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In Your Professional Opinion: An Analysis of the First Amendment Implications of Compelled Professional Speech In *Stuart v. Camnitz*

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**IN YOUR PROFESSIONAL OPINION: AN ANALYSIS OF THE
FIRST AMENDMENT IMPLICATIONS OF COMPELLED
PROFESSIONAL SPEECH IN *STUART* v. *CAMNITZ***

Erin K. Phillips

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I. INTRODUCTION

Striking the critical balance between a state’s interest in regulating the practice of medicine and a physician’s First Amendment right of free speech is not easy. In *Stuart v. Camnitz*, the Fourth Circuit grappled with this very issue. The court considered whether a North Carolina statute that required physicians to describe the development of the fetus to a woman seeking an abortion violates the First Amendment. The court concluded that such a statute that compelled ideological speech by physicians as a prerequisite to abortion procedures infringed the physicians’ First Amendment rights

II. FACTUAL BACKGROUND

In 2011, North Carolina’s General Assembly overrode the Governor’s veto and passed the Woman’s Right to Know Act (“the

Act”).¹ Under one provision of the Act, physicians were required, “to perform an ultrasound, display the sonogram, and describe the fetus to women seeking abortions.”² These requirements are collectively referred to as the “Real-Time View Requirement” (“the Requirement”).³ The Act required compliance from physicians even if the patient did not wish to view the sonogram or listen to the physician’s descriptions.⁴ A patient could refuse to look at the sonogram and cover her ears, but the physician was nonetheless required to place the sonogram within her line of sight and give the enumerated details.⁵ Additionally, the Act required physicians to inform a patient of the risks of the procedure and of alternate options.⁶

A group of physicians and clinics brought suit in the U.S. District Court for the Middle District of North Carolina prior to the Act becoming effective seeking to enjoin enforcement of the Act.⁷ The District Court initially granted only a preliminary injunction against the enforcement of the Requirement portion of the Act.⁸ The District Court permitted the plaintiffs to file an amended complaint alleging that the

¹ *Stuart v. Camnitz*, 774 F.3d 238, 242 (4th Cir. 2014).

² *Id.* In describing the fetus, a physician must include such details as the fetus’s “members and internal organs, if present and viewable.” *Id.* at 243 (citing N.C. GEN. STAT. § 90-21.85(a)(4)(2011)).

³ *Id.*

⁴ *Id.* at 243.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

Act infringed on physicians' First and Fourteenth Amendment rights.⁹ The District Court, applying intermediate scrutiny,¹⁰ found that the Requirement constituted a violation of the physicians' rights under the First Amendment and granted a permanent injunction against enforcement of the Requirement.¹¹ The District Court found that intermediate scrutiny was appropriate here specifically because the Requirement was a speech-regulating provision.¹²

III. LEGAL ANALYSIS

On appeal, the Fourth Circuit first considered the appropriate level of scrutiny under which to view this case.¹³ The Court found that the Requirement was an example of "quintessential compelled speech" because it required physicians to say certain things to their patients regardless of the physician's professional opinion.¹⁴ Further, the Court noted that compelled speech is inherently content-based.¹⁵ The North Carolina Legislature expressed its clear intent of the Requirement to dissuade patients from going through with planned abortion

⁹ *Id.*

¹⁰ Intermediate scrutiny is a test to determine the constitutionality of certain statutes, which asks whether the statute in question "further[s] an important government interest" and "do[es] so by means that are substantially related to that interest." *Intermediate Scrutiny*, WEX LEGAL DICTIONARY, https://www.law.cornell.edu/wex/intermediate_scrutiny (last visited Mar. 5, 2018).

¹¹ *Stuart*, 774 F.3d at 244.

¹² *Id.*

¹³ *Id.* at 244–45.

¹⁴ *Id.* at 246.

¹⁵ *Id.*

procedures.¹⁶ Thus, the Court found that the Requirement not only compels physicians to make certain statements, but it compels this speech in order to further a political agenda.¹⁷ While “[c]ontent-based regulations of speech typically receive strict scrutiny[,]” the Court continued its analysis of the appropriate level of scrutiny by examining the Requirement’s function as a regulation on the practice of medicine.¹⁸

The state argued that the Requirement was “merely a regulation of the practice of medicine[,]” which ordinarily receives only rational basis scrutiny.¹⁹ The Court acknowledged the state’s authority to regulate the practice of medicine, noting specifically that “the state may require the provision of information sufficient for patients to give their informed consent to medical procedures. . . .”²⁰ However, when a regulation attempts to compel speech from a professional in the practice of his or her duties, courts must balance the scrutiny required for “public dialogue” with that required for the “regulation of professional conduct.”²¹ The Court here found that the Requirement regulated medical treatment in that it required certain conduct of treating

¹⁶ *Id.* at 245.

¹⁷ *Id.* (stating that the Requirement “explicitly promotes a pro-life message by demanding the provision of facts that all fall on one side of the abortion debate. . . .”).

¹⁸ *Id.* at 246.

¹⁹ *Id.* at 246–47.

²⁰ *Id.* at 247 (citing *Canterbury v. Spence*, 464 F.2d 772, 781 (D.C. Cir. 1972)). The court further noted that the state’s authority to regulate the practice of medicine “is not lost whenever the practice . . . entails speech.” *Id.* (quoting *Lowe v. Sec. & Exch. Comm’n*, 472 U.S. 181, 228 (1985) (White, J., concurring in the judgment)).

²¹ *Id.* at 248 (quoting *Pickup v. Brown*, 740 F.3d 1208, 1227 (9th Cir. 2013)).

physicians, and was simultaneously a content-based regulation of speech, thus warranting review under intermediate scrutiny.²²

In applying intermediate scrutiny to this case, the Fourth Circuit set itself apart from the Fifth and Eighth Circuits, both of which applied only rational basis review in holding that similar “ultrasound display-and-describe requirement[s]” did not violate physicians’ First Amendment rights.²³ Both the Fifth and Eighth Circuits, relying in part on *Planned Parenthood v. Casey*,²⁴ found that these requirements fall within states’ power to require physicians to provide “truthful, [and] nonmisleading” information to their patients.²⁵ The Fourth Circuit noted, however, that while *Casey* permits “reasonable licensing and regulation” on physicians’ speech, physicians do not “forfeit their First Amendment rights” when performing abortions.²⁶ The court concluded that intermediate scrutiny comports with the Supreme Court’s holding in *Casey*²⁷ and appropriately balances the “regulation of speech and the

²² *Id.* at 245, 248.

²³ *See*, *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012); *Planned Parenthood Minn., N.D., S.D., v. Rounds*, 686 F.3d 889 (8th Cir. 2012).

²⁴ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

²⁵ *Stuart*, 774 F.3d at 248–49.

²⁶ *Id.* at 249.

²⁷ *Casey*, 505 U.S. at 884 (stating that a physician’s First Amendment right within the practice of medicine is “subject to reasonable licensing and regulation by the State” and thus, requiring a physician to inform a patient of the risks of abortion does not violate such a right).

regulation of the medical profession” with regard to abortion procedures.²⁸

The court next analyzed the Requirement under intermediate scrutiny.²⁹ The court recognized the state’s interest in preserving fetal life, but also noted the importance of ensuring that the promotion of that interest does not infringe on “individual liberty interests or competing state concerns.”³⁰ Other important state interests included “promoting the health of its citizens, . . . promoting the psychological health of women seeking abortions, . . . promoting a healthy doctor-patient relationship, . . . [and] respecting physicians’ professional judgment.”³¹ The court noted however, that these state interests must not be held as so paramount as to require physicians to surrender their constitutional rights in the practice of medicine.³²

The state argued that the Requirement plays the same role as traditional informed consent, but the court found that the Requirement significantly deviated from the purposes of traditional informed consent.³³ The purpose of informed consent is to ensure “patient autonomy” which exists when the patient can “meaningfully consent to

²⁸ *Stuart*, 774 F.3d at 249.

²⁹ *Id.* at 250.

³⁰ *Id.*

³¹ *Id.* at 250–51.

³² *Id.* at 251.

³³ *Id.* at 251–52.

medical procedures.”³⁴ Such consent can be given only when the patient has received sufficient information to freely make meaningful decisions.³⁵ Traditionally, informed consent requires the physician to determine the appropriate medical information to tell the patient based on a reasonable person standard.³⁶ While the physician is obligated to provide all information necessary for a patient to be able to give her informed consent, the patient has the right to decline hearing such information.³⁷ The court found that the Requirement went beyond requiring physicians to provide patients with information necessary to make an autonomous decision and “impose[d] a virtually unprecedented burden on the right of professional speech that operate[d] to the detriment of both speaker and listener.”³⁸

Further, the court further found that the Requirement did not seek to balance the state’s interests with the constitutional rights of physicians and patients.³⁹ The court specifically noted that requiring a physician to display the sonogram and describe the fetus even if the patient closed her eyes and covered her ears bears no state interest

³⁴ *Id.* at 251 (internal quotations omitted).

³⁵ *Id.*

³⁶ *Id.* The reasonable person standard for traditional informed consent takes into account “what a reasonable physician would convey, what a reasonable patient would want to know, and what the individual patient would subjectively wish to know given the patient’s individualized needs and treatment circumstances.” *Id.*

³⁷ *Id.* at 252.

³⁸ *Id.*

³⁹ *Id.*

whatsoever, and cannot contribute to the patient’s informed consent.⁴⁰

Additionally, the court pointed out that the Requirement could actually impede informed consent by forcing the patient to consume information while in a vulnerable position—specifically, “half-naked or disrobed on her back on an examination table, with an ultrasound probe either on her belly or inserted into her vagina.”⁴¹ As the court points out, such a setting may impair a patient’s judgment, which refutes the argument that the Requirement aids the patient in making an informed decision.⁴²

The court, finding that the Requirement did not further the state’s interest in promoting informed consent in medical decisions, exceeded the permissible regulation of the practice of medicine, and “impose[d] an extraordinary burden on [physicians’] expressive rights, held that the Requirement violated the First Amendment and affirmed the District Court’s permanent injunction on enforcement of that provision.”⁴³

IV. CONCLUSION

The *Stuart* decision marks a critical departure from its sister circuits as to a physician’s right to refrain from speech that, in her professional opinion, is not in the patient’s best interest. *Stuart* provides a framework for balancing individual constitutional rights with a state’s

⁴⁰ *Id.*

⁴¹ *Id.* at 255.

⁴² *Id.*

⁴³ *Id.* at 255–56.

legitimate interests in regulating the practice of medicine and preserving fetal life. This case further highlights the role of physicians as key stakeholders in the abortion debate and provides a creative alternative for challenging restrictions on abortions by focusing on the rights of physicians.

