IN THE UNITED STATES DISTRICT COURT

provision, granted Plaintiffs‟ motion in part, and enjoined Defendants

A. Speech-and-Display Provision

The Act requires an ultrasound at least four and no more than seventy-two hours before an abortion. N.C. Gen. Stat. § 90-21.85(a). During this ultrasound procedure, the patient must lie on an examination table where she either (i) exposes the lower portion of her abdomen, or (ii) is naked from the waist down, covered only by a drape. (Doc. 107 at ¶ 13; *see also* Doc. 110 at ¶ 10; Doc. 111 at ¶ 10.) Depending on the stage of pregnancy, the provider (i) inserts an ultrasound probe into the patient"s vagina, or (ii) places an ultrasound probe on her abdomen.[4] (Doc. 107 at ¶ 13; Doc. 110 at ¶ 10; Doc. 111 at ¶¶ 10-11.) The provider must display the images produced from the ultrasound "so that the pregnant woman may view them." N.C. Gen. Stat. § 90-21.85(a)(3). Providers must then give "a simultaneous explanation of what the display is depicting, which shall include the presence, location, and dimensions of the unborn child within the uterus," *id.* § 90-21.85(a)(2), and "a medical description of the images, which shall include the dimensions of the embryo or fetus and the presence of external members and internal organs, if present and viewable." *Id.* § 90-21.85(a)(4).

Doc. 107 at ¶¶ 31-32; Doc. 110 at ¶¶ 21-22; Doc. 111 at ¶ 18.) However, providers must comply with the speech-and-display requirements regardless, even if (i) the patient wears blinders and earphones and cannot see or hear the message; (ii) they believe that acting over the patient‟s objection will harm the patient or violate medical ethics; or (iii) doing so is contrary to their medical judgment. (*See* Doc. 107 at ¶¶ 22-24, 42, 46; Doc. 108 at ¶ 11; Doc. 109 at ¶ 16; Doc.

N.C. Admin. Code 14E.0305(d). These same regulations require a written consent form to be voluntarily signed by the patient, which signature must be witnessed and also signed by the physician performing the procedure. *Id.* at 14E.0305(a).

All physicians in North Carolina have ethical duties to their patients,[5] the violation of which subjects them to discipline by the North Carolina Medical Board. *See* N.C. Gen. Stat. §§ 90-2(a), 90-14(a)(6); *N.C. Dep of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 199, 675 S.E.2d 641, 648 (2009). Physicians are charged with the duties to respect patient autonomy;[6] to act upon patients only with the patient‟s consent and, generally, to not act over a competent patient‟s objection;[7] to act in the patient‟s individual interests as defined by the patient;[8] not to inflict harm on patients;[9] and to exercise their medical judgment and discretion.[10] Indeed, doctors in North

[5] *See generally* Tom L. Beauchamp & James F. Childress, *Principles of Biomedical Ethics* 99-239 (6th ed. 2009) (cited by state‟s expert, (Doc. 117-1 at pp. 4-5 ¶ 1), and Plaintiffs‟ expert, (Doc. 108 at ¶¶ 12, 15-16, 18)); Comm. on Ethics, Am. Coll. of Obstetricians & Gynecologists, *Comm. Op. # 390: Ethical Decision Making in Obstetrics and Gynecology* (2007) (cited by Plaintiffs‟ expert, (Doc. 108 at ¶ 12); state‟s expert was a committee member, (*see* Doc. 117-1 at p. 9)).

[6] *See* Doc. 107 at ¶ 25; Doc. 108 at ¶¶ 12, 14-15; Doc. 109 at ¶ 18; Doc. 110 at ¶¶ 15, 22; Doc. 111-2 at 2; Doc. 112 at ¶ 12; Doc. 117-1 at p. 4 ¶ 1. *See generally* Beauchamp & Childress, *supra*, at 99-140.

[7] *See* Doc. 108 at ¶¶ 15, 19; Doc. 109 at ¶ 16; Doc. 110 at ¶ 22; Doc. 112 at ¶ 15; Doc. 113-1 at 3; Doc. 117-1 at p. 4 ¶ 1. *See generally* Beauchamp & Childress, *supra*, at 99-105.

[8] *See* Doc. 107 at ¶ 46; Doc. 108 at ¶¶ 12-13, 25; Doc. 109 at ¶¶ 13-14; Doc. 110 at ¶ 19; Doc. 112 at ¶ 22; *see also* Doc. 107 at ¶ 48; Doc. 113-1 at 12; *see also Jacobs v. Physicians Weight Loss Ctr. of Am., Inc.*, 173 N.C. App. 663, 668, 620 S.E.2d 232, 236 (2005) (requiring the physician to "act in good faith and with due regard to the interests" of the patient) (quoting *Tin Originals, Inc. v. Colonial Tin Works, Inc.*, 98 N.C. App. 663, 666, 391 S.E.2d 831, 833 (1990)). *See generally* Beauchamp & Childress, *supra*, at 197-239.

[9] *See* Doc. 107 at ¶ 48; Doc. 108 at ¶¶ 12, 26; Doc. 109 at ¶ 20; Doc. 110 at ¶ 19; Doc. 112 at ¶ 18; *see also Comm. Op. # 390*, *supra*, at 3. *See generally* Beauchamp & Childress, *supra*, at

from other exceptions to disclosure requirements).[11] If unusual and rare circumstances exist such that information ordinarily required for informed consent would cause serious harm to the patient, physicians can and should decline to disclose the information to the patient.[12]

Regardless of the Act, standard medical practice for abortion in North Carolina requires a provider to discuss with the patient, among other things, the nature of the procedure, the procedure"s risks and benefits, and alternatives available to the patient, along with their respective risks and benefits. (*See* Doc. 107 at ¶¶ 10, 19, 45; Doc. 108 at ¶ 14; Doc. 110 at ¶ 6; Doc. 111 at ¶ 7.) It also

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107 at ¶¶ 28-29, 36-39; Doc. 110 at ¶¶ 16-19; Doc. 111 at ¶¶ 14-15, 20-23; Doc. 112 at ¶ 18; Doc. 115 at ¶¶ 15-19), and Plaintiffs would not display and describe the

burdensome disclosure requirements," for example, "offend the First Amendment." *Id.* at 250. The Court has evaluated some restrictions and prohibitions on professional advertising under intermediate scrutiny, *see In re R.M.J.*, 455 U.S. 191, 203-07 (1982), and others under strict scrutiny. *See NAACP v. Button*, 371 U.S. 415, 438-40 (1963).

Moreover, the commercial speech doctrine is less likely to apply when the speech regulation at issue is content-based. For example, in *Riley*, the Supreme Court considered a First Amendment challenge to a statute requiring professional fundraisers to disclose to potential donors the percentage of charitable contributions collected during the previous twelve months that were actually turned over to charity. 487 U.S. at 795. In deciding to apply strict scrutiny, the Court noted only that the Act was a content-based regulation of speech because it was compelled speech and that the speech could not be labeled commercial when examined as a whole. *Id.* at 795-96.

Similarly, in *Sorrell v. IMS Health Inc.*, the Supreme Court held that a state statute that prohibited pharmaceutical manufacturers from using prescriber-identifying information for marketing was First Amendment-protected expression that must be subject to "heightened judicial scrutiny." ___ U.S. ___, ___, 131 S. Ct. 2653, 2659 (2011). Even though the statute regulated commercial speech, the Court applied heightened scrutiny in striking it down because it was content-based; its express purpose was "to diminish the effectiveness of marketing by manufacturers of brand-name drugs." *Id.* at ___, 131 S. Ct. at 2663-64.[14] Heightened scrutiny

[14] , 469 F.3d 641, 652 (7th Cir. 2006) (applying strict scrutiny to regulation requiring the application of a sticker marked "18" on "sexually explicit" games because the sticker communicated a non-factual, "subjective[,] and highly controversial message"); *cf.* , ___ U.S. ___, ___, 131 S. Ct. 2729, 2738 (2011) (applying strict scrutiny to strike down regulation prohibiting sale or rental of violent video games to minors and requiring "18" packaging label).

requires at a minimum that the provision at issue must directly advance a substantial state interest and be drawn to achieve that interest. *See id.* at ___, 131 S. Ct. at 2667-68 (defining heightened scrutiny in the commercial speech context.) It also requires that the harms the provision prevents must be "real, not merely conjectural," and that the provision at issue "in fact alleviate[s] these harms in a direct and material way." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 662, 664 (1994).

Outside of the advertising context, it has long been recognized that the state can require licenses and impose reasonable regulations on professions which require "a certain degree of skill and learning upon which the community may confidently rely." *Dent v. West Virginia*, 129 U.S. 114, 122 (1889). In *Dent*, the Supreme Court upheld a state law prohibiting the practice of medicine without a license, holding that a state may require a license so long as it is "appropriate to the calling or profession, and attainable by reasonable study or application." *Id.* at 121-22; *see also Watson v. Maryland*, 218 U.S. 173, 176 (1910). Similarly, in *Keller v. State Bar of California*, the Supreme Court held that the state may require lawyers to belong to an organized bar that expended dues to fund activities germane to the profession because of its interests in regulating the profession and improving the quality of legal services.[15] 496 U.S. 1, 13-14 (1990).

In a variety of contexts, the Supreme Court has acknowledged the government"s "interest in protecting the integrity and ethics of the medical profession" specifically. *Washington v.*

[15] Courts have similarly held that states may regulate the licensing of other professions without running afoul of the Constitution. *See, e.g.*, *Nat Psychoanalysis v. Cal. Bd. of Psychology* (*NAAP*), 228 F.3d 1043, 1051 (9th Cir. 2000) (mental health professionals); *Mitchell v. Clayton*, 995 F.2d 772, 774 (7th Cir. 1993) (acupuncturists); *of Va. v. Bowman*, 860 F.2d 602, 605 (4th Cir. 1988) (accountants); *Underhill Assocs., Inc. v. Bradshaw*, 674 F.2d 293, 296 (4th Cir. 1982) (securities broker-dealers); *Locke v. Shore*, 682 F. Supp. 2d 1283, 1292 (N.D. Fla. 2010) (interior designers).

10-12, 326 S.E.2d 45, 51-52 (1985) (citing N.C. Gen. Stat. § 90-21.13). In doing so, courts have linked informed consent and competent advice requirements to standards of the profession and to well-established negligence standards.[19] *See Pickup*, 728 F.3d at 1054-55.

Beyond generally applicable licensing systems and enforcement of professional norms, just what "professional speech"[20] means and whether it receives a different degree of protection under the First Amendment is not particularly clear. *See Stuart*, 834 F. Supp. 2d at 431 (noting that "the phrase has been used by Supreme Court justices only in passing" and collecting cases). Nonetheless, it is clear that individuals do not surrender their First Amendment rights entirely when they speak as professionals. In *Casey*, the Court explicitly recognized a physician"s First Amendment rights and cited *Wooley v. Maynard*, 430 U.S. 705 (1977), which held that the state cannot compel a person to speak the state"s ideological message. *Casey*, 505 U.S. at 884; *see also Keller*, 496 U.S. at 13-14 (holding that the state co55 Tm[0057004B0044(-iBT/F1 12 Tf-tw 405.55 TmTf3.

therapy was harmful and ineffective, the Court found the legislature acted rationally in relying on that consensus. *Id.* at 1057.

The Ninth Circuit in *Pickup* was guided by two of its earlier speech cases. *Id.* at 1051-52. In *NAAP*, the Court held that California‟s psychology licensing scheme did not violate the First Amendment, as it was content- and viewpoint-neutral and did not "dictate what can be said between psychologists and patients during treatment." 228 F.3d at 1054-56. The *Pickup* court contrasted *NAAP* with *Conant v. Walters*, in which the Ninth Circuit applied strict scrutiny to a federal policy declaration that a doctor‟s recommendation or prescription of medical marijuana would lead to revocation of the doctor‟s registration to prescribe controlled substances. 309 F.3d 629, 639 (9th Cir. 2002). The court recognized that "[b]eing a member of a regulated profession does not, as the government suggests, result in a surrender of First Amendment rights," and concluded that the content- and viewpoint-based policy was not sufficiently narrowly tailored. *Id.* at 637, 639; *see Pickup*, 728 F.3d at 1056.[22] The court in *Pickup* characterized *Conant* as holding that "content- or viewpoint-based regulation of communication *about* treatment must be closely scrutinized." *Pickup*, 728 F.3d at 1056.

It is also clear that a state‟s regulation of professional speech must be consistent with the goals and duties of the profession. In *Legal Services Corp. v. Velazquez*, for example, the Supreme Court expressed concern about a statute that interfered with traditional professional relationships by restricting the kind of professional advice a lawyer could give. 531 U.S. 533 (2001). The Court found that regulations which prohibited federally-funded legal aid attorneys

[22] *See also Wollschlaeger v. Farmer*, 880 F. Supp. 2d 1251, 1255, 1261-62 (S.D. Fla. 2012) (applying strict scrutiny to invalidate a state statute prohibiting doctors from asking patients whether they own firearms because it was content-based and went beyond "permissible regulation of professional speech or occupational conduct that imposed a mere incidental burden on speech").

from advising clients about potential constitutional claims violated the First Amendment, noting that "[r]estricting . . . attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys." *Id.* at 544. Likewise, in *Milavetz*, the Court narrowly construed the statute at issue so as to avoid any concerns that the statute would inhibit "frank discussion" between attorney and client. 559 U.S. at 246. Courts have been careful to insure that the regulation at issue was in fact directed at the state‟s purported interest in the profession. *See Keller*, 496 U.S. at 14; *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 768 (1976) (discounting state‟s interest in improving standards of pharmacists where disclosure had more to do with retail sales than with professional standards).

As a review of these authorities makes clear, whether, when, and to what extent the government can compel speech by a professional cannot be established with hard and fast rules. *See Healy v. James*, 408 U.S. 169, 180 (1972) ("First Amendment rights must always be applied „in light of the special characteristics of the . . . environment‟ in the particular case." (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969))); *Moore-King*, 708 F.3d at 570 (recognizing "variability inherent in occupational regulations," and noting that "[j]ust as the internal requirements of a profession may differ, so may the government‟s regulatory response based on the nature of the activity and the need to protect the public" (citing Robert C. Post, *Democracy, Expertise, and Academic Freedom* 134 n.83 (2012) [hereinafter Post Book])).[23] The use of labels and categories is of limited utility.

Rather, compelled professional speech is more

delivering the information in this way, providers appear to have adopted the state‟s message, and patients are likely to assume that the provider‟s speech delivered during a medical procedure conveys ideas and messages the provider endorses and has deemed "worthy of presentation." *Hurley*, 515 U.S. at 575. (*See* Doc. 107 at ¶ 24; Doc. 111 at ¶ 17; Doc. 115 at ¶ 21); *see also* Jennifer M. Keighley, *Physician Speech & Ma*

Limit on Compelled Ideological Speech, 34 Cardozo L. Rev. 2347, 2374 (2013) ("Because of the fiduciary relationship between physicians and their patients, patients are likely to place significant value on the physicians‟ speech about a medical procedure.").

To the extent the speech-and-display provision requires providers to deliver a message designed to persuade women not to terminate a pregnancy, which the state forthrightly acknowledges is one of its purposes, (*see* Doc. 118 at 25), it "imposes burdens that are based on the content of speech and that are aimed at a particular viewpoint." *See Sorrell*, ___ U.S. at ___, 131 S. Ct. at 2663-64. Requiring a physician or other health care provider to deliver the state‟s content-based, non-medical message in his or her own voice as if the message was his or her own constitutes compelled ideological speech and warrants the highest degree of First Amendment protection. *See Hurley*, 515 U.S. at 579 ("[T]he law . . . is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government"); *Casey* 505 U.S. at 884 (citing *Wooley*, 430 U.S. 705); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (19[(, 505 U.S.)8(377, 386 (139.28e0.18 433.15 Tm

strict scrutiny always applies when the state compels content-based speech. Yet

significant training and expertise and who are already licensed by the state.[25] *See Moore-King*, 708 F.3d at 570; *see also Dent*, 129 U.S. at 122 (holding medical licensing requirements must be "appropriate to the calling or profession").[26] There may be minimal First Amendment concerns when the state compels compliance with "standards of acceptable and prevailing medical practice," *see In re Guess*, 327 N.C. 46, 52-53, 393 S.E.2d 833, 837 (1990) (internal quotation marks omitted), but when the state seeks to compel speech outside those prevailing practices, the issue is quite different.

professional speech.[29] This is particularly so here, where "the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied." *See Sorrell*, ___ U.S. at ___, 131 S. Ct. at 2667. As stated earlier, heightened scrutiny requires at a minimum that the provision directly advances a substantial state interest and is drawn to achieve that interest. *See id*. at ___, 131 S. Ct. at 2667-68.

a coerced abortion. These goals are accomplished, the state contends, by showing the woman the physical characteristics of her fetus to make her "aware of what the implications of [abortion] are in terms of fetal life." (Doc. 133-1 at 6.)

The state"s interests in protecting fetal health and insuring voluntary and informed consent are valid state interests. The state has made cogent arguments that information about the physical characteristics of the fetus conveyed as a result of the speech-and-display provision could be helpful and relevant to some patients considering abortion. (*See* Doc. 118 at 20.) And the state has offered some evidence to support this view. In a 2002 study cited by the state"s expert, (Doc. 117-1 at p. 6 ¶ 5), researchers determined that most women who were offered and accepted the opportunity to look at the ultrasound before an abortion viewed it "in a positive light, that it would help them to make a better choice."

providers to actually

providers to show and describe the images to women the providers know will be harmed, responding only that women who will be significantly harmed by the message can avoid it because the Act allows them to “avert their eyes” a

See Casey, 505 U.S. at 882 (holding there is "no reason why the State may not require doctors to inform a woman seeking an abortion of *the availability of materials relating to* the consequences to the fetus, even when those consequences have no direct relation to her health" (emphasis added)). The statute did not specify where or how the information had to be provided, and it did not require the provider to personally show information about fetal development to patients. *Id.* at 902-03 (reprinting 18 Pa. Cons. Stat. § 3205 in full). The Act requires the provider to deliver in his or her own voice information the state deems relevant during the middle of a medical procedure in the exact manner dictated by the state, a much more significant intrusion than the *Casey* statute"s

information “simply because it might cause temporary stress or anxiety,” and further testified that he is “not aware of any evidence that patients will be harmed by the provision of

government speaks for itself, it "may make content-based choices," but that "[i]n the realm of

requiring the provider to deliver information to women who refuse to listen does nothing to advance the state‟s goals, (*see* Doc. 113-1 at 7-8, 11), and by the state‟s willingness to require providers to inflict psychological harm on some of their patients in order to insure delivery of its message.[40]

Further, the state has not shown that the speech-and-display provision is necessary to alleviate a real harm. The state offers no evidence that psychological harm caused by learning of the fetus‟s physical characteristics after an abortion is substantial either in numbers or degree, nor is there evidence that the compelled disclosures ameliorate any such harm, especially when they are not received.[41] (*See* Doc. 115 at ¶¶ 23-26.) In the face of Plaintiffs‟ evidence that the provision will cause serious psychological harm to some women, the state has not shown that its interest "would be achieved less effectively absent the regulation." *See Turner Broad.*, 512 U.S. at 662 (quotation marks omitted).

The state‟s contention that the provision prevents coercive abortions is completely unclear. To the extent Defendants contend that providers are coercing abortions, the argument rests, at least in part, on an assumption that health care providers do not fulfill their legal and ethical duties to obtain informed consent or, worse, actively coerce patients to undergo abortions.

[40] The underinclusiveness of the Act also raises suspicions about the primacy of the state‟s interest in informed consent. *See Brown*, ___ U.S. at ___, 131 S. Ct. at 2740. The Act exempts an entirely different population of pregnant women who are also faced with choices that put their fetuses at risk. (*See, e.g.*, Doc. 108 at ¶¶ 28-29 (discussing increased risk of miscarriage caused by chorionic villus sampling and amniocentesis).)

[41] There is no evidence that the risk of emotional harm from learning after the fact that the fetus might have had physical features qualifies as one of the "usual and most frequent risks and hazards inherent in the . . . procedure[]" so that disclosure would be otherwise required by North Carolina law. N.C. Gen. Stat. § 90-21.13(a)(2).

There is no evidence before the Court that either of these things is true, even in small measure.[42] *Cf. Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002) (noting, in dicta, that the

commercial speech context that “restrictions must not be more extensive than necessary” and

of empirical evidence for the supposed health interests put forth, the conflicts with established rules of medical ethics, and the admitted non-medical and value-based motives behind the Act. With no provision for a therapeutic exception or for a different method of delivery to women at serious risk of harm and with no evidence of any benefit from delivering the message to women who refuse to listen to it, the Act does not directly or indirectly advance any of the proffered state interests and is not drawn to achieve a substantial state interest. It undermines well-established professional norms in the medical field, without empirical justification. It does not survive heightened scrutiny.

C. *Casey* is Consistent wETBOOttached TopTypePags9

requirement that the physician provide the information mandated by the State *here*." *Casey*, 505 U.S. at 884 (emphasis added).

Despite its brevity, the First Amendment analysis is clearly a traditional one, couched by its reference to *Wooley* in terms of compelled speech and by its reference to the state‟s ability to regulate the practice of medicine in terms of professional speech. *Casey* did not purport to carve out a new First Amendment exception or create a new standard of review for all abortion-related speech cases. *See Brown*, ___ U.S. at ___, 131 S. Ct. at 2734-38 (declining to carve out novel First Amendment exception for violent video games); *United States v. Stevens*, 559 U.S. 460, 468-72 (2010) (same for depictions of animal cruelty); *see also Pruitt v. Nova Health Sys.*, No. 12-1170, 134 S. Ct. 617 (Nov. 12, 2013) (denying certiorari from Oklahoma Supreme Court case holding similar statute unconstitutional under *Casey*).

Nowhere else in First Amendment law is the state‟s effort t { e

graphic delivery of this information in the middle of a medical procedure a risky proposition for her.

Instead of a "reasonable framework" within which a woman makes the decision about terminating a pregnancy, *see Casey*, 505 U.S. at 873, the speech-and-display provision is more like an unyielding straightjacket. It goes well beyond "encourag[ing the pregnant woman] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term" and "taking steps to ensure that [her] choice is thoughtful and informed." *Id.* at 872. By requiring providers to deliver this information to a woman who takes steps not to hear it or would be harmed by hearing it, the state has erected an obstacle and has moved from "encouraging" to lecturing, using health care providers as its mouthpiece. *See Riley*, 487 U.S. at 804 (Scalia, J., concurring). As discussed above, there is no health reason for requiring the disclosure to women who take steps not to hear it or would be harmed by hearing it, making this an "unnecessary health regulation[]" which is not allowed under *Casey*. *See* 505 U.S. at 878.

D. Conclusion

For the foregoing reasons, the one-size-fits-all speech-and-display provision violates Plaintiffs‟ First Amendment rights. The Act requires providers to deliver the state‟s message to women who take steps not to hear it and to women who will be harmed by receiving it with no legitimate purpose. Thus, it is overbroad, and it does not directly advance the state‟s interests in reducing psychological harm to women or in increasing informed and voluntary consent. To the extent the Act requires providers to deliver the state‟s message designed to discourage abortion, it is an impermissible attempt to compel these providers to deliver the state‟s message in favor of childbirth and against abortion. Plaintiffs are entitled to summary judgment.

III. Modification of Preliminary Injunction

At the preliminary injunction stage, Defendants agreed that the requirements of the speech-and-display provision rise and fall together. Now, in two sentences and without explanation, Defendants request that the Court enjoin the enforcement of only the first sentence of § 90-21.85(a)(2) and § 90-21.85(a)(4) in the alternative to enjoining the speech-and-display provision in its entirety. (Doc. 118 at 31-32.) It is not clear how the remaining provisions of § 90-21.85 would function in the absence of subsections (a)(2) and (a)(4), and the Defendants essentially ask the Court to rewrite the statute so that it is constitutional. (Doc. 159 at 51-52.) The Court declines the invitation.

DUE PROCESS CLAIM

Plaintiffs also contend that N.C. Gen. Stat. § 90-21.85 violates substantive due process. As an initial matter, Defendants argue that Plaintiffs lack standing to challenge the Act on due process grounds to the extent they seek to do so on behalf of their patients. Generally, "even when the plaintiff has alleged injury sufficient to meet the „case or controversy‟ [standing]

marks omitted). A plurality of the Supreme Court and several courts of appeal have allowed physicians and provider

Act‟s speech-and-display provision, the Court declines to reach this issue beyond its holdings on the First Amendment issue, denying both parties‟ motions on this ground as moot.

VAGUENESS CLAIM

Finally, Plaintiffs contend that the Act is void as vague. In response, Defendants urge the Court to adopt savings constructions to eliminate any alleged vagueness. Plaintiffs agree with Defendants‟ proposed constructions. Specifically, the parties agree that (1) the term "advanced practice nurse practitioner in obstetrics" included in the definition of qualified technician, N.C. Gen. Stat. § 90-21.81(9), should be defined as "a nurse practitioner who is certified i rm ed

308, 314 (4th Cir. 1983) (finding statute not void for vagueness where "[t]he meaning of its