May 1, 2014 Edition

IN THE SUPREME COURT OF THE UNITED STATES

No. 2014–2015

Andrea Sommerville and William DeNolf, Petitioners-Appellants

vs.

The State of Olympus, Respondent-Appellee

On Writ of Certiorari to the Court of Appeals for the Fourteenth Circuit

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ORDER OF THE COURT ON SUBMISSION

IT IS THEREFORE ORDERED that counsel appear before the Supreme Court to present oral argument on the following issues:

1) Whether Proposition 417 poses an undue burden in violation of the Fourteenth Amendment to the United States Constitution?

2) Whether Proposition 417 violates the free speech rights of licensed physicians under the First Amendment to the United States Constitution?

IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTEENTH CIRCUIT No. 01–76325

THE STATE OF OLYMPUS, DEFENDANT-APPELLANT

vs.

ANDREA SOMMERVILLE AND WILLIAM DENOLF, PLAINTIFFS-APPELLEES

United States Court of Appeals for the Fourteenth Circuit

Before AMY DALLAS, Chief Circuit Judge, and MAE PETRY and ANGELA SIMZICK, Circuit Judges.

OPINION BY Chief Judge Dallas

I

(A)

Overview of the Facts

The State of Olympus appeals the decision of the District Court for the Central District of Olympus, which struck down as unconstitutional Olympus's Proposition 417. No claims were brought under the Olympus Constitution or any Olympus law. The federal district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(3), and our jurisdiction rests on 28 U.S.C. § 1291. Because of the similarity in subject matter and the overlap of facts, the district court consolidated the two cases. All parties have stipulated that they accept their continued consolidation.

(B)

Facts

In 2012, voters in the State of Olympus adopted Proposition 417. *See* Appendix I. Proposition 417 requires women seeking an abortion in the State of Olympus to first submit to a trans-vaginal ultrasound ("the ultrasound procedure"). The ultrasound procedure is to be performed by a physician who is licensed in Olympus to practice medicine and to perform ultrasounds. The physician is required to read a script prepared by the State. See Appendix II. According to the rules and regulations developed by the Olympus Department of Public Health, the ultrasound procedure is to be performed while the woman is "awake and alert," and she is to face the machine's monitor. *See* Appendix III. Women are not allowed to obstruct their ears so as to be unable to hear their physician. Physicians must ensure that the woman has viewed the ultrasound and that, if capable, that she has heard the baby's heartbeat. If the father of the baby is present at the medical facility, he can request to be present with the woman undergoing the ultrasound procedure, but the woman may object to his presence. At the conclusion of the ultrasound

procedure, the woman is to be presented with a record of the test indicating the baby's size and shape, along with a pamphlet created by the State entitled, "What a Woman Should Know About Risks Associated with Abortion." This pamphlet, the full text of which is not included in this record, describes a baby's weekly development, explains different abortion procedures, and details the mental and physical health risks to women who procure abortions. These risks include, but are not limited to, suicide, depression, breast cancer, fever, hemorrhage, and infertility. The father of the baby may request the record of the test results, but the woman has the authority to instruct the doctor to deny such a request. The father is entitled by law to a copy of the pamphlet.

Proposition 417 calls for the creation of a script to be discussed with women seeking abortions. *See* Appendix II. With this script, Olympus became the eighteenth state to mandate pre-abortion counseling. Proposition 417 requires the woman to sign a statement of informed consent. This script, which is to be read at the initial consultation, can be read by any medical provider licensed by the State of Olympus. The script instructs patients about the dangers of abortion, the virtues of parenthood, and the possibility that a woman may later regret her decision to have an abortion. It specifies that studies have found that a sizeable number of women who procure abortions become depressed and/or a threat to themselves or others. Women are told that with an abortion, there is an immediate threat to their own health (*e.g.*, infection, hemorrhage, or death) as well as possible long-term physical side-effects (*e.g.*, the potential for infertility and the increased chance of getting breast cancer). They are told of the chance that the fetus feels pain as the result of an abortion. Women must certify in writing that they have been read the script and understand the risks described therein. Medical providers licensed in the State of Olympus are prohibited from discussing these studies beyond informing women that they exist. Medical providers are further prohibited from referencing or discussing any studies that conclude or suggest that there is no link between abortion and depression, suicide, or acts of violence, even if the woman alludes to, asks about, or provides proof of these alternate studies. In such instances, physicians are instructed by law to encourage women to contact the State Department of Public Health. The studies contained in the script are also referenced in "What a Woman Should Know About Risks Associated with Abortion." Under rules adopted by the State, medical providers licensed in the State of Olympus are forbidden to give advice (other than medical) about whether to obtain an abortion as well as from commenting on matters related to the dangers to the woman of an abortion, the virtues of parenthood, or the odds that she may later regret her decision. (See Rule 3 in Appendix III).

Olympus is one of forty states that require abortions to be performed by a physician. The physician who performs the ultrasound procedure is required to be the same physician who would perform the abortion. If the physician who performed the ultrasound procedure is unavailable, the woman is to either reschedule or repeat the process with a different doctor and undergo the ultrasound procedure again. The only exception to the requirement that the same physician perform the ultrasound and the abortion if the life of the mother would be at risk by waiting. In such instances the ultrasound does not have to be re-administered unless requested by the woman seeking an abortion. No woman can be made to undergo the ultrasound procedure or review the results more than three times before procuring an abortion. A physician who fails to comply with Proposition 417 risks a monetary fine and/or the temporary suspension of his or her medical license. A physician who fails to comply more than three times can be barred from

practicing medicine in Olympus or, depending on the circumstances, forbidden from performing abortions in Olympus.

Abortion is treated as a commercial enterprise in Olympus. The State has five abortion providers, each staffed by state-licensed physicians, medical technicians, nurses, and support staff who are paid for their services. Each provider advertises in print and electronic media, as well as on the radio. Like most states, Olympus allows health care providers and institutions to refuse to perform abortions. Proposition 417 forbids insurance companies operating in Olympus from paying for the procedure except under certain defined exceptions. *See* Appendix I.

Proposition 417 provides for four exceptions to the ultrasound procedure:

(A) If the woman is pregnant as a result of rape, incest, or other violation of the Olympus Penal Code that has been reported to law enforcement authorities or that has not been reported because a woman could reasonably believe that doing so would put her at risk of retaliation resulting in serious bodily injury;

(B) If the woman is a minor and obtaining an abortion in accordance with judicial bypass procedures under Olympus Family Code;

(C) If the fetus has an irreversible medical condition or abnormality, as identified by reliable diagnostic procedures and documented by a licensed physician in the woman's medical file; or

(D) If carrying the baby to term would endanger the life of the mother, and such a claim is documented by a licensed physician in the woman's medical file.

At the conclusion of the consultation, a woman is required to sign and date a form certifying that she either qualifies for an exception to the requirement that she undergo the procedure or that she underwent the consultation, understands the possible risks to herself and others associated with abortion, and still wishes to terminate her pregnancy. Upon certification, the physician is authorized to schedule and perform the ultrasound procedure. The ultrasound procedure, which takes 30-60 minutes, can be scheduled and performed the same day as the consultation. However, the requirement that a woman have a full bladder before the test could cause a short delay.

Proposition 417 was written by two state legislators—Senator Ryan Manners (R) and Representative Kari Lyles (D). Senator Manners, who is pro-choice, and Representative Lyles, who is pro-life, worked with grass roots organizations to obtain the signatures required to get the measure on the ballot. According to Senator Manners, "The intent of the ballot measure is not to outlaw abortion, or to chip away at abortion rights, but rather to save and improve lives—both of the countless number of women and their families whose lives are ruined by suicides, mental health issues, and domestic abuse linked to the decision to procure an abortion." Representative Lyles has stated that she was motivated, not by any desire to chip away at abortion rights, but rather by a desire to "ensure that decisions about abortion are fully informed, because all too often regret and guilt that can be avoided sets in and ruins lives in ways that are tragic and heart-breaking."

Senator Manners and Representative Lyles, working with members of the Olympus mental health lobby, suicide and substance abuse prevention groups, manufacturers of ultrasound machines, religious leaders, pro-life groups, and Olympians for Fair and Sensible Abortion Laws, raised funds to support Proposition 417. This coalition paid for television ads, robo-calls, mailings, and a position statement in the state's official voter guide to the 2012 Propositions. The theme of this outreach effort was that "Proposition 417 will save and improve the lives of women by cutting down on the suicides, depression, and drug use that often follow the decision to abort a fetus." The campaign was aided by the State's pro-life Governor Brianna Wilbur (R) who recorded TV ads.

Proposition 417 went into effect on January 22, 2013. Counting Olympus, twenty-five states have trans-vaginal ultrasound laws. Eleven of these states require that the trans-vaginal ultrasound be performed before any abortion. Four of these eleven states require that providers display and describe the ultrasound image to women. Seven of these eleven states, while requiring the procedure, stop short of requiring that providers display and describe the ultrasound image to women, but require provider to offer to display the image to women. For a listing of the twenty-five states that have enacted trans-vaginal ultrasound laws as of this date, *see* Appendix IV.

On February 14, 2013, Andrea Sommerville discovered that she was eight weeks pregnant. She did not qualify for Medicaid. On Friday, February 15, 2013, Ms. Sommerville consulted with a licensed abortion provider, Dr. William DeNolf. Dr. DeNolf read Ms. Sommerville the script required by Proposition 417. She informed him that she did not qualify for any of the exceptions nor for the waiver of the 24-hour waiting period (*see* Appendix I). Ms. Sommerville, whose mother and grandmother had both been diagnosed with breast cancer, asked Dr. DeNolf if an abortion would really raise her risk of breast cancer. He informed her that under the law, at risk of being fined and losing his license, he could not instruct her on the matter other than to refer her to the State Department of Public Health. Ms. Sommerville asked if Dr. DeNolf could recommend a good oncologist with whom she could consult about the breast cancer risks associated with abortion. Again, he informed her that he could not under the law. Ms. Sommerville asked him what section of the law forbids such a referral. Dr. DeNolf admitted that he was uncertain, but that his facility's legal advisor had advised him "not to answer any questions about anything related to Proposition 417." Ms. Sommerville left and later contacted the State Department of Public Health and asked for more information on the studies referenced in "What a Woman Should Know About Risks Associated with Abortion." The official with whom she spoke referred her to several of the groups associated with the campaign for Proposition 417. This included Olympians for Fair and Sensible Abortion Laws. None of the groups that she contacted would discuss the merits of the studies referenced by Dr. DeNolf or in "What a Woman Should Know About Risks Associated with Abortion." Ms. Sommerville contacted an oncologist who practiced medicine outside of Olympus, who informed her that in his opinion "the studies were inconclusive at best" and "likely flawed and biased." Ms. Sommerville read several similar accounts of the studies on-line.

On Monday, February 18, 2013, Ms. Sommerville contacted Dr. DeNolf to schedule her trans-vaginal ultrasound. She arranged an appointment on the morning of Wednesday, February 20, 2013. At this appointment, Dr. DeNolf, pursuant to Olympus law, performed the ultrasound procedure. Ms. Sommerville, who paid out of pocket, viewed the ultrasound and heard the

heartbeat. She was presented with a record of the test indicating the baby's size and shape and was presented with the pamphlet "What a Woman Should Know About Risks Associated with Abortion." The record below does not indicate how her pregnancy was ultimately resolved.[1]

On March 17, 2013, Ms. Sommerville retained legal counsel and filed a lawsuit in federal court under 42 U.S.C. § 1983 against the State of Olympus asserting that Proposition 417 violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution because it requires an unnecessary medical procedure as a pre-condition to procuring an abortion. Ms. Sommerville asserts that the procedure required by Proposition 417 represented "an undue burden" and as such is unconstitutional. At her trial challenging Proposition 417, Ms. Sommerville stated:

> No woman should have to undergo what Proposition 417 requires. The burden was too great—especially when one is at peace with one's decision. This is not about abortion rights. This is about forcing an unwanted and invasive medical procedure on women, not to mention making them pay for it out of pocket.

Ms. Sommerville was joined in the suit by Dr. DeNolf, who alleges that Proposition 417 violates the First Amendment to the United States Constitution because it compels him to express political, moral, medical, and scientific sentiments that are not his own. At trial, the federal district court judge, The Honorable Amanda Rickey, ruled that Proposition 417 is unconstitutional because it compels physicians to make statements contrary to their personal beliefs and opinions, and is an undue burden on a woman's right to procure abortion healthcare. The State of Olympus appealed to this court. We do not review the material facts or the issue of standing; rather, we review the substantive merits of the constitutional arguments raised below. The issue of standing was not raised below and both sides have stipulated that Ms. Sommerville and Dr. DeNolf have standing. This court is persuaded on these facts that both Ms. Sommerville and Dr. DeNolf have standing. The parties to this case have stipulated to the aforementioned facts with one exception. Dr. DeNolf does not concede that the speech in question is of a commercial nature. Accordingly, all issues raised are legal. We review all questions *de novo*. We REVERSE the ruling of the district court.

II

Analysis of the Undue Burden Standard

The question before this court today is whether the Olympus ultrasound procedure creates an undue burden on the woman forced to undergo the procedure. We hold that it does not. This is an issue on which good people with sincere convictions can differ. With that in mind, we take care to explain our decision in a manner that we hope will assuage those who disagree.

Since *Roe v. Wade*, 410 U.S. 113 (1973), courts have consistently held that a right of personal privacy, or a guarantee of certain areas or zones of privacy, exists under the United States Constitution. In a number of decisions, the Court has identified activities relating to marriage, procreation, contraception, family relationships, child rearing, and education as those that fall within this realm. *Roe* held that the right to personal privacy is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. According to the Centers for

[1] In this sense the facts of this case are similar to those of *Roe v. Wade*, 410 U.S. 113, 124 (1973).

Disease Control and Prevention (CDC), in the years following *Roe* there have been roughly fifty million abortions performed in the United States. The CDC estimates that there are a little over one million abortions performed in the United States annually. The CDC and estimates generated by private sources report that about 20% of all pregnancies in the United States result in an abortion. According to the CDC, in 2009, the most recent year for which information is available, the majority of women who have an abortion (55.3%) have only one in their lifetime.

Abortion is a qualified right—one that must be considered against important state interests in regulating abortions and protecting the unborn. It is indisputable that under the present legal framework established by the Supreme Court, states have an interest in ensuring that women undergoing an abortion are safe and that abortion providers meet certain basic medical practices and conditions. Recognizing that the further the pregnancy progresses, the stronger these state interests become, the *Roe* Court presented a trimester framework using a sliding scale of rights. During the first trimester, all decisions were to be made based on sound medical judgment between a woman and her doctor, whereas in the second and third trimesters, the state's interest became more compelling. Of course, determining the proper cut off point between the rights of the woman and those of the state is not an exact science. As medical technology progressed, the need to rely on such a formula receded and has been replaced with a question of viability. *See Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989). In upholding a Missouri law requiring viability testing after the twenty week point prior to the performance of an abortion, the Court recognized that as medical science changes, the law in this area must change with it. *Id.* at 518–20.

In her concurrence in *Webster*, Justice O'Connor noted "that requiring the performance of examinations and tests useful to determining whether a fetus is viable, when viability is possible, and when it would not be medically imprudent to do so, does not impose an undue burden on a woman's abortion decision." *Id.* at 530. That logic holds true today.

Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), further illustrates this point. While reaffirming the "right of the woman to choose to have an abortion before viability and to obtain it without undue interference" the Court nonetheless upheld several obstacles to abortion procedures. *Id.* at 846, 880–901. Most on point for our dispute today, the *Casey* Court validated Pennsylvania's use of a 24-hour waiting period, mandatory counseling, and the requirement of an informed consent process. *Id.* at 886–87. The majority in *Casey* held that these provisions did not create an undue burden, finding that "the informed consent provision is rationally related to the state's interest in assuring that a woman's consent to an abortion be fully informed, and the 24-hour waiting period reasonably furthers the state's legitimate interests." *Id.* at 887. Ultimately, that is all Proposition 417 has done. It ensures that a woman be fully informed.

It is clear that the state has an interest in protecting human life. As scientists become able to pinpoint the moment when a fetus can survive outside the womb with greater accuracy, it follows that the methods employed to detect viability will necessarily change as well. Today, we are confronted with a new method to determine the development of the fetus in the form of a trans-vaginal ultrasound. Like the statutes upheld in *Webster* and *Casey*, the Olympus law does not prevent any woman from obtaining an abortion. Rather, the law uses the latest advances in science to ensure that the woman makes an informed decision. Having an abortion is a life-changing event. It has the potential to cause serious physical and emotional repercussions for years to come. The Constitution does not forbid a state from ensuring that one of its citizens has

the information necessary prior to making a painful choice at a time when the woman is at her most vulnerable. *Casey*, 505 U.S. at 886–87. Nor, in the interest of the people, should it forbid states to do so.

The question we face is whether Olympus creates an undue burden on the woman forced to undergo the medical procedure at issue. *Casey* defines an undue burden as "shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." 505 U.S. at 877. The Court explained that "a statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it." *Id.*

Among the provisions of the law considered in *Casey* was a requirement that women attest that they have informed their husband prior to having an abortion. 505 U.S. at 888–98. *Casey* found this requirement unconstitutional. *Id.* By forcing a woman to share this difficult decision with another, the bounds of privacy were stretched too far. *Id.* The Court recognized that many women are victims of domestic abuse and physical assault and that the notification requirement could potentially place such women in harm's way and would do little to advance the state's interest. *Id.*

Hodgson v. Minnesota, 497 U.S. 417 (1990), provides another good example. Minnesota required a 48-hour waiting period following the notification of both parents. The Supreme Court found that the two-parent requirement created an undue burden on the woman seeking an abortion. *Id.* at 450–55. The two-parent requirement could lead to bizarre results and did little, if anything, to advance the state's compelling interest in protecting life. *Id.* The Supreme Court has also struck down a Nebraska statute that did not provide any exception for the life or health of the mother. *See Stenberg v. Carhart*, 530 U.S. 914, 950 (2000). Such cases are distinguishable from this case.

Unlike the spousal notification requirement in *Casey* and the two-parent notification requirement in *Hodgson*, the Olympus law is set up to "inform the woman's free choice, not hinder it." Being forced to learn about the health risks of a medical procedure is never an enjoyable experience. Seeing and hearing about the development of a fetus can be very painful for a woman who chooses to terminate her pregnancy. Both will certainly be a burden in some way, but the Olympus law is not an *undue* burden because it serves to inform the woman's choice while advancing the state's interest in protecting life. Along these lines, the Eighth Circuit has ruled a law similar to Proposition 417 to be consistent with *Casey* and *Gonzalez v. Carhart*, 550 U.S. 124 (2007). See *Planned Parenthood of Minn., N.D., S.D. v. Rounds*, 686 F.3d 889 (8th Cir. 2012) (en banc).

III

Analysis of Compelled Speech

The second question is whether Olympus law violates the free speech rights of licensed physicians. We find that it does not. States can regulate the speech of licensed professionals where those regulations concern speech related to a profession and not speech related to a professional's private life. *Accountant's Soc'y of Va. v. Bowman*, 860 F.2d 602, 604 (4th Cir.

1988). The law compels no doctor to espouse any set of beliefs or values. Those who are subject to the statute are not told what to think or say in their private lives. If anything, the law regulates professional conduct. *See Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014). Dr. DeNolf's conclusion that he could not refer Ms. Sommerville to "a good oncologist" is not supported by the language of the statute and, as such, is not one at which a rational person would arrive based on the plain meaning of the text.

It is well established that not all regulation of speech, especially that of professional speech, must satisfy strict scrutiny. *Accountant's Soc'y of Va.*, 860 F.2d at 604. After consideration of the facts and Supreme Court jurisprudence, we conclude that the speech in question is of a commercial nature. Accordingly, the correct level of scrutiny is intermediate scrutiny.

The regulated speech is commercial in nature and is entitled to intermediate scrutiny.

The Supreme Court has defined commercial speech as "expression related solely to the economic interests of the speaker and its audience." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561 (1980). To be considered commercial speech, the speech "must concern lawful activity and must not be misleading." *Id.* at 566. This aptly describes the speech before us. The two sides have stipulated that the doctors and clinics here are engaged in a commercial enterprise for which they charge and receive a fee. They advertise their services in print, on-line, and on radio airwaves. States can regulate commercial speech—especially where such regulations help maintain standards among licensed professionals. *Accountant's Soc'y of Va.*, 860 F.2d at 603–04. This includes regulating what persons engaged in commerce must say or cannot say. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618 (1995). Advertisers are adequately protected so long as the disclosure requirements are tailored to a state's interest in preventing fraud. *Cent. Hudson*, 447 U.S. at 574. In light of precedent, abortion clinics and abortion doctors operating in Olympus, including Dr. DeNolf, are the equivalent of advertisers and as such are entitled to no more protection than that which is afforded to advertisers.

There is a distinction between ideological dissemination and the long-preserved police power of a state to protect the health and well-being of its constituents. We find that the speech in question falls into the latter category for two reasons. First, the language at issue speaks to associated health risks of a woman seeking an abortion. Second, ideological dissemination of information would focus on the morality of abortion, but the speech here lacks such a focus.

Applying the Test for Commercial Speech.

We turn to the test for laws that regulate commercial expression. Under the *Central Hudson* framework, commercial speech that neither concerns unlawful activity nor is misleading may be regulated if (1) the asserted governmental interest is substantial, (2) the regulation directly advances that interest, and (3) the regulation is not more extensive than is necessary to serve that interest. 447 U.S. at 566. The regulation need not be the least restrictive means of advancing the state's interest so long as it is "narrowly drawn" and there "is a 'fit' between the legislature's ends and the means" employed. *See Florida Bar*, 515 U.S. at 624, 632 (1995). The state's interest in the health and welfare of the mother is more than substantial.

At least three other circuits have developed an alternative approach to cases involving regulation of speech by professionals. This approach, dubbed the Professional Speech Doctrine, relies

heavily on the views expressed by two Supreme Court Justices in their concurring opinions, neither of which has ever been formally adopted by the Court. Under this approach, courts examine if the regulated speech is incidental to the profession. If so, then regulations that affect it are regulations of professional conduct more so than of protected speech. This approach holds: "Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment . . . ." *Accountant's Soc'y of Va.*, 860 F.2d at 604*; see also Pickup*, 740 F.3d at 1227; *Stuart v. Loomis*, No. 1:11-CV-804, 2014 WL 186310 (M.D.N.C. Jan. 17, 2014). In the present case, the "nexus" is substantiated in the doctor-patient relationship; therefore, the speech is professional, not personal, and is subject to regulation.

The regulation is not compelled speech.

The voters of Olympus have not regulated speech regarding the ultrasound procedure outside the confines of a medical provider's office. Put another way, as in the Ninth Circuit case of *Pickup*, private speech about the procedure can occur in any other available forum. The voters of Olympus have simply availed themselves of their constitutional authority to regulate what can be said about the ultrasound procedure by the men and women who will perform it.

Two sister circuits have similarly sanctioned the wisdom of states in imposing such regulations.

The Fifth and Eighth Circuits have affirmed a law that is similar in nature and scope to that of Proposition 417. *See Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012); *Rounds*, 686 F.3d 889. *Rounds* held that when judging if a compelled disclosure violates the First Amendment courts must "examine first what disclosure actually is required, second whether that disclosure is truthful, and third whether it is non-misleading and relevant to the patient's decision to have an abortion." *Rounds*, 686 F.3d at 893. We agree with this framework and its application compels us to conclude that Proposition 417 is constitutional. The judgment of the district court is REVERSED.

SIMZICK, *Circuit Judge*, dissenting:

I dissent because Proposition 417 poses an undue burden on the rights of women and because it violates the First Amendment rights of doctors.

I

Analysis of the Undue Burden Standard

Griswold v. Connecticut, 381 U.S. 479 (1965), recognized that there is a fundamental right to privacy. *Roe v. Wade*, 410 U.S. 133, 153 (1973), held that this right "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Like a number of states and special interest groups before it, Olympus seeks to undermine this right. The Olympus requirement is unnecessary; it is degrading to women, and it poses a substantial burden upon a woman's right to decide to terminate her pregnancy. If the right to privacy in this realm is to

have any meaning at all, this law must be struck down and the majority's decision must be overturned.

The undue burden concept is not new. It was applied nearly 25 years ago in *Webster* and has been consistently held up as the judicial standard governing this area ever since. In that case, a test to determine viability was held not to create an undue burden. Unlike in *Webster*, the ultrasound law here is not designed to determine if a fetus could live outside of the womb. Rather, its sole purpose is to coerce a woman from terminating her pregnancy, which is her right under *Roe*.

Contrast this with the undue burden imposed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). There, the Supreme Court struck down a Pennsylvania requirement that a woman inform her husband prior to exercising her right to an abortion. Like the Olympus law, the requirement at issue in *Casey* had nothing to do with the life or health of the woman and did nothing to further that state's interest in the protection of human life. *Casey* made clear that "a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability." 505 U.S. at 879. It also may not impose an undue burden upon this right, 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." *Id.* at 878. Ms. Sommerville was far too early in her pregnancy for there to be any question about viability. This law is not about protecting life at all. Rather, it is exclusively and intentionally designed to coerce and bully women into accepting the State's preferred views on the question of abortion. The State is free to express its preferences in many ways, but creating a law that advances no legitimate purpose and poses an almost total roadblock for women who disagree is patently unconstitutional.

II

Analysis of the First Amendment Challenge

The Correct Test is Strict Scrutiny.

The script mandated by Proposition 417 is not of a commercial nature. Rather, it is a form of compelled ideological speech. States cannot tell their people what to think. *Wooley v. Maynard*, 430 U.S. 705, 713 (1977). The statute places an unconstitutional prohibition on protected speech, preventing doctors from communicating fully with patients about their medical options. As such, the proper analytical framework through which the script must be evaluated is "whether the prohibition is (1) a reasonable time, place, or manner restriction; (2) a permissible subject-matter regulation; or (3) a narrowly tailored means of serving a compelling state interest." *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 535 (1980).

Applying Strict Scrutiny.

Proposition 417 fails strict scrutiny. Regulating speech about abortion may be reasonable under certain circumstances. In the immediate case, however, the law is not narrowly tailored.

Compelled Speech and Regulating the Medical Profession.

"[T]he 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." *Wooley*, 430 U.S. at 714. The right to speak and the right not to speak are "complementary components" of individual freedom under the First Amendment. *Id.*

Physicians retain their First Amendment rights, even when engaged in the practice of medicine, and the State cannot compel them to engage in ideological speech. *See, e.g.*, *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion) (recognizing physician's First Amendment right not to speak). The script required by Proposition 417 requires physicians to espouse beliefs they may or may not hold about parenthood and reproduction, which are in no way *medical* advice. "[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Wooley*, 430 U.S. at 717. While it may regulate conduct, the State cannot restrict a doctor's ability to give medical advice within the doctor-patient relationship. *See Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014); *Stuart v. Loomis*, No. 1:11-CV-804, 2014 WL 186310 (M.D.N.C. Jan. 17, 2014). It is true that the State has an interest in the regulation of the medical practice, and thus has the power to impose regulations on physicians generally. But "[b]eing a member of a regulated profession does not . . . result in a surrender of First Amendment rights." *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002). To the contrary, the Supreme Court has found that professional speech may in fact be entitled to "the strongest protection our constitution has to offer" when it is more than purely commercial speech. *See Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995).

Several courts have found that government restrictions that "alter the traditional role" of professionals by "prohibit[ing] speech necessary to the proper functioning of those systems" are unconstitutional. *See Conant*, 309 F.3d at 638; *see also Stuart*, 2014 WL 186310. The application of this principle to the immediate case dooms Proposition 417 because what is being regulated is not the expression of a doctor encouraging a woman to obtain an abortion, but rather what advice can be dispensed if an abortion is sought. Proposition 417 does not allow physicians to provide patients with complete medical advice or offer their own medical opinions if such are sought. This prohibition alters the traditional role of the doctor in a manner that is constitutionally impermissible. The Ninth Circuit has found that the state cannot threaten to revoke a physician's license to prescribe controlled substances based "solely [on] the physician's professional 'recommendation' of the use of medical marijuana." *Conant*, 309 F.3d at 632. If physicians retain their First Amendment rights to recommend controversial medical treatment, then they retain a right to recommend a completely legal procedure. As the district court stated in *Conant*, "'[t]o hold that physicians are barred from communicating to patients sincere medical judgments would disable patients from understanding their own situations well enough to participate in the debate.'" *Id*. at 634–35. A federal district court in North Carolina voiced a similar concern when it found unconstitutional a North Carolina trans-vaginal ultrasound law that was not unlike the law before this court today. *See Stuart*, 2014 WL 186310, at *33–*35.

Commercial Speech.

Even if the speech required by the statute is considered to be commercial speech, which is subject to the lesser standard of intermediate scrutiny, rather than ideological speech, the State's

law is still unconstitutional. Commercial speech that is not false, deceptive, or misleading, and that does not propose unlawful activity may only be regulated if (1) the asserted governmental interest is substantial, (2) the regulation directly advances that interest, and (3) the regulation is not more extensive than is necessary to serve that interest. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 566 (1980). The asserted intent of Proposition 417 is not to outlaw abortion, "but rather to save and improve lives." Yet the law prevents physicians from telling women potentially life-saving information about abortion and compels them to mislead women about a medical procedure. It regulates speech more extensively than is necessary to serve its interest in saving and improving lives, and thus fails the third prong of the *Central Hudson* test.

The commercial speech doctrine is audience-oriented rather than individual-rights-oriented. It also focuses on the preservation of the flow of non-misleading commercial information to the public, rather than only on the preservation of an individual speaker's right to engage in speech. *See, e.g.*, *Cent. Hudson*, 447 U.S. at 562. Proposition 417 causes two harms that the commercial speech doctrine is designed to prevent: the spread of deceptive information and the curtailment of individual speech. The law requires doctors to read a misleading script and prevents them from discussing all sides of the abortion issue with their patients. Patients should have access to complete information that they can use to make informed medical decisions. This is the very essence of why commercial speech is protected by the First Amendment and the nature of Proposition 417 runs contrary to that purpose.

Proposition 417 regulates physicians' First Amendment rights in a manner that is unconstitutional.

Accordingly, I respectfully dissent.

Cases Cited: Undue Burden Cases

1) *Griswold v. Connecticut*, 381 U.S. 479 (1965) http://supreme.justia.com/cases/federal/us/381/479/case.html
2) *Roe v. Wade*, 410 U.S. 133 (1973) http://supreme.justia.com/cases/federal/us/410/113/case.html
3) *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) http://supreme.justia.com/cases/federal/us/492/490/
4) *Hodgson v. Minnesota*, 497 U.S. 417 (1990) http://supreme.justia.com/cases/federal/us/497/417/
5) *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) *http://supreme.justia.com/cases/federal/us/505/833/*
6) *Stenberg v. Carhart*, 530 U.S. 914 (2000) http://supreme.justia.com/cases/federal/us/530/914/case.html
7) *Gonzalez v. Carhart*, 550 U.S. 124 (2007) http://www.supremecourt.gov/opinions/06pdf/05-380.pdf
8) *Planned Parenthood of Minn., N.D., S.D. v. Rounds 686 F.3d 889* (8th Cir. 2012) (en banc) *http://media.ca8.uscourts.gov/opndir/12/07/093231P.pdf*

Cases Cited: Free Speech Cases

1) *Wooley v. Maynard*, 430 U.S. 705 (1977) *http://supreme.justia.com/cases/federal/us/430/705/*
2) *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530 (1980) *http://supreme.justia.com/cases/federal/us/447/530/*
3) *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980) *http://supreme.justia.com/cases/federal/us/447/557/*
4) *Accountant's Soc. of Va. v. Bowman*, 860 F.2d 602 (4th Cir. 1988) *http://law.justia.com/cases/federal/appellate-courts/F2/860/602/465793/*
5) *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) *http://supreme.justia.com/cases/federal/us/515/618/*
6) *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) *http://caselaw.findlaw.com/us-9th-circuit/1343211.html*
7) *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014) *http://cdn.ca9.uscourts.gov/datastore/general/2014/01/29/12-17681_order_amended_opinion.pdf*
8) *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012) *https://www.ca5.uscourts.gov/opinions/pub/11/11-50814-CV0.wpd.pdf*
9) *Stuart v. Loomis*, 1:11-CV-804, 2014 WL 186310 (M.D.N.C. 2014) *http://www.ncmd.uscourts.gov/sites/default/files/opinions/11cv804_163moo.pdf*

- There is some overlap in cases that are relevant to both certified questions. This is true of *Planned Parenthood of Se. Pa. v. Casey (1992), Gonzalez v. Carhart (2007),* and *Planned Parenthood of Minn., N.D., S.D. v. Rounds (8th Cir. 2012).* The opinions of 4th, 5th, and 9th Circuit Courts are not available on official public websites that reflect the pagination found in the 2nd and 3rd Series of the Federal Reporter. In order to produce pinpoint citations for entries to the ACMA written brief competition advocates may need to consult private websites. Contact ACMA with any questions.

Appendix I

Proposition 417

The Voters of Olympus do hereby amend the Olympus State Public Health and Public Safety Code.

Section 1: DEFINITIONS: In this proposition the following terms are employed:

(1) "Abortion" means the use of any means to terminate the pregnancy of a female known by the attending physician to be pregnant with the intention that the termination of the pregnancy by those means will, with reasonable likelihood, cause the death of the fetus.

(2) "Abortion provider" means a facility where an abortion is performed, including the office of a physician and a facility licensed under Chapter 245 of Olympus State Code.

(3) "Medical emergency" means a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that, as certified by a physician, places the woman in danger of death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed.

(4) "Ultrasound" means the use of ultrasonic waves for diagnostic or therapeutic purposes, specifically to monitor an unborn child.

Section 2: All women seeking to procure an abortion in Olympus must submit to a trans-vaginal ultrasound. Failure to do so shall result in penalties that shall include a fine of $500 to $5000 and/or a prison term of no fewer than 30 and no greater than 60 days. Judges can suspend these sentences for first-time offenders.

Section 3: The requirement to submit to a trans-vaginal ultrasound shall not apply to women:

A) If the woman was pregnant as a result of a rape, incest, or other violation of the Olympus Penal Code that has been reported to law enforcement authorities or that has not been reported because a woman could reasonably believe that doing so would put her at risk of retaliation resulting in serious bodily injury;

(B) If the woman is a minor and obtaining an abortion in accordance with judicial bypass procedures under Olympus Family Code;

(C) If the fetus has an irreversible medical condition or abnormality, as identified by reliable diagnostic procedures and documented in the woman’s medical file; or

(D) If carrying the baby to term would endanger the life of the mother, and such a claim is documented by a licensed physician in the woman’s medical file.

Section 4: Women seeking an exemption must do so in writing specifying the reason for the exception. Lying or making false statements about qualifying for an exception is a misdemeanor punishable by a fine not to exceed $500 for each occurrence.

Section 5: At the conclusion of the trans-vaginal ultrasound, women seeking to procure an abortion in Olympus shall be presented with a record of the test indicating the baby's size and shape and a pamphlet to be created by the Olympus Department of Public Health. This pamphlet shall describe a baby's development, week by week, and explains abortion procedures. The father of the baby may request a copy of this record, as well as to be present for the procedure; however, the mother has the authority to instruct her physician to deny such a request. The mother's decision as it pertains to requests made by the father is not appealable to any state or municipal court of law within the jurisdiction of the State of Olympus.

Section 6: All abortions in Olympus shall be performed by a physician who is licensed in the State of Olympus to practice medicine and to perform ultrasounds.

Section 7: The Olympus State Department of Public Health shall create rules and procedures for the procedure required by Section 2 of this law by January 23, 2013. That department shall develop a script to be read to women seeking an abortion and create a free pamphlet for women seeking an abortion that shall describe fetal development, and an explanation of the procedure to be performed. This pamphlet shall detail the mental and physical health risks to women who procure abortions. These shall include, but are not be limited to, risks of suicide, depression, breast cancer, fever, hemorrhage, and infertility. This pamphlet shall be offered to the father of the child, if present at the medical facility, and it shall be posted on-line.

Section 8: Women seeking an abortion in the State of Olympus who do not qualify for one of the exceptions established in Section 3 of this law shall sign and date a form to be developed by the Olympus State Department of Public Health certifying that she has consulted with a physician licensed by the State of Olympus to perform abortions in Olympus, that she understands the possible risks associated with abortion, and that she still wishes to terminate her pregnancy.

Section 9: Women who have certified that they wish to procure an abortion in Olympus from a physician licensed by the State of Olympus to perform abortions in Olympus must wait for a period of at least 24 hours before procuring an abortion. This provision can be waived if a woman certifies in writing that she currently lives 100 miles or more from the nearest licensed abortion facility in the State of Olympus. Women seeking a waiver from the 24-hour waiting period must provide proof of residence in the form of a government-issued photo identification card, which includes an address, two utility bills limited to cable, gas, or electric, and a letter from a landlord or bank certifying the location of the woman's residence. Women seeking a waiver from the 24-hour waiting period must produce the aforementioned documents of proof of residency at the time of their trans-vaginal ultrasound to legally waive the waiting period.

Section 10: The physician who performs a patient's abortion must be the same physician who performed the trans-vaginal ultrasound. If the physician who performed the trans-vaginal ultrasound is unavailable, the patient must repeat the trans-vaginal ultrasound and its review with a different physician who is licensed to practice medicine and perform ultrasounds in the State of Olympus. No patient shall be made to undergo a trans-vaginal ultrasound procedure or repeat the consultation and/or review the results more than three times. In such instances the script shall not have to be re-administered unless requested by the woman seeking an abortion. The only exception to repeating this process is if the life of the mother would be at risk by waiting.

Section 11: Physicians licensed to practice medicine in Olympus shall not give advice (other than medical) about whether to obtain an abortion. They shall read and review a script, to be developed by the Olympus State Department of Public Health, with patients who seek an abortion. Physicians who fail to comply with this law shall be fined up to $10,000 for each occurrence and are subject to a suspension of their medical license. Physicians who fail to comply with this law in excess of three times shall be subject to loss of license and/or be subject to being forbidden to perform abortions in Olympus.

Section 12: No insurance company operating in Olympus shall pay for trans-vaginal ultrasounds unless the patient qualifies for a non-elective abortion as established in Section 3 of this law.

Section 13: This law shall take effect January 23, 2013

Appendix II

"The Script"

Women are to be told: "Studies have found that a sizeable number of women who procure abortions become depressed and/or a threat to themselves or others. A sizeable number of women who abort fetuses commit suicide or engage in other acts of violence aimed at themselves or others. You should know that when it comes to abortion there is always an immediate threat to your own health, including but not limited to death, developing infections, or hemorrhaging, and you may suffer long-term physical side-effects, including but not limited to the potential for infertility and the increased chance of getting breast cancer. You may suffer from a lifetime of guilt and develop mental health issues, including but not limited to depression. There is a chance the fetus feels pain as a result of an abortion. Do you understand what I have just told you? Do you wish to continue with the process of performing a trans-vaginal ultrasound, which will allow you to view the fetus and hear its heartbeat, and potentially procure an abortion that will extinguish the life of the fetus and may put you and your loved ones at risk? The State has made information available to you about the risks posed by abortion. Would you like to receive such information? It is available on-line at the Olympus State Department of Public Health's website."

Appendix III

Procedures Developed by the Olympus State Department of Public Health Governing the Performance of Trans-Vaginal Ultrasounds

Rule 1: Physicians administering trans-vaginal ultrasounds are to ensure that patients are awake and alert and that they position themselves so as to face the machine's monitor. Physicians shall ensure that patients do not obstruct their ears so as to be unable to hear their physician and that they can hear the heartbeat. Physicians shall make every reasonable effort to describe what they see or hear with respect to the fetus to any patient who is physically unable to view or hear the ultrasound.

Rule 2: Physicians administering trans-vaginal ultrasounds shall instruct patients about the dangers of abortion as well as the virtues of parenthood, the possibility that they will come to regret their decision, and dangers that are associated with abortion. Patients are to be read a script prepared by the State of Olympus Department of Public Health.

Rule 3: Physicians licensed to practice medicine in Olympus shall not discuss the merits of any material provided by the State of Olympus to patients as they relate to abortion. Nor shall they critique or pass judgment—personal, medical, or otherwise—on the propriety of abortion, the wisdom or legality of this law, or the virtue of any study that examines the risks and benefits associated with abortion with their patients. This includes if a patient alludes to or asks about alternate studies. Physicians shall direct all such inquiries to the State Department of Public Health.

Rule 4: Physicians administering trans-vaginal ultrasounds shall comply with all laws of the State of Olympus respecting what advice they shall offer or shall not offer to patients seeking to procure an abortion in Olympus.

Rule 5: These rules shall take effect January 23, 2013.

Appendix IV

The following list summarizes the ultrasound procedures of the twenty-five states that offer or require the trans-vaginal ultrasound procedure.

GROUP 1: States that require that ultrasounds be offered to women but do not require that it be undergone or viewed:

Indiana, Missouri, North Dakota, South Dakota

GROUP 2: States that do not require the procedure but require that if an ultrasound is performed that the health provider offer to show it to the woman, who is not required to view it:

Arkansas, Georgia, Idaho, Michigan, Missouri, Nebraska, Ohio, South Carolina, Utah, West Virginia

GROUP 3: States that require an ultrasound for every abortion and that women be offered the chance to view the ultrasound:

Alabama, Arizona, Florida, Kansas, Louisiana, Mississippi, Virginia

GROUP 4: States that require an ultrasound for every abortion and that women view the ultrasound:

North Carolina,[2] Olympus, Texas, Wisconsin

[2] The statute of North Carolina has been found unconstitutional by a federal district court. *See Stuart v. Loomis*, No. 1:11-CV-804, 2014 WL 186310 (M.D.N.C. 2014).