.85 is reviewed under a heightened scrutiny or strict scrutiny standard, this Court should nevertheless reject the District Court's conclusion

on the First Amendment claim because the challenged provision is narrowly tailored to advance various compelling state interests.

The District Court described the heightened scrutiny standard it applied as requiring the State to prove that the legislative enactment "directly advances a substantial state interest," "is drawn to achieve that interest," addresses harms that "are 'real, not merely conjectural,'" and "'in fact alleviate[s] these harms in a direct and material way.'" (J.A. 839 (citations omitted); MDO at 23)

1. Substantial State Interests Are Advanced by the Act.

First, the State has a compelling interest in ensuring that women seeking an abortion are fully informed about the effect of that medical procedure on the fetus. As previously discussed, truthful information on this issue is relevant and a legitimate prerogative for the State to advance. "[I]nformed choice need not be defined in such narrow terms that all considerations of the effect on the fetus are made irrelevant." *Casey*, 505 U.S. at 883. It is an appropriate state interest to legislatively require disclosures that could prevent irreparable harm to women who abort with less-than-complete information and later regret their decisions. *Id*. at 882; *Gonzales*, 550 U.S. at 159.

Second, the State has a compelling interest in persuading pregnant women to opt for childbirth over abortion. States may further the "legitimate goal of protecting

the life of the unborn" through "legislation aimed at ensuring a decision that is mature and informed, even when in so doing the State expresses a preference for childbirth over abortion." *Casey*, 505 U.S. at 883. And the mandated provision of such information is necessary because

> In a decision so fraught with emotional consequence some doctors may prefer not to disclose precise details of the means that will be used, confining themselves to the required statement of risks the procedure entails. From one standpoint this ought not to be surprising. Any number of patients facing imminent surgical procedures would prefer not to hear all details, lest the usual anxiety preceding invasive medical procedures become the more intense. This is likely the case with the abortion procedures here in issue [partial-birth abortions].

Gonzales, 550 U.S. at 159. Furthermore, it is

> precisely this lack of information concerning the way in which the fetus will be killed that is of legitimate concern to the State. ("States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning"). The State has an interest in ensuring so grave a choice is well informed.

Id. (citation omitted). And,

> [t]he State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision [to elect a late-term abortion].

Id. at 160.

Third, the State has a compelling interest in ensuring that women are not rushed or coerced into having an abortion. The General Assembly could

appropriately take notice that some women who seek to obtain an abortion may have been pressured into doing so, (J.A. 175-77; Declaration of Tracie Johnson ¶¶ 3-9), and that women who have the opportunity to see and hear specific information about fetal development have time to ponder the decision and a chance to discuss it with their physician. (J.A. 633, 637; Defs. Motion for Summary Judgment, Bowes Aff. ¶ 2 at 1 and Bowes Aff. Ex. 1 at 637 ¶¶ 2 & 3) The Act directly advances those interests by requiring the provision of information that may give certain women the determination or confidence they need to decide not to have an abortion even if others maintain that they should undergo the procedure.

2. The Act Is Narrowly Tailored to Advance Substantial State Interests.

To be "narrowly tailored," a statute must have a close fit with the interests the State seeks to advance. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 333 (2003). In this case, the Act is narrowly tailored to advance the objectives described above. The Act is neither under-inclusive nor over-inclusive in that the required specific information is relevant to all women considering an abortion. Moreover, the information required by the Act, including real-time visual and auditory information about a woman's own pregnancy and the fetus within her, is specific information relevant to her individual decision. If a woman elects to avail herself of the

information, it is reasonably likely that the effect, at least in some cases, will be to encourage her to engage in a moment of reflection about her decision whether to terminate her pregnancy – and the gravity of that decision.

If a woman concludes, after careful consideration, that terminating her pregnancy is what is best for her, the information made available to her will help to fully inform her decision. Alternatives, such as making information available in written form or offering to provide information only upon the patient's affirmative request, are less likely to ensure that the specific information the General Assembly has deemed relevant as part of the informed consent process reaches women seeking an abortion. General written materials necessarily are not as narrowly tailored to informed consent as a requirement of the opportunity to view a real-time image of a fetus and hear a description of that image. As previously discussed, there is no dispositive reason to declare that information cannot be presented using modern technology and in a compelling way. Additionally, merely offering the information but not providing it unless a woman asks to receive it means that the information would not be conveyed to women who might choose to look and hear as the ultrasound is being performed. And a legislature appropriately can take into account the likelihood that merely providing an opportunity for a woman to receive information "encourages evasion of the disclosures and manipulation of the woman's

statutory opt-out," and therefore mandate the provision of a visual image and a verbal description. *Lakey*, 667 F.3d at 583. Thus, purported alternatives would not be as effective in furthering the State's interests.

3. The Act Alleviates Harms in a Direct and Substantial Way.

The State has a legitimate interest "from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child." *Casey*, 505 U.S. at 846. Here, the legislature appropriately concluded that the Act furthers substantial interests, even if some women profess not to want the information. Some women who may think they do not want to see or hear about the sonogram image may change their minds while the sonogram is being conducted; for such women, the information would not be available if the Act did not require it. Thus, the Act advances legitimate state interests.

This Court should conclude, as the Fifth Circuit did when it upheld a Texas statute substantially similar to the provision of the Act challenged here, that "requiring disclosures and written consent are sustainable under *Casey*, are within the State's power to regulate the practice of medicine, and therefore do not violate the First Amendment." *Lakey*, 667 F.3d at 580.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court reverse the decision of the District Court, dissolve the permanent injunction, and enter summary judgment in favor of Defendants declaring that N.C.G.S. § 90-21.85 does not violate Plaintiffs' rights under the First Amendment.

Respectfully submitted, this the 1st day of May, 2014.

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