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# THE RIGHT TO REMAIN SILENT: ABORTION AND COMPELLED PHYSICIAN SPEECH

**Abstract:** Across the country, courts have confronted the question of whether laws requiring physicians to display ultrasound images of fetuses and describe the human features violate the First Amendment to the U.S. Constitution. On April 5, 2019, in *EMW Women’s Surgical Center, P.S.C. v. Beshear*, the U.S. Court of Appeals for the Sixth Circuit joined the Fifth Circuit and upheld Kentucky’s law, thus rejecting a physician’s free speech challenge. The Supreme Court declined to review this decision without providing an explanation. The Sixth Circuit became the third federal appellate court to rule on such regulations, often referred to as “ultrasound narration laws” or “display and describe laws,” and joined the Fifth Circuit in upholding such a law against a First Amendment challenge. The Fourth Circuit, however, held that a North Carolina ultrasound narration law did, in fact, violate physicians’ First Amendment right to free speech. This Note discusses the varying approaches employed by circuit courts and proposes a framework for future analysis. Ultimately, this Note concludes that ultrasound narration laws violate physicians’ right to free speech.

## INTRODUCTION

Carolyn Jones was thirty-two years old when she became pregnant.<sup>1</sup> She and her husband looked forward to welcoming a son into their growing family of three.<sup>2</sup> Then, Carolyn received devastating news: her unborn child had a rare genetic disorder that would cause severe developmental abnormalities in his legs, spine, and brain.<sup>3</sup> Doctors could not guarantee that he would survive childbirth and, if he did, his life would be defined by constant pain and medical treatment.<sup>4</sup> After grappling with this unsettling development, Carolyn and her husband made the heartrending decision to terminate the pregnancy.<sup>5</sup>

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<sup>1</sup> Rebuttal Declaration of Carolyn Jones in Support of Plaintiffs’ Motion for a Temporary Restraining Order at 1, *EMW Women’s Surgical Ctr., P.S.C. v. Beshear*, 283 F. Supp. 3d 629 (W.D. Ky. 2017), *rev’d*, 920 F.3d 421 (6th Cir. 2019) (No. 17-cv-00016) [hereinafter Declaration of Carolyn Jones].

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 1–2. Carolyn was twenty weeks pregnant at the time. *Id.* at 1.

<sup>4</sup> *Id.* at 2. Carolyn rushed to receive a second opinion from a specialist who reached the same conclusion. *Id.*

<sup>5</sup> *Id.* One study found that concerns regarding fetal or maternal health accounted for approximately twenty-five percent of all abortions. Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSPS. ON SEXUAL & REPROD. HEALTH 110, 117 (2005), <https://www.guttmacher.org/sites/default/files/pdfs/pubs/psrh/full/3711005.pdf> [<https://perma.cc/DAN6-EAZR>].

In Texas, women are required to receive an ultrasound and consult a doctor before having an abortion.<sup>6</sup> Therefore, at Carolyn's appointment, her doctor displayed the image of the fetus, described the fetus's human features, and played the fetal heartbeat aloud.<sup>7</sup> Despite a diagnosis ensuring a lifetime disability, the fetus's organs appeared healthy, leaving Carolyn forced to listen to the doctor's description of a fetus that she knew would suffer immensely if she chose childbirth.<sup>8</sup> Before long, Carolyn was inconsolable.<sup>9</sup> Yet, under Texas law, the doctor had no choice but to continue describing the baby's features in the face of her grief.<sup>10</sup> Reflecting on the experience years later, Carolyn described it as torturous.<sup>11</sup>

In the seminal 1973 decision *Roe v. Wade*, the U.S. Supreme Court recognized that women have a constitutional right to obtain an abortion.<sup>12</sup> The Court later reaffirmed this liberty in *Planned Parenthood of Southeastern Pennsylv-*

<sup>6</sup> Declaration of Carolyn Jones, *supra* note 1, at 1. Texas also has a mandatory twenty-four hour waiting period between pre-abortion counseling and the procedure. *Id.* Women who live more than one hundred miles from the nearest abortion provider may waive the pre-abortion counseling. TEX. HEALTH & SAFETY CODE ANN. § 171.012 (West 2020). But if they live within one hundred miles of an abortion provider, they will need to visit in-person. *Id.* To justify mandatory waiting periods (often spanning from eighteen to twenty-four hours), states cite the need to ensure that women are making informed decisions after a period of reflection. *But see Waiting Periods for Abortion*, GUTTMACHER INST. (Jan. 2020), <https://www.guttmacher.org/evidence-you-can-use/waiting-periods-abortion> [<https://perma.cc/3L9Z-ZQNB>] (collecting data on the effectiveness of mandatory waiting periods for abortions, and concluding that they are rarely impactful). Though plausible, this logic ignores the practical reality that women rarely change their minds during waiting periods. *Id.* In fact, ninety-two percent of women resolve to obtain an abortion *before* they complete pre-abortion counseling. *Id.* These consultations therefore provide little benefit to most women, while imposing a practical hurdle to obtain an abortion. *Id.* Waiting periods are especially troublesome for impoverished women traveling far distances to abortion clinics; these women may lack the resources to make two separate trips or to purchase overnight accommodations near the clinic. *Id.*

<sup>7</sup> Declaration of Carolyn Jones, *supra* note 1, at 1. Carolyn had to suffer the indignity of a forced ultrasound while stirrups restrained her feet, thus illustrating the intrusive nature of these ultrasound experiences. *Id.*

<sup>8</sup> *Id.* at 2. The doctor described the baby's healthy diaphragm and functioning heart. *Id.*

<sup>9</sup> *See id.* (documenting her husband's attempts to comfort her while the doctor did what little he could, namely waiting for her to catch her breath before resuming his description).

<sup>10</sup> *See id.* at 3 (recalling her futile attempts to avoid viewing the ultrasound by closing her eyes and contorting herself away from the image). The doctor and staff told Carolyn that the law served no legitimate medical purpose, but that the state obligated them to perform it anyway. *Id.* They apologized repeatedly throughout the experience. *Id.* Although Carolyn appreciated their sincerity, she stated that it did little to lessen the traumatizing effects of the experience. *Id.*

<sup>11</sup> *See id.* (maintaining that the procedure added pain and suffering to what "was already the worst day of [her] life").

<sup>12</sup> *See* 410 U.S. 113, 138, 153 (1973) (reviewing a Texas statute that prohibited abortions except when emergency procedures were needed to save the prospective mother's life). In a 7-2 decision, the Supreme Court struck down the law as unconstitutional. *Id.* at 166. The Court relied on the implicit right to privacy as a basis for a woman's right to reproductive autonomy. *Id.* at 153. The Court noted that although the Constitution does not explicitly mention any right to privacy, the Court has recognized this right consistently, and held that it extends to a woman's right to choose. *Id.*

*nia v. Casey*, though tempering its scope.<sup>13</sup> In *Casey*, the Court held that states could regulate abortion, provided that their legislation did not impose an undue burden on a woman's right to choose whether to terminate a pregnancy.<sup>14</sup>

Abortions have been performed since our nation's beginning and remain commonplace today.<sup>15</sup> In 2017 alone, healthcare providers performed 862,320

<sup>13</sup> See 505 U.S. 833, 853, 878 (1992) (plurality opinion) (reconsidering a woman's right to reproductive freedom, and reaffirming *Roe's* central holding, while noting that the Court rejected *Roe's* trimester framework), *rev'd*, 14 F.3d 848 (3d Cir. 1994). The Court focused primarily on the inflexible nature of the *Roe* system. *Id.* at 872. It emphasized that the trimester approach made abortion regulation all but impossible during the first trimester and, in doing so, "contradicted the State's permissible exercise of its powers." *Id.*

<sup>14</sup> *Id.* at 876. In articulating its new due process framework, the Court provided that the state could permissibly enact legislation to further the health or safety of the woman seeking an abortion, but could not unduly burden her right to choose. *Id.* at 878. The Court looked to post-*Roe* Supreme Court decisions that suggested that women do not enjoy the right to abortion access "without interference from the state." *Id.* at 875 (quoting *Planned Parenthood v. Danforth*, 428 U.S. 52, 61 (1976)). In addition to making abortion regulation for maternal health difficult, the Court emphasized that *Roe* undervalued the state's interest in promoting fetal life. *Id.*

<sup>15</sup> See LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 28–51 (2d ed. 1992) (chronicling abortion in the United States). Abortion has a long history in the United States, dating back to the country's founding. *Id.* at 28. At that time, agriculture was the dominant industry, and childbirth benefited families by adding additional members to a clan's workforce. *Id.* at 29. Because families often benefited—at least economically—from additional children, scholars speculate that the most common reason women obtained abortions was to avoid the societal condemnation that often existed when an unmarried woman gave birth. *Id.* In the years immediately following the American Revolution, abortions were a prevalent, albeit rarely discussed, practice. Jessica Ravitz, *The Surprising History of Abortion in the United States*, CNN (June 27, 2016), <https://www.cnn.com/2016/06/23/health/abortion-history-in-united-states/index.html> [<https://perma.cc/HT5K-Y6WD>]. Abortions were also legal. *Id.* At common law, abortions were permitted until a woman's "quickening [time]" or when she could feel the fetus kick. *Id.* By the 1800s, abortion was a common practice in the United States. *Id.* Some estimates indicate that there was one induced abortion for every four births. TRIBE, *supra*, at 29. Despite their prevalence, early abortions were hazardously inexact procedures that often endangered the patient's life. *Id.* Recognizing these harms, states began drafting laws regulating abortion to protect women. *Id.* Connecticut, credited as the first state to pass abortion legislation, did so by outlawing poison-induced abortion, a practice where doctors would administer poison to a patient in a dose that terminated the fetus without killing the woman. *Id.* at 13. This law—like others that would soon follow—centered around maternal health. *Id.* As state regulation became more common, public sentiment towards abortion shifted. *Id.* at 30. What was once an accepted, though clandestine practice, became the subject of calls for its prohibition. *Id.* Doctors were the most vocal critics. *Id.* Medical professionals' growing aversion to performing abortions was two-fold. *Id.* From a practitioner's perspective, as scientific advancements began to shed light on the "life" of a fetus, some doctors believed that facilitating abortions violated their oath to do no harm. *Id.* And from a moral standpoint, ending the life of a sentient being—a being that doctors once viewed as lifeless—felt troubling. See Mark L. Rienzi, *The Constitutional Right Not to Participate in Abortions: Roe, Casey, and the Fourteenth Amendment Rights of Healthcare Providers*, 87 NOTRE DAME L. REV. 1, 27 (2011) (outlining the growth of the anti-abortion movement). What began as a vocal minority swiftly became an overwhelming majority. *Id.* By 1859, the American Medical Association called for an absolute prohibition on abortions. *Id.* Many states responded by outlawing the practice, with limited therapeutic exceptions for when childbirth would risk the mother's life. TRIBE, *supra*, at 34. Despite the criminalization of abortions in the latter half of the nineteenth century and the beginning of the twentieth century, they remained a common practice, partially due to physicians' broad interpretation of therapeutic excep-

abortions.<sup>16</sup> Yet this figure represents a sixty percent decline from 1990, just two years before the *Casey* decision.<sup>17</sup> And despite this precipitous drop, state legislators continue to carve away at the right to choose.<sup>18</sup> In recent years, states—predominantly those in conservative strongholds in the South and Midwest—passed dozens of laws inhibiting abortion in various manners.<sup>19</sup> These regulations ranged from mandatory waiting periods to narrated ultrasound requirements, similar to the procedure that Carolyn endured.<sup>20</sup>

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tions. *Id.* at 35. But their prevalence also can be attributed to the pervasiveness of illicit “backroom” abortions. *Id.* These clandestine abortions often had catastrophic results. *Id.* Although poor women obtained most illegal abortions, across every social sector, horror stories of backroom abortions gone wrong emerged. *Id.* By the 1960s, as safer and more humane abortion procedures developed, feminists began lobbying for relaxed abortion laws; they tied their reform efforts to maternal health issues, rather than female autonomy concerns. *Id.*

<sup>16</sup> See Rachel K. Jones et al., *Abortion Incidence and Service Availability in the United States, 2017*, GUTTMACHER INST. (Sept. 2019), [https://www.guttmacher.org/sites/default/files/report\\_pdf/abortion-incidence-service-availability-us-2017.pdf](https://www.guttmacher.org/sites/default/files/report_pdf/abortion-incidence-service-availability-us-2017.pdf) [<https://perma.cc/A9D6-4DT2>] (cataloguing abortion in the United States and identifying trends).

<sup>17</sup> See Lisa M. Koonin & Jack C. Smith, *Abortion Surveillance—United States, 1990*, NAT’L CTR. FOR CHRONIC DISEASE PREVENTION & HEALTH PROMOTION (Dec. 17, 1993), <https://www.cdc.gov/mmwr/preview/mmwrhtml/00031585.htm> [<https://perma.cc/DS92-TY3P>] (studying abortion totals in the United States during 1990); see also Jones et al., *supra* note 16 (noting that U.S. abortion rates in 2017 fell to their lowest figures since 1973).

<sup>18</sup> See Jones et al., *supra* note 16 (chronicling the continued upward trend in state abortion restrictions, as well as the decline in health care clinics that provide abortions); Elizabeth Nash et al., *State Policy Trends 2019: A Wave of Abortion Bans, but Some States Are Fighting Back*, GUTTMACHER INST. (Dec. 10, 2019), <https://www.guttmacher.org/article/2019/12/state-policy-trends-2019-wave-abortion-bans-some-states-are-fighting-back> [<https://perma.cc/L4KM-GCZY>] (providing an overview of state-promulgated abortion legislation in 2019).

<sup>19</sup> See Heather D. Boonstra & Elizabeth Nash, *A Surge of State Abortion Restrictions Puts Providers—and the Women They Serve—in the Crosshairs*, GUTTMACHER INST. (Mar. 1, 2014), <https://www.guttmacher.org/gpr/2014/03/surge-state-abortion-restrictions-puts-providers-and-women-they-serve-crosshairs> [<https://perma.cc/4DBJ-QGCU>] (chronicling the growing number of laws restricting abortions that states have passed in recent years); Ariana Eunjung Cha, *At Least 20 Abortion Cases Are in the Pipeline to the Supreme Court. Any One Could Gut Roe v. Wade.*, WASH. POST (Feb. 15, 2019), <https://www.washingtonpost.com/health/2019/02/15/least-abortion-cases-are-steps-us-supreme-court-any-one-could-gut-roe-v-wade/> [<https://perma.cc/98BX-TSES>] (discussing abortion cases that the Supreme Court could consider in 2019, and noting that most of these suits challenge laws restricting the right to obtain an abortion under the undue burden framework); Nash et al., *supra* note 18 (providing an overview of the increase in state laws restricting abortion); Elizabeth Nash & Rachel Benson Gold, *In Just the Last Four Years, States Have Enacted 231 Abortion Restrictions*, GUTTMACHER INST. (Jan. 5, 2015), <https://www.guttmacher.org/article/2015/01/just-last-four-years-states-have-enacted-231-abortion-restrictions> [<https://perma.cc/5ACS-BK5E>] (discussing renewed efforts by conservative states to restrict abortions). Participants on both sides of the abortion debate agree that this is the tensest political environment since the 1990s, when “instances of blockades, bombings and arson at clinics were on the rise.” Cha, *supra*.

<sup>20</sup> See KY. REV. STAT. ANN. § 311.727 (West 2020) (requiring doctors to display and describe a sonogram before performing an abortion); TENN. CODE ANN. § 39-15-215 (2020) (requiring that patients undergo pre-abortion ultrasounds, and mandating that medical staff display and describe the images); TEX. HEALTH & SAFETY CODE ANN. § 171.012 (West 2020) (same); WIS. STAT. § 253.10 (2020) (requiring that women complete pre-abortion counseling, which promotes childbirth, at least twenty-four hours before medical staff can perform the abortion).

For pro-life activists, abortion legislation serves two purposes.<sup>21</sup> On a practical level, it makes the abortion process more taxing, thereby frustrating patients' access to abortions.<sup>22</sup> And from a legal standpoint, abortion opponents anticipate that eventually one of these laws will land at the steps of the Supreme Court.<sup>23</sup> They hope that the Court's conservative majority will overturn

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<sup>21</sup> See Cha, *supra* note 19 (discussing the legislative strategy behind these laws); Nash et al., *supra* note 18 (providing an overview of state-promulgated abortion legislation in 2019). Many of these legislative efforts succeeded. Nash et al., *supra* note 18. More liberal states, primarily in the Northeast and West, attempted to combat the anti-abortion movement through legislation of their own, resulting in the passage of thirty-six regulations protecting abortion. *Id.* Abortion opponents are typically labeled "pro-life," a reference to their view that abortion devalues human life. Tom Head, *The Pro-Life vs Pro-Choice Debate*, THOUGHTCO. (Nov. 16, 2019), <https://www.thoughtco.com/pro-life-vs-pro-choice-721108> [<https://perma.cc/FAD6-JC2B>]. Conversely, the pro-choice movement seeks to preserve the legality and accessibility of abortions. *Id.* Also, several lawmakers within majority "pro-life" states have employed an interesting strategy to highlight the perceived hypocrisy of male legislators regulating what women may do with their bodies. See Ray Levy-Uyeda, *Forced Vasectomies in Alabama: Why Pro-Choice Lawmakers Are Using Joke Bills to Get Your Attention*, REWIRE NEWS GRP. (Feb. 21, 2020), <https://rewire.news/article/2020/02/21/forced-vasectomies-in-alabama-pro-choice-state-legislators-seek-to-impact-public-opinion-with-satirical-bills/> [<https://perma.cc/V97V-RKT7>] (describing the legislative counter-movement against anti-abortions through satirical laws that attempt to mirror the paternalistic attitude towards women that abortion legislation engenders). Consider Alabama, a state that recently enacted a statute that would impose a near absolute ban on abortion, starting in November 2019, but has been stalled by a legal challenge to the bill. H.B. 314, 2019 Leg., Reg. Sess. § 1 (Ala. 2019). In response to this law, Alabama State Representative Rolanda Hollis (D-Birmingham) introduced a bill that "call[ed] for forced vasectomies for men within a month of their 50th birthdays or after the birth of their third child, whichever comes first." Levy-Uyeda, *supra*. According to Representative Hollis, the bill—though satirical—underscores the frustrating double standard where "year after year the majority party continues to introduce new legislation that tries to dictate a woman's body and her reproductive rights." *Id.* Her bill serves as a tongue-in-cheek reminder of what she considers to be an equally "outrageous overstep in authority." *Id.*

<sup>22</sup> See Cha, *supra* note 19 (noting the practical hurdles that these restrictions impose on women seeking abortions).

<sup>23</sup> See Sabrina Tavernise, *'The Time Is Now': States Are Rushing to Restrict Abortion, or to Protect It*, N.Y. TIMES (May 15, 2019), <https://www.nytimes.com/2019/05/15/us/abortion-laws-2019.html> [<https://perma.cc/6B93-LPVR>] (highlighting the wave of anti-abortion legislation passed in 2019). Efforts to get a case before the Supreme Court were successful. See *June Medical Services LLC v. Russo*, OYEZ, <https://www.oyez.org/cases/2019/18-1323> [<https://perma.cc/VPP3-A4MA>] (noting that the Supreme Court granted certiorari on October 4, 2019). In March 2020, the Court heard oral arguments in a case centering on the constitutionality of a Louisiana law that required physicians performing abortions to have admitting privileges at a local hospital. *Id.* Nearly two hundred Republican members of Congress submitted an amicus brief asking the Court to reconsider *Roe* and *Casey*. See Brief Amici Curiae of 207 Members of Congress in Support of Respondent and Cross-Petitioner at 34, *June Med. Servs., L.L.C. v. Russo*, 140 S. Ct. 2103 (2020) (No. 18-1323) (urging the Court to reconsider *Roe* and *Casey* in response to technological advancements). *Roe*, the amici drafters alleged, had confused courts and was an outdated tool for analysis. *Id.* at 33. The congressmen maintained that *Roe* did not categorize abortion as a fundamental right; rather, the Supreme Court had merely implied that it was a guaranteed liberty. *Id.* at 30. *Casey*, they contended, provided a new framework for regulation that explicitly overruled *Roe*'s test and abortion's implicit fundamental right status. *Id.* at 32. According to *Roe* critics, the undue burden framework is an ambiguous and vexing standard that lower courts apply with varying results. *Id.* Therefore, the congressmen asked the Court to reconsider the fundamental nature of the right to abortion and the framework for state regulation. *Id.* at 34. The Supreme

*Roe* and *Casey*, thus allowing states to prohibit or restrict abortion at their discretion.<sup>24</sup>

Individuals challenging these abortion restrictions often rely on the Fourteenth Amendment's Due Process Clause.<sup>25</sup> But for informed consent regulations and ultrasound narration laws, the First Amendment provides a viable alternative.<sup>26</sup> One could argue, as others have, that such laws violate physicians' First Amendment rights by forcing them to promote the government's preference toward childbirth.<sup>27</sup>

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Court struck down the law in a 5–4 opinion. *June Med. Servs.*, 140 S. Ct. at 2133. Justice Amy Coney Barrett has since replaced Justice Ruth Bader Ginsburg—a member of the majority in that close decision. Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N.Y. TIMES (Oct. 26, 2020), <https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html> [<https://perma.cc/4GCS-6BZ8>].

<sup>24</sup> See Brief Amici Curiae of 207 Members of Congress in Support of Respondent and Cross-Petitioner, *supra* note 23, at 34 (arguing that the Supreme Court has retreated from *Roe* in subsequent decisions, and stating that states have responded by restricting abortion to the maximum extent possible, which greatly diminishes *Roe*'s *stare decisis* value and warrants overturning it); Kevin M. Barry, *The Death Penalty and the Fundamental Right to Life*, 60 B.C. L. REV. 1545, 1600 (2019) (noting the potential for the Court to rethink its holding that women have a fundamental right to an abortion and subsequently overturn *Roe*). With the appointment of Justice Brett Kavanaugh, there are now five male conservative justices. See Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering Against Abortion Rights: NIFLA v. Becerra*, 94 N.Y.U. L. REV. 61, 111, 123 (2019) (chronicling the current Supreme Court's composition and attitude toward abortion). Between 2011 and 2015, three of those justices—Chief Justice John Roberts and Justices Clarence Thomas and Samuel Alito—favored upholding every abortion restriction before the Court. *Id.* at 121. Based on Justice Neil Gorsuch's past rulings on matters concerning women's rights, Chemerinsky and Goodwin assume that Justice Gorsuch will display an anti-abortion attitude. *Id.* at 121–22. Justice Amy Coney Barrett's recent appointment, moreover, has only amplified concerns that the Court might revisit *Roe* and *Casey*. See Adam Liptak, *Barrett's Record: A Conservative Who Would Push the Supreme Court to the Right*, N.Y. TIMES (Oct. 12, 2020), <https://www.nytimes.com/2020/10/12/us/politics/barretts-record-a-conservative-who-would-push-the-supreme-court-to-the-right.html> [<https://perma.cc/2LFJ-CWTX>] (examining Justice Barrett's judicial record and her resistance against expansive interpretations of abortion rights).

<sup>25</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113, 153 (1973) (considering a due process challenge to abortion restrictions). The Fourteenth Amendment bars states from depriving citizens of “life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV, § 1.

<sup>26</sup> See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion) (addressing a free speech challenge to a regulation compelling physician speech), *rev'd*, 14 F.3d 848 (3d Cir. 1994); Amended Complaint for Injunctive and Declaratory Relief at 4, *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014) (No. 1:11-cv-00804) (arguing that North Carolina's narrated ultrasound requirement violated the First Amendment by compelling physicians' speech). The plaintiffs maintained that the law forced physicians to perform an ultrasound narration so that the state could impress its viewpoint on patients regarding whether to terminate pregnancies. Amended Complaint for Injunctive and Declaratory Relief, *supra*, at 4. This, they claimed, violated the First Amendment's Free Speech Clause. U.S. CONST. amend. I.

<sup>27</sup> See *Stuart*, 774 F.3d at 243 (holding that a North Carolina ultrasound narration law violated physicians' First Amendment rights to free speech); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 584 (5th Cir. 2012) (ruling that a Texas ultrasound narration law did not violate medical providers' First Amendment rights to free speech); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 738 (8th Cir. 2008) (en banc) (overturning a lower court's decision that an informed consent requirement violated physicians' First Amendment rights to free speech).

These challenges have yielded mixed results.<sup>28</sup> In 2012, in *Texas Medical Providers Performing Abortion Services v. Lakey*, the Fifth Circuit ruled that ultrasound narration laws do not violate physicians' First Amendment right to free speech.<sup>29</sup> Two years later, in *Stuart v. Camnitz*, the Fourth Circuit concluded otherwise, holding that a similar law violated the U.S. Constitution.<sup>30</sup> Recently, in 2019, the Supreme Court declined to review a Sixth Circuit decision upholding Kentucky's ultrasound narration regulation in *EMW Women's Surgical Center, P.S.C. v. Beshear*.<sup>31</sup>

Thus, a circuit split exists in favor of upholding ultrasound narration requirements against First Amendment challenges.<sup>32</sup> Though only four states have such laws in place, the Supreme Court has signaled its view as to the viability of such laws by declining to review *EMW*, and state lawmakers may respond in kind.<sup>33</sup> This Note examines the free speech implications of these anti-abortion laws.<sup>34</sup> Part I of this Note provides an overview of the First Amend-

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<sup>28</sup> See *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 446 (6th Cir. 2019) (upholding a display and describe law after outlining a rigid doctrinal test to determine whether the law comported with the First Amendment); *Stuart*, 774 F.3d at 256 (ruling that an ultrasound narration law violated the First Amendment after determining that it harmed patients, rather than helped them); *Lakey*, 667 F.3d at 577 (upholding an ultrasound narration regulation against physicians' First Amendment challenge, and emphasizing the importance of courts' deference to the elected legislature).

<sup>29</sup> See 667 F.3d at 577–78 (upholding a Texas ultrasound narration law).

<sup>30</sup> 774 F.3d at 256.

<sup>31</sup> See 920 F.3d at 439; see also *Supreme Court Leaves in Place Kentucky Law Requiring Ultrasounds Before Abortions*, L.A. TIMES (Dec. 9, 2019), <https://www.latimes.com/world-nation/story/2019-12-09/kentucky-law-ultrasounds-abortion-supreme-court> [<https://web.archive.org/web/20210521221150/https://www.latimes.com/world-nation/story/2019-12-09/kentucky-law-ultrasounds-abortion-supreme-court>] (reviewing the Supreme Court's decision to deny certiorari without explanation).

<sup>32</sup> Compare *EMW*, 920 F.3d at 439 (upholding an ultrasound narration law), and *Lakey*, 667 F.3d at 584 (ruling that a Texas ultrasound narration law did not violate medical providers' First Amendment rights to free speech), with *Stuart*, 774 F.3d at 243 (holding that a North Carolina ultrasound narration law violated physicians' First Amendment rights).

<sup>33</sup> See Bethany Rodgers, *Mandatory Abortion Ultrasound Bill Dies in Final Hours of Utah's 2020 Legislative Session*, SALT LAKE TRIB. (Mar. 13, 2020), <https://www.sltrib.com/news/politics/2020/03/13/mandatory-ultrasound-bill/> [<https://web.archive.org/web/20210521221618/https://www.sltrib.com/news/politics/2020/03/13/mandatory-ultrasound-bill/>] (noting that Utah nearly adopted an identical ultrasound narration law that narrowly avoided passage after an all-female group of bipartisan state legislators walked out of the legislative chamber in protest). The bill's sponsor, Steve Christiansen, vowed to revive the bill. *Id.* Iowa, Maryland, and Missouri have also introduced similar bills that are currently pending. Jessica Mason Pieklo, *Mandatory Ultrasounds. Abortion Bans. Utah, Are You OK?*, REWIRE NEWS GRP. (Mar. 17, 2020), <https://rewire.news/article/2020/03/17/mandatory-ultrasounds-abortion-bans-utah-are-you-okay/> [<https://perma.cc/C2ZS-L8C6>] (discussing Utah's ultrasound narration law). Additionally, many states are using informed consent disclosures to restrict abortions. See Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 940 (quoting Thomas A. Glessner, who contends that pro-life advocates view informed consent statutes as a short-term approach along "the march to the 'ultimate goal . . . to completely end abortion in America.'").

<sup>34</sup> See *infra* notes 43–328 and accompanying text.



ment and details the historical treatment of compelled physician speech.<sup>35</sup> Part II summarizes and explores in greater detail two competing judicial theories that have emerged from prior decisions regarding the treatment of compelled physician speech.<sup>36</sup> Finally, Part III proposes an alternative framework for determining whether state-mandated informed consent provisions and their progeny—display and describe laws—warrant strict judicial scrutiny.<sup>37</sup> In doing so, this Note argues that courts should defer to traditional medical understandings of informed consent.<sup>38</sup> It further maintains that ultrasound narration laws violate physicians' rights.<sup>39</sup>

## I. THE COMPELLED SPEECH DOCTRINE AND INFORMED CONSENT PRECEDENT

Contextualizing physicians' First Amendment rights requires first exploring the compelled speech doctrine.<sup>40</sup> Section A of this Part discusses the intersection of that doctrine with states' authority to regulate the medical profession.<sup>41</sup> Section B then examines, in chronological order, important First Amendment decisions in the abortion context, including the circuit split surrounding ultrasound narration requirements.<sup>42</sup>

### *A. The Compelled Speech Doctrine and Regulating the Medical Profession*

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech . . .”<sup>43</sup> The Amendment safeguards minority viewpoints, promotes freedom of thought, and encourages the free exchange of

<sup>35</sup> See *infra* notes 43–172 and accompanying text.

<sup>36</sup> See *infra* notes 173–240 and accompanying text.

<sup>37</sup> See *infra* notes 241–328 and accompanying text.

<sup>38</sup> See *infra* notes 250–287 and accompanying text.

<sup>39</sup> See *infra* notes 288–328 and accompanying text.

<sup>40</sup> See *infra* notes 43–82 and accompanying text.

<sup>41</sup> See *infra* notes 53–82 and accompanying text.

<sup>42</sup> See *infra* notes 83–172 and accompanying text.

<sup>43</sup> U.S. CONST. amend. I. The Supreme Court held that the First Amendment also applies to state governments. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (holding that the First Amendment is incorporated to the states through the Fourteenth Amendment). There are three often cited reasons for the First Amendment's free speech protection: (1) facilitating an open marketplace of ideas; (2) promoting democracy; and (3) encouraging autonomy and self-expression. Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1291–92 (2014). The first basis refers to the belief that government speech hinders the flow of ideas, thereby stifling societal progress. *Id.* at 1292. The second is rooted in the notion that a functioning participatory democracy must allow its constituents to voice their opinions, even if they are unpopular ones. *Id.* Lastly, individual autonomy refers to an intangible aspect of the human psyche, freedom of expression, which is a necessary precursor to self-realization. *Id.*

ideas—all of which are essential characteristics of a functioning democracy.<sup>44</sup> Private citizens often invoke this right when the government restricts public discourse.<sup>45</sup> Importantly, the First Amendment also limits the government's ability to compel speech.<sup>46</sup> Constitutional scholars and courts refer to this principle as the compelled speech doctrine.<sup>47</sup> This doctrine precludes the government from forcing private citizens to promote certain ideas, viewpoints, or expressions.<sup>48</sup>

The compelled speech doctrine is firmly entrenched in American jurisprudence.<sup>49</sup> State courts have been striking down government-mandated speech since 1894, and the Supreme Court followed suit in 1943.<sup>50</sup> But its pro-

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<sup>44</sup> See *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (emphasizing the important role that prohibiting compelled speech serves in protecting minority viewpoints); *Frudden v. Pilling*, 742 F.3d 1199, 1201 (9th Cir. 2014) (assessing a claim that a school's uniform policy mandating that students display the phrase "Tomorrow's Leaders" on their shirts violated the compelled speech doctrine), *aff'd in part, rev'd in part*, 877 F.3d 821 (9th Cir. 2021), *aff'd*, 801 F. App'x 546 (9th Cir. 2020). The Ninth Circuit noted that the compelled speech doctrine precludes the government from compelling speech regardless of whether the speech is ideological. *Frudden*, 742 F.3d at 1206.

<sup>45</sup> See *Wooley*, 430 U.S. at 714 (considering a private citizen's First Amendment challenge and stating that the First Amendment protects an individual's right both to speak and refrain from speaking). The Supreme Court's First Amendment precedents acknowledge that the right to free speech limits the government's ability to require private citizens to promote state ideologies through their speech. See *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006) (considering a challenge to a law withholding federal funds from law schools that did not permit military recruiters on their campus).

<sup>46</sup> See *Wooley*, 430 U.S. at 714 (discussing limitations on the government's ability to compel speech). In what scholars consider to be the seminal compelled speech decision, the Court held that a New Hampshire law requiring non-commercial vehicles to feature license plates engraved with the state motto, "Live Free or Die," violated the First Amendment. *Id.* at 715. The Court noted that the law forced the petitioner to serve as a mouthpiece for the government. *Id.* According to the Court, the state impermissibly entered the region of beliefs and ideologies that the First Amendment preserves. *Id.*

<sup>47</sup> See David L. Hudson Jr., *Compelled Speech*, FIRST AMEND. ENCYC., <https://www.mtsu.edu/first-amendment/article/933/compelled-speech> [<https://perma.cc/TN92-HV9J>] (providing an overview of the compelled speech doctrine). See generally *Cressman v. Thompson*, 719 F.3d 1139, 1148, 1156 (10th Cir. 2013) (overturning the district court's dismissal of a claim that Oklahoma's law requiring citizens to display the "Sacred Rain Arrow" image on their vehicles violated the compelled speech doctrine), *aff'd*, 798 F.3d 938 (10th Cir. 2015); *Braintree Elec. Light Dep't v. FERC*, 550 F.3d 6, 13 (D.C. Cir. 2008) (referring to the prohibition on government-induced speech as the "compelled speech doctrine"); *R.J. Reynolds Tobacco Co. v. Shewry*, 423 F.3d 906, 915 (9th Cir. 2005) (outlining the purpose behind what the Ninth Circuit referred to as the "compelled speech doctrine").

<sup>48</sup> See, e.g., *Wooley*, 430 U.S. at 715 (invalidating New Hampshire's license plate requirement because it functioned as compelled speech by forcing private individuals to serve as conduits for the government's ideological interests).

<sup>49</sup> See Eugene Volokh, Essay, *The Law of Compelled Speech*, 97 TEX. L. REV. 355, 361 (2018) (emphasizing that the principles behind the compelled speech doctrine date back to the early years of American free speech law).

<sup>50</sup> See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (invalidating a West Virginia statute requiring public school teachers and students to salute the flag); *Wallace v. Ga. C. & N. R. Co.*, 22 S.E. 579, 579–80 (Ga. 1894) (overturning a law requiring employers to provide dismissed

tections are not absolute, and for certain individuals, including physicians, their rights are steadily eroding.<sup>51</sup> To appreciate the shrinking constitutional parameters of physician compelled speech, it is helpful to understand the manner in which courts assess free speech claims.<sup>52</sup>

### 1. Basic Framework for Analyzing Compelled Speech

Whenever a court confronts a First Amendment challenge, it must first decide which level of judicial scrutiny to apply to the underlying law.<sup>53</sup> This determination is a critical one.<sup>54</sup> There are three principle levels of judicial review: rational basis, intermediate, and strict scrutiny.<sup>55</sup> Courts applying ration-

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employees with a letter discussing the reason for their termination, and noting that the right to free speech is a fundamental constitutional principle that includes the right to remain silent).

<sup>51</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (noting that the right to free speech is subject to some limitations), *superseded by statute*, ALA. CODE § 13A-11-8 (1996) *as recognized in* *Fallin v. City of Huntsville*, 865 So. 2d 473 (Ala. Crim. App. 2003). In *Chaplinsky v. New Hampshire*, the Supreme Court established that “fighting words” are excluded from First Amendment protection. *Id.* The case involved Walter Chaplinsky, a Jehovah’s Witness, who sparked controversy by handing out pamphlets condemning organized religion. *Id.* at 569. A police officer detained Chaplinsky after an angry crowd surrounded him. *Id.* Chaplinsky responded by calling the city marshal several names. *Id.* He was convicted of violating a New Hampshire law outlawing intentionally offensive speech directed at others in a public place. *Id.* Chaplinsky appealed, claiming that the law was unconstitutionally vague and that it violated his First Amendment right to free speech. *Id.* Considering this claim, the Court emphasized that there are some areas of speech that the government can regulate without violating the Constitution. *Id.* at 571–72. Those included “the lewd and obscene, the profane, the libelous, and the insulting,” and offensive “‘fighting’ words.” *Id.* at 572. The Court viewed those categories of speech as serving no cognizable benefit to society and held that the government could restrict them. *Id.* The modern Supreme Court is continuing to limit the scope of the First Amendment’s free speech protections. See RONALD J. KROTOSZYNSKI, JR., *THE DISAPPEARING FIRST AMENDMENT* 176 (2019) (tracing the continued dissipation of First Amendment protections). Through its tepid approach to compelled speech, the Supreme Court continues to retract traditional First Amendment protections, including those for physicians. *Id.* at 6. This betrays the commonly held belief that the Supreme Court is steadily expanding the scope of First Amendment protections. *Id.* at 20–21.

<sup>52</sup> See *infra* notes 53–82 and accompanying text.

<sup>53</sup> See, e.g., 281 Care Comm. v. Arneson, 766 F.3d 774, 782 (8th Cir. 2014) (noting that the first step in assessing First Amendment challenges is to determine which level of judicial scrutiny is applicable).

<sup>54</sup> See Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (describing rational basis review as employing “minimal scrutiny in theory and virtually none in fact”); Robert McNamara & Paul Sherman, *NIFLA v. Becerra: A Seismic Decision Protecting Occupational Speech*, 2018 Cato Sup. Ct. Rev. 197, 205 (comparing strict scrutiny’s application across all constitutional challenges and concluding that courts apply it with the most force in First Amendment jurisprudence).

<sup>55</sup> See *Strict Scrutiny*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/strict\\_scrutiny](https://www.law.cornell.edu/wex/strict_scrutiny) [<https://perma.cc/A3SU-88SY>] (defining strict scrutiny and noting that the other standards of judicial scrutiny are rational basis and intermediate scrutiny). Strict scrutiny emerged from the celebrated footnote four of *United States v. Carolene Products Co.* See 304 U.S. 144, 152 n.4 (1938) (stating that some legislation may warrant “more searching judicial inquiry”). As a term, strict scrutiny first appeared in *Skin-*

al basis review perform a superficial inquiry: if a law is rationally related to a legitimate government interest, then it will be upheld.<sup>56</sup> Therefore, under rational basis, the government need only offer a plausible reason as to why the law may serve its stated purpose.<sup>57</sup> Considering the law's express goal, rather than its utility, thereby signals the test's deferential nature.<sup>58</sup>

Strict scrutiny lies on the other end of the judicial review spectrum.<sup>59</sup> Courts applying this high level of scrutiny will only uphold laws that are necessary to achieve a compelling state interest.<sup>60</sup> Whereas courts applying rational basis review generally ignore a regulation's efficacy, under strict scrutiny courts will dissect a law and ensure that lawmakers utilized the most effective and least burdensome means for accomplishing their goal.<sup>61</sup> Applying strict

*ner v. Oklahoma*, a case in which the Court invalidated a law permitting the sterilization of persons convicted of at least two crimes involving moral turpitude. 316 U.S. 535, 541 (1942).

<sup>56</sup> See *Rational Basis Test*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/rational\\_basis\\_test](https://www.law.cornell.edu/wex/rational_basis_test) [<https://perma.cc/WA8V-JH9X>] (defining rational basis review and providing the standard for inquiry). Courts should consider whether the law is reasonably related to some articulable government interest. *Id.*

<sup>57</sup> See Gunther, *supra* note 54, at 8 (describing the deferential nature of rational basis review). Unlike strict scrutiny, which requires narrow tailoring, under rational basis review a law may be over-inclusive or under-inclusive. *Heller v. Doe*, 509 U.S. 312, 321 (1993). An "imperfect fit between means and ends" is acceptable. *Id.*

<sup>58</sup> See Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357, 359 (1999) (assessing how courts apply the rational basis review test and noting that in certain instances the test is so lenient as to effectively "amount to no review at all"). Challengers not only must demonstrate the irrationality of the stated purpose, but also must negate "every conceivable basis which might support it." See *Madden v. Kentucky*, 309 U.S. 83, 88 (1940) (discussing rational basis review).

<sup>59</sup> See Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 807, 815 (2006) (conducting an empirical study of strict scrutiny, and quoting a scholar who described the distinction between strict scrutiny and rational basis). "[O]nce the Court sorts the case into one or another constitutional bin [strict scrutiny or rational basis], the outcome is virtually foreordained." *Id.* at 807 (quoting JERRY L. MASHAW, GREED, CHAOS, & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 55 (1997)). Gerald Gunther described strict scrutiny as "strict in theory, fatal in fact." See Gunther, *supra* note 54, at 8 (comparing strict scrutiny to rational basis review). Gunther's statement is considered to be one of the most quoted lines in legal scholarship. Kathleen M. Sullivan, Tribute, *Gerald Gunther: The Man and the Scholar*, 55 STAN. L. REV. 643, 645 (2002).

<sup>60</sup> See Winkler, *supra* note 59, at 800 (defining strict scrutiny). A compelling interest refers to "[the] societal importance" of the government's reasons for enacting the challenged law." See *id.* (quoting renowned jurist Hans Linde). Only imperative governmental concerns will justify abrogating constitutional rights. *Id.* When compared to other types of constitutional challenges, strict scrutiny is more rigorous in the First Amendment context than any other. See *id.* at 815 (analyzing the effect of courts applying strict scrutiny across all types of constitutional challenges).

<sup>61</sup> See *id.* at 800. Narrow tailoring means that the law only burdens those activities or persons necessary to advance the state's purported interests. *Id.* Phrasing this requirement differently, the Supreme Court articulated that the law must be the "least restrictive means" of achieving that interest. *Id.* If a less taxing alternative exists, the law must fail. See *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981) (providing that the state may justify curtailing constitutional rights by demonstrating that "it is the least restrictive means of achieving some compelling state interest").

scrutiny, rather than rational basis review, dramatically increases the likelihood that courts will invalidate a challenged law, especially in the First Amendment context wherein the Supreme Court has only twice upheld laws under this exacting inquiry.<sup>62</sup>

Somewhere in the middle of these two extremes falls intermediate scrutiny.<sup>63</sup> Though the language varies between circuits, courts typically ask whether the challenged law is reasonably necessary to achieve an important governmental interest.<sup>64</sup> Just as its definition may vary between courts, so too does the strength with which it applies.<sup>65</sup> Thus, rational basis review and strict scrutiny tend to generate more predictable results.<sup>66</sup>

To determine the appropriate level of judicial scrutiny, courts first consider whether the law at issue regulates the content, meaning the speech's message itself.<sup>67</sup> If it does, the law is presumed to be invalid, and strict scrutiny is

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<sup>62</sup> See McNamara & Sherman, *supra* note 54, at 205 (considering the Supreme Court's First Amendment jurisprudence and emphasizing the power of strict scrutiny). The first of these decisions involved national security interests. See *Holder v. Humanitarian Law Project*, 561 U.S. 1, 9, 39 (2010). The Supreme Court considered whether the federal government could ban providing non-violent material support to terrorist organizations without violating the First Amendment. *Id.* at 7. The government argued for lower scrutiny, insisting that the law burdened speech only as an incidental part of regulating conduct. *Id.* at 26. The Court rejected this argument, but found that the law still satisfied strict scrutiny. *Id.* at 27–28, 39. Chief Justice Roberts, writing for the majority, noted that national security is the most compelling of government interests and that the law effectively served these ends. *Id.* at 36, 39. By prohibiting non-material support for terrorist organizations, it would burden the organizations by having to complete tasks like legal services by themselves. *Id.* at 30. Likewise, lending services to these organizations granted a degree of legitimacy to them, an undesirable result in the eyes of the Court. *Id.* at 30. The only other decision in which the Supreme Court held that a law satisfied strict scrutiny involved judicial ethics. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 437 (2015). At issue in *Williams-Yulee v. Florida Bar* was a Florida law restricting judicial candidates from personally soliciting funds for their election campaigns. *Id.* In upholding the law, the Court noted that the law was sufficiently narrow to satisfy the compelling government interest in preserving the impartiality of the judiciary. *Id.* at 455, 457.

<sup>63</sup> See generally Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783.

<sup>64</sup> See *id.* at 801 (discussing the varying language that courts employ when discussing intermediate scrutiny).

<sup>65</sup> See E.A. Hull, *Sex Discrimination and the Equal Protection Clause: An Analysis of Kahn v. Shevin and Orr v. Orr*, 30 SYRACUSE L. REV. 639, 671 (1979) (noting that, as compared to rational basis review and strict scrutiny, “the middle-tier has no predictable application”).

<sup>66</sup> See *id.* (surveying the tiers of judicial review).

<sup>67</sup> See, e.g., *Ashcroft v. ACLU*, 542 U.S. 656, 660, 676–77 (2004) (considering a free speech challenge to the Child Online Protection Act, a law aimed at preventing minors from accessing pornography online, and discussing the framework for First Amendment analysis), *aff'd sub nom. ACLU v. Mukasey*, 534 F.3d 181 (3d Cir. 2008). Content-based laws regulate speech based on what that speech communicates. Geoffrey R. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 81 (1978). Conversely, content-neutral laws limit speech irrespective of its message. *Id.* For an example of a content-neutral law, consider *Thomas v. Chicago Park District*, wherein the Supreme Court upheld a local law requiring permits for all gatherings of fifty or more individuals. 534 U.S. 316, 322 (2002). The Court held that the permit-

applied.<sup>68</sup> In *Riley v. National Federation of the Blind*, the Supreme Court held that compelled speech regulations are inherently content-based restrictions.<sup>69</sup> According to the Court, these regulations alter a speech's content by forcing actors to modify or utter speech that they otherwise would not.<sup>70</sup> Thus, judges should begin their analysis of laws compelling speech by assuming that strict scrutiny applies.<sup>71</sup>

This presumption of strict scrutiny, however, appears to be at odds with many state and federal laws that compel speech.<sup>72</sup> Some examples include: regulations requiring cleaning product manufacturers to list ingredient information on their product labels; laws mandating that pharmaceutical companies disclose gifts made to physicians; and legislation forcing retailers to warn consumers about potential health risks of cellphone radiation.<sup>73</sup> Presumably, because these laws compel speech and are therefore content-based, strict scrutiny should apply.<sup>74</sup> One might wonder then, how laws compelling speech are so prevalent if they trigger the dependably fatal strict scrutiny that *Riley* commands.<sup>75</sup>

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ting scheme was a content-neutral speech restriction because, although it applied to protests, it also governed all large assemblies in the park, regardless of their purpose. *Id.*

<sup>68</sup> See *Ashcroft*, 542 U.S. at 660 (noting that content-based restrictions are “presumed invalid” and that the government assumes the burden of establishing their constitutionality).

<sup>69</sup> See 487 U.S. 781, 795 (1988) (holding that compelled speech is necessarily a content-based restriction). The case involved a challenge to a North Carolina law that required professional fundraisers for charities to disclose to potential donors what percentage of donated money in the previous year went to the charity. *Id.* at 786. The Court determined that this was a content-based restriction. *Id.* at 797. It reasoned that forcing someone to speak inevitably changes the speech's content. *Id.* By altering the content, compelled speech may also have a chilling effect because the speaker might refrain from speaking at all. *Id.*; see also *Mia. Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo*, 418 U.S. 241, 256–57 (1974) (invalidating a content-based state law requiring newspaper publishers to provide equal space in their newspapers to political candidates who were the subjects of newspaper articles, and noting that the law may lead the newspaper to refrain from writing articles).

<sup>70</sup> See *Riley*, 487 U.S. at 795 (summarizing why compelled speech laws are content-based regulations).

<sup>71</sup> See *id.* (discussing the application of strict scrutiny to compelled speech).

<sup>72</sup> See, e.g., CAL. HEALTH & SAFETY CODE § 108950 (West 2020) (providing disclosure requirements for cleaning product manufacturers); BERKELEY, CAL., MUN. CODE § 9.96.010 (2020) (mandating that cellphone retailers disclose the potential health risks of their products); MASS. GEN. LAWS ch. 111N, § 6 (2020) (requiring pharmaceutical companies to track and disclose gifts made to physicians, hospitals, or other customers in the medical profession).

<sup>73</sup> See CAL. HEALTH & SAFETY CODE § 108950 (listing disclosure requirements for cleaning product producers); BERKELEY, CAL., MUN. CODE § 9.96.010 (requiring companies that sell mobile phones to disclose the products' potential hazardous side effects); MASS. GEN. LAWS ch. 111N, § 6 (requiring pharmaceutical companies report gifts made to medical providers).

<sup>74</sup> See *Riley*, 487 U.S. at 796 (stating that compelled speech is content-based and applying the “test for fully protected expression”).

<sup>75</sup> See *McNamara & Sherman*, *supra* note 54, at 205 (discussing the application of strict scrutiny in First Amendment decisions); *Winkler*, *supra* note 59, at 815 (conducting an empirical analysis of strict scrutiny as applied to common constitutional challenges, and concluding that it applies with the most force in free speech claims).

The answer lies in practicality: if the mere involvement of speech automatically triggered strict scrutiny, it would deal a devastating blow to government regulatory schemes.<sup>76</sup> Recognizing this logistical hurdle, courts traditionally afford rational basis review to laws that regulate speech as only a lesser, necessary component of regulating conduct.<sup>77</sup> For illustrative purposes, recall the law requiring cleaning product manufacturers to disclose their products' ingredients on their labels.<sup>78</sup> Although this compels speech, it does so as a subsidiary component of governing conduct—corporate responsibility—in effect regulating commercial activity to promote public health.<sup>79</sup>

Thus, whether a law compels speech as part of regulating conduct or purely controls speech is an important determination because it triggers the

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<sup>76</sup> See VALERIE C. BRANNON, CONG. RSCH. SERV., R45700, ASSESSING COMMERCIAL DISCLOSURE REQUIREMENTS UNDER THE FIRST AMENDMENT 1–2 (2019) (discussing permissible state compelled speech). As the Supreme Court noted in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, the First Amendment protects speech from government regulation through intense judicial review. See 518 U.S. 727, 741 (1996) (describing this tradition after a long list of citations to landmark free speech cases). But it cautioned that courts should avoid applying the test so rigidly as to hamstring the government's abilities to address legitimate concerns. *Id.* States enjoy substantial authority to regulate the medical profession under their police powers—their reserved legislative authority to promote their constituents' health, safety, morals, and general welfare. See *State Police Power*, BLACK'S LAW DICTIONARY (11th ed. 2019). Even before the Civil War, the Supreme Court recognized the states' abilities to legislate for the common interest. See *Smith v. Turner*, 48 U.S. (7 How.) 283, 298, 320 (1849) (considering a New York law taxing passengers and crews of each ship entering the Port of New York). The Supreme Court noted that state "police laws" exercised for "necessary purposes," such as health, are generally constitutional. *Id.* at 320.

<sup>77</sup> See BRANNON, *supra* note 76, at 6 n.59 (outlining Supreme Court decisions permitting compelled speech). See generally *Rumsfeld v. Forum for Acad. & Institutional Rights*, 547 U.S. 47, 62 (2006) (rejecting a compelled speech challenge to a law requiring colleges and universities to allow the military to recruit on their campuses, reasoning that the law burdened speech as a necessary consequence of regulating conduct—military recruitment); *Virginia v. Hicks*, 539 U.S. 113, 123 (2003) (holding that laws governing non-expressive conduct do not violate the First Amendment), *rev'd*, *Commonwealth v. Hicks*, 596 S.E.2d 74 (Va. 2004); *R. A. V. v. St. Paul*, 505 U.S. 377, 389 (1992) (highlighting that speech itself can violate the law, and using treason as an example of when speech can be restricted as part of regulating conduct); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706–07 (1986) (noting that strict scrutiny is not necessarily triggered when the outlawed conduct has some minor effect on First Amendment rights).

<sup>78</sup> See CAL. HEALTH & SAFETY CODE § 108950 (requiring cleaning product manufacturers to list the product's ingredients on its label).

<sup>79</sup> See *id.* (noting that the law's purpose was to promote public health by limiting consumer exposure to hazardous chemicals). Courts also consider the conduct-speech distinction when analyzing federal regulations. See *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 27 (D.C. Cir. 2014) (en banc) (upholding the Country of Origin Labeling Act against a First Amendment challenge). The D.C. Circuit considered a federal regulation that required companies to label the origin country of their meats. 7 U.S.C. § 1368; *Am. Meat Inst.*, 760 U.S. at 27. The D.C. Circuit applied only rational basis review for commercial speech that involved factual, non-controversial speech. *Am. Meat Inst.*, 760 F.3d at 27. This is likely because commercial speech is "more akin to conduct than are other forms of speech." See Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372, 389 (1979) (exploring the commercial speech theory).

application of rational basis review rather than strict scrutiny.<sup>80</sup> This distinction, however, is often nebulous, and there is also much debate as to how courts should resolve it.<sup>81</sup> As the following cases demonstrate, in the realm of compelled physician speech, competing approaches have emerged for determining whether a law regulates conduct or pure speech.<sup>82</sup>

### B. Compelled Physician Speech in the Abortion Context

There are several notable First Amendment decisions addressing compelled physician speech in the abortion context.<sup>83</sup> Though the laws at issue in each case may differ, the courts' constitutional analyses overlap.<sup>84</sup> Integrated within this discussion are the three circuit court decisions addressing ultrasound narration laws.<sup>85</sup> This Note explores these rulings in chronological order, starting with *Roe* and culminating with the Sixth Circuit's ultrasound narration decision in 2019.<sup>86</sup>

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<sup>80</sup> See *Nat'l Inst. of Family & Life Advocates v. Becerra (NIFLA)*, 138 S. Ct. 2361, 2372 (2018) (noting that strict scrutiny generally applies unless a law fits within two exceptions). These exceptions to strict scrutiny, in the context of compelled speech, are for laws regulating commercial, non-controversial speech and for laws affecting speech only as a minor component of regulating conduct. *Id.*

<sup>81</sup> See *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 428–29 (6th Cir. 2019) (adopting a categorical three-part test to assess compelled physician speech); *id.* at 448 (Donald, J., dissenting) (criticizing the majority's test as an incorrect, inappropriate application of Fourteenth Amendment undue burden factors to a First Amendment challenge).

<sup>82</sup> See *infra* notes 83–172 and accompanying text.

<sup>83</sup> See *infra* notes 87–172 and accompanying text. The Supreme Court has provided little guidance about physician controlled speech in particular. See generally Timothy Zick, *Professional Rights Speech*, 47 ARIZ. ST. L.J. 1289, 1335 (2016) (exploring judicial precedent concerning the First Amendment implications of compelled physician speech).

<sup>84</sup> See *NIFLA*, 138 S. Ct. at 2361, 2379 (holding that two compelled speech requirements prompting disclosures by reproductive services providers violated the First Amendment); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion) (upholding an informed consent requirement against a First Amendment challenge), *rev'd*, 14 F.3d 848 (3d Cir. 1994); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 762 (1986) (nullifying regulations that legislators employed to deter women from obtaining abortions), *overruled by Casey*, 505 U.S. 833; *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 452 (1983) (analyzing the Fourteenth Amendment implications of a state law requiring physician disclosure of the fetus's development and estimated date of viability, health risks of an abortion, and the availability of resources if the woman chose childbirth), *overruled by Casey*, 505 U.S. 833; *EMW*, 920 F.3d at 446 (upholding a Kentucky law requiring narrated ultrasounds against physicians' First Amendment challenge); *Stuart v. Camnitz*, 774 F.3d 238, 256 (4th Cir. 2014) (holding that North Carolina's ultrasound narration law is an unconstitutional violation of the First Amendment); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 577–78 (5th Cir. 2012) (upholding an ultrasound narration regulation against a compelled speech challenge).

<sup>85</sup> See *infra* notes 87–172 and accompanying text.

<sup>86</sup> See *infra* notes 87–172 and accompanying text.



## 1. *Roe*: A Watershed Moment

In 1973, in *Roe*, the Supreme Court recognized that the Fourteenth Amendment's Due Process Clause provides a fundamental right to privacy that encompasses a pregnant woman's freedom to obtain an abortion.<sup>87</sup> The *Roe* Court adopted a trimester framework to dictate how states could regulate abortion.<sup>88</sup> Under this framework, states were prohibited from regulating abortions within the first trimester, permitted to regulate to protect the health of the mother during the second trimester, and could completely prohibit abortions six months after conception—the approximate time for a fetus to become viable outside the womb.<sup>89</sup>

A monumental decision by any measure, *Roe* was a much-celebrated achievement for the pro-choice movement.<sup>90</sup> Rather than ending state regulation of abortions, however, it ushered in the modern era of abortion legislation—one marked by state oversight and continuing legislative efforts to whittle away at *Roe*'s holding.<sup>91</sup>

## 2. Post-*Roe*: The Supreme Court Limits State Interference with Women's Rights

Considering due process challenges to abortion restrictions in the immediate aftermath of the *Roe* decision, the Supreme Court demonstrated a commitment to ensuring that the doctor-patient relationship remained free of state intrusion.<sup>92</sup> The Court twice struck down legislation requiring that abortion

<sup>87</sup> See 410 U.S. 113, 136–37, 153 (1973) (considering the validity of a Texas statute mandating that doctors only perform abortions to save the prospective mother's life).

<sup>88</sup> See *id.* at 164–65 (outlining the trimester approach to abortion regulation).

<sup>89</sup> *Id.* Justice Harry Blackmun reasoned that, in the first trimester, abortion was safer than childbirth. *Id.* at 163. Thus, any restriction interfering with a woman's ability to obtain an abortion would be unconstitutional. *Id.* Because abortions become less safe as the pregnancy progresses (albeit not substantially so), Justice Blackmun allowed for regulations during the second trimester that aimed to protect the mother's health. *Id.* During the third trimester, the fetus is able to survive outside of the womb with assistance. *Id.* At that point, the states' interest in promoting fetal life permits them to freely regulate abortion. *Id.*

<sup>90</sup> See *Celebrating a Fragile Roe v. Wade Victory for Choice*, PLANNED PARENTHOOD LEAGUE OF MASS., <https://www.plannedparenthood.org/planned-parenthood-massachusetts/who-we-are/our-history/celebrating-fragile-roe-v-wade-victory-choice> [<https://perma.cc/8EDZ-36BU>] (discussing the national response to *Roe*, and noting that “[a]dvocates of choice across . . . the nation celebrated the end of back-alley abortions and their tragic consequences”).

<sup>91</sup> See T.J. Raphael & Amber Hall, *In the 45 Years Since Roe v. Wade, States Have Passed 1,193 Abortion Restrictions*, THE WORLD (Jan. 22, 2018), <https://www.pri.org/stories/2018-01-22/45-years-roe-v-wade-states-have-passed-1193-abortion-restrictions> [<https://perma.cc/B22P-DYVL>].

<sup>92</sup> See *Thornburgh Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 762 (1986) (nullifying regulations that were aimed at deterring women from obtaining abortions and highlighting their impermissible effect on the doctor-patient relationship), *overruled by* *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion), *rev'd*, 14 F.3d 848 (3d Cir. 1994); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 444 (1983) (determining

providers inform the patient of the status of the pregnancy, the stage of fetal development, the expected viability date, the health risks of abortion, and the availability of childbirth resources.<sup>93</sup> In two separate opinions, the Court held that these disclosure requirements violated patients' due process rights because the laws aimed to dissuade women from obtaining abortions.<sup>94</sup>

By invalidating the laws, the Court reaffirmed its dedication to protecting women's unimpeded right to choose.<sup>95</sup> The Court condemned state encroachment on the doctor-patient relationship and castigated legislators for exploiting doctors to promote their ideological viewpoints.<sup>96</sup> Unless states implemented measures out of medical necessity—a legitimate concern within their police powers—the Court ruled that they could not further their ideological objectives by regulating abortion.<sup>97</sup> But the Supreme Court's discomfort with states' commandeering of the doctor-patient relationship was short-lived.<sup>98</sup>

that provisions of an Akron, Ohio regulation were unconstitutional because they were demonstrably aimed at steering women away from abortions), *overruled by Casey*, 505 U.S. 833. Early challengers relied on the Fourteenth Amendment's Due Process Clause because the *Roe* Court recognized women's due process right to obtain an abortion. *Roe*, 410 U.S. at 164.

<sup>93</sup> See *Thornburgh*, 476 U.S. at 758, 760, 772 (striking down a law compelling mandatory physician disclosures before abortions); *Akron*, 462 U.S. at 425, 452 (holding that a physician disclosure law was unconstitutional). Both the *Thornburgh* and *Akron* Courts recognized that the laws, though couched in terms of informed consent, provided a litany of physical and psychological harms that could discourage abortion by describing a "parade of horrors." *Thornburgh*, 476 U.S. at 760; *Akron*, 462 U.S. at 445.

<sup>94</sup> See *Thornburgh*, 476 U.S. at 762 (highlighting the rigid nature of the statute and concluding that it did not facilitate informed consent); *Akron*, 462 U.S. at 445, 452 (noting that the disclosure requirement at issue went far beyond normal informed consent provisions, and, by discouraging abortion, served as an unconstitutional obstacle to this fundamental right).

<sup>95</sup> See *Thornburgh*, 476 U.S. at 762 (stating that the law was unconstitutional because it undermined women's privacy interests and concerns with patient health); *Akron*, 462 U.S. at 444 (holding that the state could not justify abortion regulations designed to sway women into choosing childbirth).

<sup>96</sup> See *Thornburgh*, 476 U.S. at 762 (describing the informed consent provision as "nothing less than an outright attempt to wedge the Commonwealth's message discouraging abortion into the privacy" of the doctor-patient relationship); *Akron*, 462 U.S. at 445 (denouncing the state's attempt to "plac[e] the physician in . . . an 'undesired and uncomfortable straitjacket.'" (quoting *Planned Parenthood v. Danforth*, 428 U.S. 52, 67 (1976))).

<sup>97</sup> See *Akron*, 462 U.S. at 444 (concluding that the state could not justify abortion regulations designed to sway women into choosing childbirth). Because the Court found the provisions unconstitutional under the Fourteenth Amendment, the majority did not discuss the First Amendment implications of either law. *But see id.* at 472 n.16 (O'Connor, J., dissenting) (noting that informed consent provisions may run afoul of the First Amendment if they force the physician to communicate the state's ideological preference, but that the challengers did not bring a First Amendment claim in this case).

<sup>98</sup> See *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 434–35 (6th Cir. 2019) (outlining the history of First Amendment challenges to abortion regulations). There is, however, a plausible argument to be made that *Akron* and *Thornburgh* should still be considered good law. See Lauren R. Robbins, Comment, *Open Your Mouth and Say 'Ideology': Physicians and the First Amendment*, 12 U. PA. J. CONST. L. 155, 194 (2009) (arguing that the First Amendment discussion from the *Akron* and *Thornburgh* dissents should still govern regulations involving compelled ideologi-

### 3. *Casey*: Recasting *Roe*

Viewed by some commentators as a retreat from *Roe*, *Casey* is widely known for jettisoning the trimester framework and adopting the undue burden test for due process challenges to abortion regulations.<sup>99</sup> The law at issue in *Casey* contained several challenged provisions, including an informed consent requirement that mandated that doctors discuss the risks related to abortion procedures and the availability of information concerning the fetus with their patients.<sup>100</sup> The challengers brought both a Fourteenth Amendment due process claim and a First Amendment free speech challenge against the required physician disclosure.<sup>101</sup> First addressing the due process implications of the informed consent provisions, the Court retreated from its early post-*Roe* stance.<sup>102</sup> It declared that states could advance their pro-life ideology within informed consent disclosures, provided that they did so through truthful, non-misleading information.<sup>103</sup> The Court held that such requirements do not unduly burden women's due process right to reproductive freedom.<sup>104</sup>

The *Casey* plurality also addressed the First Amendment implications of physician compelled speech.<sup>105</sup> In the final portion of its opinion, the Court responded to the petitioner's separate First Amendment argument that state-compelled speech forced abortion providers to promote a pro-life message and

cal speech); see also KROTOSZYNSKI, *supra* note 51, at 193 (arguing that courts should "deploy the First Amendment more aggressively" to protect physicians from manifestly ideological speech).

<sup>99</sup> See 505 U.S. 833, 873, 884 (1992) (plurality opinion) (assessing a First Amendment challenge brought by physicians to a Pennsylvania informed consent requirement, as well as additional challenges to other provisions, including a mandatory waiting period, a spousal notice requirement, and a parental consent requirement for minors), *rev'd*, 14 F.3d 848 (3d Cir. 1994).

<sup>100</sup> See 18 PA. CODE § 3205 (2020) (governing informed consent requirements for abortions).

<sup>101</sup> See *Casey*, 505 U.S. at 881, 882, 884 (challenging the informed consent provision, among others, as an undue burden on a woman's right to choose).

<sup>102</sup> See *id.* at 881 (rejecting its earlier analysis for compelled physician disclosures that resulted from *Roe*'s trimester framework). The Court reversed course from its earlier hardline stance in which it rejected state intrusion on women's rights. *Id.* The Court held that states do not unduly burden women's abilities to exercise their reproductive freedoms by expressing the government's preference for childbirth. *Id.* at 883.

<sup>103</sup> See *id.* at 882 (overruling *Akron* and *Thornburgh* disclosure rulings). The Court saw the *Akron* and *Thornburgh* decisions as an outgrowth of *Roe*'s trimester framework and noted that because the trimester approach no longer governed abortion regulations, the Court was not bound by those prior decisions. *Id.* at 883.

<sup>104</sup> See *id.* at 883 (discussing the informed consent provision at issue). The Supreme Court accorded substantial weight to physicians' abilities to exercise their discretion in providing the required information. *Id.* at 883–84. The Pennsylvania law did not require physicians to provide the information if the doctor believed in good faith that providing the information would adversely affect the patient's health. 18 PA. CODE § 3205; *Casey*, 505 U.S. at 883–84. Therefore, the Court reasoned that the statute allowed physicians to exercise discretion based on their medical expertise. *Casey*, 505 U.S. at 884.

<sup>105</sup> See 505 U.S. at 884 (addressing the petitioners' First Amendment claim relating to compelled physician speech in the context of abortion disclosures). The Court limited its analysis to one paragraph of its nearly seventy-page opinion. See *id.*

failed to satisfy strict scrutiny review.<sup>106</sup> The Court dismissed this claim in three terse sentences:

All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.<sup>107</sup>

Put simply, the Court viewed the regulation as promoting disclosures that facilitated a patient's informed consent, which the Court saw as a fundamental component of the practice of medicine and subject to state regulation.<sup>108</sup> Because the law regulated conduct—promoting informed consent for abortions—and only burdened speech as an attendant consequence of this pursuit, the Court determined that the requirement was constitutional.<sup>109</sup> Though the Court limited its First Amendment analysis to just this paragraph, lower courts considering First Amendment challenges to informed consent regulations have since turned to *Casey* for regular guidance.<sup>110</sup>

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<sup>106</sup> *See id.*

<sup>107</sup> *Id.* (citations omitted).

<sup>108</sup> *Id.* The Justices were not united in this view. *Id.* at 934–36 (Blackmun, J., dissenting in part). Justice Blackmun believed that certain aspects of the disclosure requirement undermined informed consent. *Id.* The impermissible provisions were those forcing physicians to alert women that the printed materials from the state were available and included descriptions of the fetus, information about medical assistance for childbirth and availability of child support from the father, and a list of adoption agencies and other childbirth resources. *Id.*

<sup>109</sup> *See id.* at 884 (majority opinion). The Court appeared to treat the informed consent as a necessary part of regulating conduct—securing informed consent for abortions—and, as such, the burdens on speech were merely an accompanying consequence of the state's exercising its police powers to promote the health of its constituents. *Id.*

<sup>110</sup> *See id.* (discussing the First Amendment implications of the Pennsylvania physician disclosure requirement); *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 427 (6th Cir. 2019) (utilizing *Casey* to analyze Kentucky's ultrasound narration law and to determine whether it facilitated informed consent); *Stuart v. Camnitz*, 774 F.3d 238, 248, 249 (4th Cir. 2014) (considering *Casey* while analyzing an ultrasound narration law, and determining that *Casey* did not control in this instance because North Carolina's ultrasound narration law differed in significant respects from the informed consent provision in *Casey*, and thus invalidated the law); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 575, 577–78 (5th Cir. 2012) (upholding an ultrasound narration regulation after relying on *Casey*).

#### 4. The Fifth Circuit Upholds an Ultrasound Narration Law

Approximately twenty years after *Casey*, the Fifth Circuit became the first federal appellate court to consider an ultrasound narration law in *Lakey*.<sup>111</sup> The Texas law at issue prohibited a woman from undergoing an abortion unless her physician first performed an ultrasound, placed the ultrasound images in her view, described the images to her, made the fetal heart sounds audible, and explained those sounds.<sup>112</sup> The petitioners argued that the ultrasound requirements violated the First Amendment rights of the physician by mandating that a doctor deliver politically motivated communications to the patient, even over the woman's objections.<sup>113</sup> The district court issued a preliminary injunction, enjoining several portions of the ultrasound related provisions.<sup>114</sup> The State then appealed to the Fifth Circuit, which rejected the challengers' argument that the law violated doctors' First Amendment rights and vacated the preliminary injunction.<sup>115</sup>

In doing so, the Fifth Circuit relied upon *Casey*, borrowing from both its due process and First Amendment analyses.<sup>116</sup> The court viewed the sum of these two parts as instructing judges first to consider whether the compelled speech involved truthful, non-misleading, and relevant disclosures.<sup>117</sup> If it did, then the court should apply only rational basis review, which the Fifth Circuit believed was the appropriate judicial scrutiny based on the brevity of *Casey*'s First Amendment discussion.<sup>118</sup> Because the Supreme Court had limited its First Amendment analysis to just one paragraph in a sixty-nine-page opinion, the Fifth Circuit perceived the *Casey* Court as signaling the extreme deference to which courts should give lawmakers when legislation involves the disclosure of factual, relevant information.<sup>119</sup> Applying the truthful, non-misleading

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<sup>111</sup> See 667 F.3d at 578 (describing the features of the Texas law restricting abortion access).

<sup>112</sup> TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(4)(A)–(D) (West 2020). The law is still in effect today. See *id.*

<sup>113</sup> See *Lakey*, 667 F.3d at 574 (outlining the First Amendment claim). The challengers argued that the law served no valid medical purpose and that it was simply the Texas legislature's attempt to manipulate vulnerable patients and deter them from proceeding with an abortion. *Id.*

<sup>114</sup> See *id.* at 573 (discussing the procedural posture of the case).

<sup>115</sup> See *id.* at 580 (concluding that the Texas law did not violate the First Amendment). The court found that the law was within the state's police powers, and upheld the law against a First Amendment challenge because it passed *Casey*'s undue burden test. *Id.*

<sup>116</sup> See *id.* (stating that *Casey* compelled its holding, and similarly declining to embark on a lengthy First Amendment analysis). The Fifth Circuit viewed the ultrasound and playing of the fetal heartbeat as a common practice in "pregnancy medicine." *Id.* at 579. It viewed the failure to provide that information as more inconsistent with the practice of medicine than providing it. *Id.*

<sup>117</sup> See *id.* at 579 (noting, for example, that sonograms are typical measures that deliver necessary information to patients).

<sup>118</sup> See *id.* at 575 (highlighting the length of *Casey*'s First Amendment discussion, which the court noted was limited to just three sentences).

<sup>119</sup> See *id.* at 579 n.7 (noting that because the court considered the law constitutional, it need not consider the wisdom of the legislature's decision).

language from *Casey*'s due process analysis, the Fifth Circuit found that the law only burdened speech as part of regulating informed consent in the abortion context.<sup>120</sup> Therefore, it applied lower judicial scrutiny and upheld the law.<sup>121</sup>

### 5. The Fourth Circuit Finds Ultrasound Narration Law Unconstitutional

Shortly after the Fifth Circuit's decision, the Fourth Circuit struck down a similar law in *Stuart*.<sup>122</sup> Unlike the *Lakey* court, the Fourth Circuit did not interpret *Casey*'s First Amendment discussion as holding categorically that all truthful, non-misleading medical speech should receive rational basis review.<sup>123</sup> The Fourth Circuit instead viewed *Casey* as applying a case-specific approach for determining judicial scrutiny.<sup>124</sup> That is, although the law at issue in *Casey* warranted only rational basis review, other laws might trigger heightened scrutiny, and therefore courts should consider the facts of each case before determining which level of judicial scrutiny to apply.<sup>125</sup>

The Fourth Circuit's interpretation of *Casey* departed substantially from what the Fifth Circuit had deemed a standard for universal application.<sup>126</sup> Applying the case-specific approach to the law before it, the *Stuart* court determined that intermediate scrutiny should apply to the law at issue.<sup>127</sup> This reflected an appropriate middle-ground between states' legitimate ability to regulate the medical profession and the general prohibition against compelled

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<sup>120</sup> *See id.* at 577. The court offered scant analysis of the disclosure's non-misleading nature because the petitioner did not dispute this element. *Id.* The Fifth Circuit did note, however, that the lower court erred when it considered the "ideological" nature of the speech in assessing whether it was misleading. *Id.* at 577 n.4. The Fifth Circuit said that the information here provided factual information, not a moral or philosophical viewpoint. *Id.* Just because it might affect the patient's decision did not render it ideological. *Id.*

<sup>121</sup> *See id.* at 580 (holding that the law did not violate physicians' First Amendment rights because of its focus on conduct, not speech).

<sup>122</sup> *See* 774 F.3d 238, 256 (4th Cir. 2014) (holding that North Carolina's ultrasound narration law violated the First Amendment).

<sup>123</sup> *See id.* at 248–49 (discussing and rejecting *Lakey*'s First Amendment analysis).

<sup>124</sup> *Id.* According to the Fourth Circuit, *Casey*'s "particularized finding hardly announces a guiding standard of scrutiny for use in every subsequent compelled speech case involving abortion." *Id.* at 249 (emphasis added).

<sup>125</sup> *See id.* The *Stuart* court is not alone in reading *Casey* in this light. *See* Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 773–74 (1999) (considering the doctrinal implications of *Casey*'s First Amendment discussion). Halberstam asserts that *Casey* provides scant guidance as to how courts should assess physicians' First Amendment claims other than stating that the Court examined the specific law at issue. *Id.* at 774.

<sup>126</sup> *See Stuart*, 774 F.3d at 248–49. The Fourth Circuit likewise questioned *Lakey*'s reliance on *Gonzales v. Carhart*, 550 U.S. 124 (2007), as *Gonzalez* did not involve a First Amendment challenge. *See id.* (describing the Fifth Circuit's reliance on *Gonzalez* as "inapposite" because *Gonzalez* involved due process, not First Amendment claims).

<sup>127</sup> *Id.* at 249.

speech.<sup>128</sup> For First Amendment free speech challenges, the *Stuart* court noted that the state's interest should be comparable to the burden on an individual's free speech; that is, the burden on the physician and the patient, a "captive listener," cannot be greater than the state interest the legislation aims to promote.<sup>129</sup> The Court ultimately found that, for several reasons, the law failed to survive even intermediate scrutiny.<sup>130</sup>

## 6. *National Institute of Family and Life Advocates v. Becerra (NIFLA)*: A Necessary Interlude

After this circuit split developed between the Fourth and Fifth Circuits, and before a federal appellate court would again consider an ultrasound narration law, the Supreme Court provided some clarity with respect to government compelled physician speech.<sup>131</sup> *NIFLA*, a 2018 case, involved a challenge by a crisis pregnancy center (CPC) to California's Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT).<sup>132</sup> Because the

<sup>128</sup> See *id.* at 249–50.

<sup>129</sup> See *id.* (articulating that measuring the burden on First Amendment rights requires considering its effect on both the speaker and listener). The Fourth Circuit noted that in instances involving a captive listener, the impact on the listener is an especially salient factor. *Id.* Here, that captive listener was the patient seeking an abortion. *Id.*

<sup>130</sup> See *id.* Considering the government interest at stake, the Fourth Circuit noted that prior Supreme Court decisions recognized states' substantial interests in ensuring that women are fully informed prior to obtaining an abortion. *Id.* at 250–51. States emphasize that a fully informed patient is less likely to suffer psychological harm from regretting an ill-informed or hastily made decision to terminate her pregnancy. *Id.* Likewise, the Fourth Circuit recognized that states have a significant interest in promoting fetal life. *Id.* at 250. Thus, the court reasoned that it would uphold the ultrasound narration law if the regulation served those interests and if the burden it placed on physicians was commensurate to the state interest. *Id.* In considering first the state's interest in protecting women from future psychological harm, the court emphasized how the ultrasound narration law differed from traditional informed consent requirements. *Id.* at 251–52. As the court noted, informed consent requires that a woman fully comprehend the decision at issue and retain autonomy over her decision. *Id.* at 252. The court discussed conventional informed consent regulations that require abortion providers to discuss with the patient the nature of the abortion procedure, the risks and alternatives to the procedure, the risks of carrying the child to term, and the likely gestational age of the fetus. *Id.* Unlike these more customary disclosures, the court emphasized that ultrasound narration laws require physicians to display images of the fetus and describe its human features, regardless of whether the patient wishes the doctor to conduct such exhibits. *Id.* at 254. The Fourth Circuit emphasized that by substituting its own ideological beliefs for the sound medical judgment of professionals, the state undermined public trust in the doctor-patient relationship. *Id.* Without offering therapeutic privilege, or the ability for medical providers to exercise judgment about the patient's mental state when displaying and describing a sonogram, the law would require physicians to disregard their oath to do no harm. *Id.* The Court further noted that because patients could refuse to view the sonogram or hear the description by covering their eyes and ears, the regulation failed to serve the state interest, given that in some instances the speech would fall on deaf ears. *Id.* at 253.

<sup>131</sup> See *Nat'l Inst. of Family & Life Advocates v. Becerra (NIFLA)*, 138 S. Ct. 2361, 2368 (2018) (considering a compelled speech challenge to a California law).

<sup>132</sup> See *id.* (evaluating the constitutionality of CAL. HEALTH & SAFETY CODE § 123470 (West 2020)).

*NIFLA* decision arose out of markedly different circumstances compared to those of earlier compelled speech cases, a brief overview of the context is helpful.<sup>133</sup>

A CPC is an organization that provides pregnancy services and ultimately aims to discourage abortion.<sup>134</sup> Many CPCs have ties to national evangelical pro-life groups.<sup>135</sup> By and large, most women who visit CPCs are uneducated and living below the poverty line.<sup>136</sup> California attempted to combat systemic issues plaguing its own CPCs by passing FACT.<sup>137</sup> This bill requires CPCs to

<sup>133</sup> See *infra* notes 134–144 and accompanying text.

<sup>134</sup> See Joanne D. Rosen, *The Public Health Risks of Crisis Pregnancy Centers*, GUTTMACHER INST. (Sept. 10, 2012), <https://www.guttmacher.org/journals/psrh/2012/09/public-health-risks-crisis-pregnancy-centers> [<https://perma.cc/8KM3-6MMF>] (chronicling systemic issues with crisis pregnancy centers (CPCs)).

<sup>135</sup> *Id.* Most local CPCs are affiliated with larger organizations, oftentimes Birthright International, Care Net, Heartbeat International, or the National Institute of Family and Life Advocates. See Amy G. Bryant & Jonas J. Swartz, *Why Crisis Pregnancy Centers Are Legal but Unethical*, 20 AMA J. ETHICS 269, 269 (2018) (discussing the dangerous nature of CPCs). Undercover visits to CPCs revealed that the clinics are not always forthright about their anti-abortion stance. *Id.* at 270. Many CPCs pass themselves off as being objective medical clinics. *Id.* It is not uncommon for women to meet with individuals wearing white lab coats in examination rooms. *Id.* In the United States, CPCs substantially outnumber abortion providers. See *id.* at 269 (noting that, in 2011, there were 1,969 CPCs in the United States as compared to the 327 abortion clinics). Their prevalence is buttressed by government funding; many state governments allow for pro-life license plates and allocate profits to CPCs and others receiving federal funding. *Id.* CPCs offer a wide range of services from distributing pregnancy tests, to providing information about abortion and childbirth, to performing ultrasounds to demonstrate fetal life. See *id.* The information CPCs provide is often lacking in factual accuracy. See SPECIAL INVESTIGATIONS DIV., MINORITY STAFF OF H. COMM. ON GOV'T REFORM, 109TH CONG., FALSE AND MISLEADING HEALTH INFORMATION PROVIDED BY FEDERALLY FUNDED PREGNANCY RESOURCE CENTERS I, 7–14 (2006), <https://www.motherjones.com/wp-content/uploads/waxman2.pdf> [<https://perma.cc/5GNV-JZ26>] (reporting to Congress about the dangers of CPCs). CPCs often spread misinformation about unsubstantiated abortion side effects, linking the procedure to breast cancer, subsequent fertility issues, and long-term mental health issues. *Id.* at 7–14. Some CPCs encourage women to delay abortions, erroneously assuring them that abortions are available throughout their pregnancies. Bryant & Swartz, *supra*, at 270–73. Beyond just obstructing access to abortions, this false advice can cause real health risks to patients. *Id.* at 272. Though generally safe, research indicates that abortions become riskier at the later stages of pregnancy. *Id.* CPCs have come under increasing scrutiny from both federal and state regulatory agencies. *Id.* Regulation can be difficult, however, as the clinics are technically not medical providers. *Id.* at 271–72. Furthermore, because they do not charge for their services, they are generally not subject to commercial regulations. *Id.*

<sup>136</sup> Rosen, *supra* note 134. Because most unintended pregnancies involve women between the ages of eighteen and twenty-four, most women visiting CPCs are young. *Id.* Critics allege that CPCs often manipulate women and outright deceive them through misinformation aimed at persuading them to choose childbirth. *Id.* Many CPCs advertise on the internet, over the phone, or outside abortion clinics. *Id.* Those located near abortion clinics often adopt similar logos, leading some women to believe that they are meeting with abortion providers. See *id.* (discussing CPCs' deceitful advertising tactics).

<sup>137</sup> See CAL. HEALTH & SAFETY CODE § 123470 (instituting a civil fine for CPCs that have failed to complete certain disclosure requirements); *NIFLA*, 138 S. Ct. at 2369 (describing the challenged regulation). Legislators passed the Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT) to ensure access to reproductive health services for all California residents, regardless of income. *NIFLA*, 138 S. Ct. at 2369.



provide notices to women who visit their clinics, including information stating that California offers free or low-cost reproductive health services.<sup>138</sup> It also mandates that unlicensed CPCs notify women that California does not license these clinics to provide medical services.<sup>139</sup>

In *NIFLA*, three pro-life groups providing pregnancy-related services in California brought First Amendment challenges to both provisions of FACT.<sup>140</sup> The parties disagreed over which level of judicial scrutiny the court should apply.<sup>141</sup> The pro-life CPCs maintained that strict scrutiny should apply because the compelled speech was a content-based regulation.<sup>142</sup> California, however, advocated for rational basis review, arguing that the regulation burdened speech incidental to regulating conduct.<sup>143</sup> Thus, according to the state, because the law involved professional speech, the regulation warranted lesser First Amendment protection than ordinary speech.<sup>144</sup>

California's argument relied on a line of cases and scholarly literature recognizing the *professional speech doctrine*—a concept that the government may more freely restrict individuals communicating in their professional capacity than private citizens.<sup>145</sup> The doctrine purportedly stems from states' po-

<sup>138</sup> *NIFLA*, 138 S. Ct. at 2369. Additionally, California required clinics to provide women with a phone number to call about these services. *Id.* This was to ensure that women knew their rights and the extent of health care services available to them. *Id.*

<sup>139</sup> *Id.* at 2370. California required unlicensed facilities to display the following message on-site and in their advertisements: "This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services." CAL. HEALTH & SAFETY CODE § 123472(b)(1). The provision's purpose was to ensure "that pregnant women in California know when they are getting medical care from licensed professionals," and by inference, when they are *not*. 2020 Cal. Legis. Serv., § 1(e) (West).

<sup>140</sup> *See* 138 S. Ct. at 2370. The challengers were a licensed CPC, an unlicensed CPC, and an umbrella organization composed of additional CPCs. *Id.*

<sup>141</sup> *See id.* at 2371–72 (discussing the parties' disagreement over what standard of review was appropriate for the court to apply). The petitioners contended that heightened scrutiny applied, whereas the state countered that, in accordance with the professional speech doctrine, the court should apply only rational basis review. *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *See* Appellees' Answering Brief at 23, *Nat'l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823 (9th Cir. 2016) (No. 15-cv-0227) (arguing that the provision governing licensed providers regulated their conduct by requiring them to provide relevant medical information), *rev'd in part, vacated in part sub nom. Nat'l Inst. of Family & Life Advocates v. Becerra*, 902 F.3d 900 (9th Cir. 2018), *rev'd*, 138 S. Ct. 2361.

<sup>144</sup> *See id.* California contended it had substantial police power authority to regulate the medical profession in order to promote the health and safety of the women in its state. *Id.* at 25. The state's legislative findings concluded that half of all pregnancies in California are unintended (approximately 350,000 annually). *Id.* at 5. These findings also concluded that many women are unaware of the state's family planning services, which in turn makes them increasingly at risk of exposure to CPCs' targeted manipulation. *Id.*

<sup>145</sup> *See* *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring) (arguing that lower scrutiny should be applied to regulations governing professional speech because a professional who is offering services to a client is engaging in speech "incidental to the conduct of the profession"); Zick, *supra* note 83, at 1333 (exploring the roots of the professional speech doctrine). One common theory as

lice power, which provides a mechanism by which states can protect the health and safety of their citizens through regulation.<sup>146</sup> As a result, protecting state citizens requires that states regulate professions, including the medical profession, and, in turn, courts should apply strict scrutiny to every law that involves professional speech that could hinder this effort.<sup>147</sup>

*NIFLA* provided the Supreme Court with an opportunity to acknowledge professional speech as a category of speech that automatically triggered less rigorous First Amendment protection.<sup>148</sup> The Supreme Court, however, declined to do so when it stated that strict scrutiny would remain the standard for all government compelled speech.<sup>149</sup> Although the Court refused to recognize a

to why professionals should enjoy less First Amendment protection, in comparison to private citizens, is the conduct-speech dichotomy that *Casey* appeared to consider implicitly in its brief First Amendment analysis. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion), *rev'd*, 14 F.3d 848 (3d Cir. 1994). Essentially, all professional activities, including those involving speech, are forms of conduct subject to permissible state regulation. *Zick*, *supra* note 83, at 1333–34. For a detailed discussion on the intersection of professional speech and physician speech in the abortion context, see Post, *supra* note 33, at 944.

<sup>146</sup> See *King v. Governor of N.J.*, 767 F.3d 216 (3d Cir. 2014) (citing to Supreme Court precedent for the proposition that states' police powers have enabled them to regulate certain trades and professions).

<sup>147</sup> See *Pickup v. Brown*, 740 F.3d 1208, 1229–30 (9th Cir. 2014) (concluding that “[p]ursuant to its police power,” California could regulate mental health providers’ therapy services). The Ninth Circuit viewed professional speech as existing on a “continuum.” *Id.* at 1227. At one end, laws governing speech offered as part of the public dialogue warranted the most stringent judicial review and protection. *Id.* Laws governing pure professional conduct were at the opposite end of the spectrum and required deferential judicial review. *Id.* at 1229. Laws governing professional speech that were incidental to conduct fell closer to the latter end, and accordingly courts typically applied rational basis review. *Id.*

<sup>148</sup> See Halberstam, *supra* note 125, at 834 (noting that the Supreme Court has rarely addressed the free speech implications of government regulation of professionals). This issue is not limited to the medical context; it also has arisen in the legal profession, where regulations often limit or compel speech. See generally Kathleen M. Sullivan, *The Intersection of Free Speech and the Legal Profession: Constraints on Lawyers’ First Amendment Rights*, 67 *FORDHAM L. REV.* 569 (1998) (chronicling the conflict between lawyers’ free speech rights and professional speech regulations). For example, ethics laws that limit in-person solicitations by lawyers restrict speech, but are nevertheless constitutional because they are part of regulating conduct—ethics in the legal profession. *Id.*

<sup>149</sup> See *Nat’l Inst. of Family & Life Advocates v. Becerra (NIFLA)*, 138 S. Ct. 2361, 2372 (2018) (noting that Supreme Court precedent did not support or “recognize such a tradition for a category called ‘professional speech’”). The Court said that it would not cordon off this entire category for lesser protection. *Id.* Justice Thomas stated that “[s]peech is not unprotected merely because it is uttered by ‘professionals.’” *Id.* at 2371–72. The Supreme Court expressed its general aversion to setting aside categories of speech to receive lesser protection. *Id.* This cautious approach is consistent with Supreme Court precedent. See *United States v. Alvarez*, 567 U.S. 709, 722 (2012) (plurality opinion) (stating that the Court is generally averse to exempting categories of speech from the normal prohibition on content-based restrictions). The Court will only do so if there is a history of a “long . . . unrecognised . . . tradition.” *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 792 (2011) (stating that, without a long tradition of exempting speech from traditional protections, the legislature may not undermine the First Amendment just because the speakers are professionals). As to the professional speech doctrine, the *NIFLA* Court recognized no such historical precedent to justify creating a sweeping exemption to the First Amendment’s protections. *NIFLA*, 138 S. Ct. at 2372.

general carveout, it did qualify its standard by offering two exceptions in which it would be more deferential to the legislature.<sup>150</sup> The first exception applies to laws that require professionals to disclose factual, non-controversial information in their commercial speech.<sup>151</sup> The second exists for regulations targeting conduct, but incidentally implicating speech.<sup>152</sup> If a regulation qualifies for either exception, the Court should apply a lower level of scrutiny.<sup>153</sup>

Working under this framework, the *NIFLA* Court then proceeded to analyze whether the two provisions of FACT fit into either exception.<sup>154</sup> With re-

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<sup>150</sup> See *NIFLA*, 138 S. Ct. at 2372 (noting that there are two categories of professional speech that warrant lesser protections).

<sup>151</sup> *Id.*; see *Zauderer v. Off. of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 651 (1985) (holding that states could require advertisers to make certain disclosures provided that the restrictions were rationally related to protecting the citizenry from deception or fraud). The Court viewed disclosure requirements as less burdensome on advertisers' interests than restrictions on ordinary speech. *Zauderer*, 471 U.S. at 651. In the immediate years following *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, courts generally applied the factual, non-controversial commercial speech exception to food labeling and product warnings with the stated goal of avoiding consumer deception. See Micah L. Berman, *Clarifying Standards for Compelled Commercial Speech*, 50 WASH. U. J.L. & POL'Y 53, 55–59 (2016) (exploring the *Zauderer* standard and its application prior to the *NIFLA* decision). Courts now hold that the *Zauderer* standard applies, even in the absence of deception, because it alleviates some of the danger posed by the information gap between consumers and manufacturers. See CTIA—The Wireless Ass'n v. City of Berkeley, 928 F.3d 832, 844, 853 (9th Cir. 2019) (employing the *Zauderer* standard and upholding a San Francisco ordinance requiring cellphone providers to disclose to consumers that leaving cellphones in their pockets could expose them to unsafe levels of radiation); *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 27 (D.C. Cir. 2014) (applying the *Zauderer* standard to a regulation compelling meat providers to disclose their products' origin); *Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 116 (2d Cir. 2001) (relying on the *Zauderer* standard to uphold disclosure requirements on fluorescent light bulbs warning consumers that the products contained mercury and should be disposed as hazardous waste).

<sup>152</sup> See *NIFLA*, 138 S. Ct. at 2372 (providing the two categories of lesser speech). The Court relied on the *Zauderer* ruling to support the factual, non-controversial commercial speech exception. *Id.* The Court also cited to *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), as support for this exception to strict scrutiny. *Id.* at 2373. In *Ohralik*, the Court considered whether the legal profession's ethical rules, prohibiting in-person solicitation of non-lawyer clients, violated the First Amendment. 436 U.S. at 459. The Court viewed procuring employment as conduct that only marginally triggers First Amendment concerns. *Id.* It viewed speech in the context of soliciting clients not as a necessary element, but rather a "subordinate component" of the larger conduct at issue—securing employment. *Id.* at 457. The Court determined that this type of speech deserved some protection and that the state could permissibly regulate conduct, including the lawyer's speech. *Id.* at 459. In noting that regulations burdening speech incidental to conduct receive lesser scrutiny, the Court seemed to anticipate that this standard may be prone to abuse. See *NIFLA*, 138 S. Ct. at 2373 (emphasizing that states could not use this exception as a pretext for truncating constitutional liberties). The second exception to strict scrutiny applies to laws that primarily regulate professional conduct and only burden speech as part of these efforts. *Id.*

<sup>153</sup> See *NIFLA*, 138 S. Ct. at 2372. The Court stated that the law "cannot survive even intermediate scrutiny." *Id.* at 2375. It is somewhat unclear which level of judicial scrutiny would apply if a law satisfies either exception. See *id.* In *Zauderer*, the Court held that non-controversial, factual commercial speech must only be reasonably related to a legitimate state interest. 471 U.S. at 652. This standard resembles rational basis review. See *id.* Therefore, *NIFLA* likely indicates that only rational basis review will apply if the law satisfies either exception. See *id.*

<sup>154</sup> 138 S. Ct. at 2372–73.

spect to the required disclosure of state abortion services, the Court emphasized that this provision did not relate to any resources provided by the pro-life groups and did involve a controversial topic—abortion.<sup>155</sup> As a result, the Court found that the provision did not fit within the first exception.<sup>156</sup> Furthermore, because the regulation compelled disclosure of the state services, despite the pro-life organization having no involvement in any abortion procedure, the Court found that the regulation also could not be incidental to conduct.<sup>157</sup> After declining to fit the disclosure provision into either exception, the Court held that the provision failed to withstand even intermediate scrutiny.<sup>158</sup>

Likewise, without discussing whether the licensing requirement fit within either exception, the Court noted that the law failed to satisfy even rational basis review.<sup>159</sup> Because this provision protected residents from the purely speculative harm of an unlicensed pro-life organization offering medical services, given that there was no evidence of this occurring, the Court found that the law was overly broad and consequently invalidated the regulation in its entirety.<sup>160</sup>

Therefore, although the *NIFLA* Court stated that abortion regulations could never qualify as commercial, non-controversial regulations, it provided little substantive guidance for how courts should determine whether a law fits into the second exception—speech incidental to conduct—and thus warrants deferential judicial review.<sup>161</sup> In 2019, the Sixth Circuit became one of the first courts to confront this question.<sup>162</sup>

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<sup>155</sup> See *id.* at 2372, 2377–78 (applying strict scrutiny to the disclosure requirements because they did not fall within the categories of government-compelled speech that warrant lower scrutiny).

<sup>156</sup> See *id.* at 2372 (stating that abortion is a far cry from being uncontroversial). The Court focused not on whether the disclosure’s contents were factually accurate or controversial, but instead on the divisiveness of the disclosure’s subject matter. *Id.*

<sup>157</sup> See *id.* at 2373–74 (noting that the law regulated speech, not conduct, because it required a disclosure regardless of whether the provider rendered services).

<sup>158</sup> See *id.* at 2377 (determining that Court precedent instructs that “disclosures [must] remedy a harm that is ‘potentially real not purely hypothetical’” (quoting *Ibanez v. Fla. Dep’t of Bus. & Prof’l Regulation*, 512 U.S. 136, 146 (1994))).

<sup>159</sup> *Id.* The Court noted that laws may not extend “broader than reasonably necessary.” *Id.* (quoting *In re R. M. J.*, 455 U.S. 191, 203 (1982)).

<sup>160</sup> See *id.* at 2377, 2379 (holding that the two provisions unconstitutionally compelled speech).

<sup>161</sup> See *id.* (invalidating FACT). While announcing its holding, the Court did not downplay the important rights at stake: “Freedom of speech secures freedom of thought and belief. [FACT] imperils those liberties.” *Id.* at 2379.

<sup>162</sup> See *EMW Women’s Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 446 (6th Cir. 2019) (applying *NIFLA*’s exceptions to an informed consent requirement). Acknowledging that the Fourth Circuit previously had invalidated an ultrasound narration law, the Sixth Circuit stressed that the *NIFLA* decision undermined the Fourth Circuit’s reasoning in *Stuart*, and as such, *Stuart* was “unpersuasive.” *Id.* at 436; see *Stuart v. Camnitz*, 774 F.3d 238, 251 (4th Cir. 2014) (holding that show and describe laws cannot withstand intermediate scrutiny).

## 7. The Sixth Circuit Joins the Fifth Circuit in Upholding Ultrasound Narration Law

Recently, after relying principally on *NIFLA*, the Sixth Circuit upheld a Kentucky ultrasound narration law in *EMW*.<sup>163</sup> The 2-1 justice majority determined that the law in question satisfied *NIFLA*'s compelled speech exception for legislation regulating speech incidental to its regulation of conduct.<sup>164</sup> Comparing the statute at issue to the informed consent regulation in *Casey*, the Sixth Circuit found that the ultrasound narration law was merely a modern adaptation of the standard requirement of informed consent, and that the speech components of this procedure were a necessary consequence of regulating medicine.<sup>165</sup> Therefore, the court applied the ever-lenient rational basis review.<sup>166</sup>

The Sixth Circuit rejected the petitioners' alternative arguments—that heightened scrutiny should still apply because the speech was ideological—because it subverted the doctor-patient relationship and harmed women.<sup>167</sup> In rejecting the ideological speech argument, the Sixth Circuit noted that *Casey* had upheld a law against First Amendment challenges despite its ideological underpinnings.<sup>168</sup> Moreover, the Sixth Circuit reasoned that the law did not

<sup>163</sup> See *EMW*, 920 F.3d at 436 (considering a Kentucky ultrasound narration law). The law required doctors to perform an ultrasound, display the image, describe what the sonogram was depicting, and, if possible, play the fetal heartbeat aloud. KY. REV. STAT. ANN. § 311.727 (West 2020).

<sup>164</sup> See *EMW*, 920 F.3d at 436.

<sup>165</sup> See *id.* at 429, 430–32. The court unquestionably stated that a heartbeat, sonogram, and description of such are not false, nor misleading. *Id.* at 429. It claimed that, to hold otherwise, “would be an insult to common sense and the practice of medicine.” *Id.* at 429 (quoting *United States v. Paulus*, 894 F.3d 267 (6th Cir. 2018)).

<sup>166</sup> See *id.* at 430–32 (evaluating whether the law regulated speech incidental to conduct and whether it was truthful and non-misleading, and ultimately answering each question in the affirmative). The court held that the law furthered the legitimate interest of ensuring that patients did not later regret undergoing an abortion. *Id.* at 442.

<sup>167</sup> See *id.* at 444. (rejecting the argument that these requirements harmed women seeking abortions). The court stated that the essence of facilitating informed consent is providing relevant, truthful, and non-misleading information. *Id.* It viewed withholding relevant information as more harmful than providing it. *Id.* The court also noted that the current method was particularly impactful on younger generations who rely on images and videos to share information. *Id.* at 432.

<sup>168</sup> See *id.* at 436 (considering the ideological nature of the speech as irrelevant in determining which level of judicial scrutiny to apply). Although *Casey* tolerates the ability of states to promote childbirth, abortion regulations are the only type of content-based speech regulations where the Court permits states to inject their ideological views. Corbin, *supra* note 43, at 1290. Curiously, the Supreme Court seems willing to permit states to express their preference for childbirth, but not their support for abortion. See Nat'l Inst. of Family & Life Advocates v. Becerra (*NIFLA*), 138 S. Ct. 2361, 2379, 2387 (2018) (highlighting that states may “not attempt ‘to ‘prescribe what shall be orthodox in politics, nationalism, religion,’” and invalidating a law that aimed to prevent pregnant women from being deceived by CPCs (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 624 (1943))). A more fundamental issue with *Casey*'s ideological embrace is highlighted by Helen Norton. See Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 28 (2009). Norton argues that the state's expression of its

necessarily compromise the doctor-patient relationship because the doctor could express to the patient that the state required the ultrasound narrative.<sup>169</sup> The court lent significant weight to the ability of doctors to distinguish the state's speech from their own.<sup>170</sup> Lastly, the Sixth Circuit stated that even if the law did harm women, any discomfort was an inescapable consequence of making this informed decision and that withholding such information also would harm women by rendering their consent less informed.<sup>171</sup> Therefore, the court upheld the Kentucky law in its entirety.<sup>172</sup>

## II. COMPETING APPROACHES TO COMPELLED PHYSICIAN DISCLOSURES

Recall that as a threshold matter, strict scrutiny applies to all government compelled physician speech.<sup>173</sup> Lower scrutiny is the exception, not the rule, and *National Institute of Family and Life Advocates v. Becerra (NIFLA)* provides the two limited circumstances in which rational basis applies.<sup>174</sup> The Court foreclosed any possibility that an abortion regulation could qualify as commercial, non-controversial speech.<sup>175</sup> Thus, ultrasound narration laws will warrant strict scrutiny unless courts determine that the laws are regulating conduct and incidentally burdening speech.<sup>176</sup> The principal question that emerges then is how courts should make this determination.<sup>177</sup>

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ideological viewpoint is permissible, as it conveys important information to the public. *Id.* She maintains, however, that the government must do more to indicate that it is the actual speaker. *Id.*

<sup>169</sup> *EMW*, 920 F.3d at 439–40 (first citing *Rust v. Sullivan*, 500 U.S. 173, 200 (1991); then citing *Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 534 (8th Cir. 1994)) (stating that the opportunity to dissociate one's self from government speech is a relevant consideration).

<sup>170</sup> *See id.* (noting that doctors were free to tell patients that the state required this disclosure).

<sup>171</sup> *See id.* at 442 (citing *Casey* to support the proposition that discomfort was a necessary burden and would not render an informed consent regulation unconstitutional).

<sup>172</sup> *Id.* at 446. The court stated that “[a]s a First Amendment matter, there is nothing suspect with a State’s requiring a doctor, before performing an abortion, to make truthful, non-misleading factual disclosures, relevant to informed consent.” *Id.* If this process makes a patient choose childbirth over an abortion, that is an acceptable consequence. *Id.*

<sup>173</sup> *See NIFLA*, 138 S. Ct. at 2372 (stating that strict scrutiny presumptively applies to all speech, regardless of whether it occurs in the professional setting); *EMW*, 920 F.3d at 429 (emphasizing that strict scrutiny will apply to laws unless the speech qualifies for one of the exceptions that the Court outlined in *NIFLA*).

<sup>174</sup> *See* 138 S. Ct. at 2372.

<sup>175</sup> *See id.* (stating that the *Zauderer v. Office of Disciplinary Counsel of Supreme Court* standard cannot apply to abortion regulations because abortions are an inherently controversial topic).

<sup>176</sup> *See EMW*, 920 F.3d at 426 (noting that strict scrutiny will apply unless the regulation burdens speech as a necessary consequence of regulating conduct within the state’s police powers).

<sup>177</sup> *See NIFLA*, 138 S. Ct. at 2372 (stating that compelled speech will always receive strict scrutiny unless the regulation restricts commercial, non-controversial speech or restricts speech as a necessary consequence of permissibly regulating conduct); *EMW*, 920 F.3d at 429 (applying lower scrutiny because ultrasound narration laws burden speech incidental to their permissible regulation of the abortion process).

The best argument in support of placing display and describe laws within this exception is one that many states have cited: these laws promote informed consent, a universally recognized prerequisite to undergoing an abortion.<sup>178</sup> If these regulations facilitate informed consent, they would therefore only burden speech incidental to the government's regulation of conduct—the practice of medicine.<sup>179</sup> Consequently, courts must determine whether the laws support informed consent, thereby policing conduct, or if they impermissibly regulate pure speech.<sup>180</sup>

*EMW Women's Surgical Center; P.S.C. v. Beshear* is a useful vehicle for assessing these two competing viewpoints.<sup>181</sup> In *EMW*, the majority relied upon prior judicial interpretations of informed consent to fashion a straightforward test, whereas the dissent deferred to the traditional medical understanding of informed consent.<sup>182</sup> Sections A and B of this Part explore the merits of each approach.<sup>183</sup>

### A. The EMW Majority Test

The upside of the *EMW* majority's approach is precisely what its detractors have cited as its shortcoming—simplicity.<sup>184</sup> The majority extracted several factors from *Planned Parenthood of Southeastern Pennsylvania v. Casey*

<sup>178</sup> See *EMW*, 920 F.3d at 440 (noting the legitimate state interest in preventing the psychological harm that accompanies the regret of deciding to terminate a pregnancy with insufficient information); *Stuart v. Camnitz*, 774 F.3d 238, 250 (4th Cir. 2014) (outlining the state's interest in ensuring that women do not make such a serious decision without enough information); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576 (5th Cir. 2012) (relying on *Casey* as support for the legitimate state interest in reducing the likelihood that women will later regret their abortions and suffer psychological harm).

<sup>179</sup> See *EMW*, 920 F.3d at 426 (analyzing whether the law at issue facilitated patients' informed consent); *Stuart*, 774 F.3d at 251 (discussing whether North Carolina's display and describe law facilitated informed consent); *Lakey*, 667 F.3d at 577–78 (outlining a Texas regulation that aimed to strengthen patients' informed consent by ensuring that women were fully informed before receiving an abortion).

<sup>180</sup> Compare *EMW*, 920 F.3d at 424 (applying a categorical doctrinal test), with *id.* at 450 (Donald, J., dissenting) (adopting an ad hoc approach).

<sup>181</sup> See *id.* at 424 (majority opinion) (applying rational basis review because the law was relevant to the abortion procedure and involved truthful, non-misleading information); *id.* at 448 (Donald, J., dissenting) (arguing that the law did not facilitate informed consent under the traditional medical understanding and therefore did not fit within the exception for regulations burdening speech incidental to regulating conduct).

<sup>182</sup> Compare *id.* at 444, 446 (majority opinion) (stating that the law facilitated informed consent), with *id.* at 448 (Donald, J., dissenting) (condemning the majority's test as an erroneous and inappropriate application of the Fourteenth Amendment's undue burden factors).

<sup>183</sup> See *infra* notes 184–240 and accompanying text.

<sup>184</sup> Compare KROTOSZYNSKI, *supra* note 51, at 17 (exploring the merits of categorical tests as applied to First Amendment free speech claims), with John R. Vile, *Ad Hoc Balancing*, FIRST AMEND. ENCYC. (2009), <https://www.mtsu.edu/first-amendment/article/888/ad-hoc-balancing> [<https://perma.cc/P3VK-58A7>] (providing the benefits of a case-specific, ad hoc approach to free speech claims).

and *NIFLA* to assess whether the law at issue qualified as an informed consent disclosure.<sup>185</sup> Under the majority's test, courts must first ask whether the compelled speech is related to a medical procedure.<sup>186</sup> Next, they must inquire as to whether the speech is truthful and non-misleading.<sup>187</sup> Finally, a court must decide if the information is germane to a patient's choice of whether to undergo the procedure.<sup>188</sup> If the answer to each of these questions is in the affirmative, the regulated speech facilitates informed consent and thus warrants rational basis review.<sup>189</sup>

An initial question that the *EMW* dissent raised was whether the majority had extracted the truthful, non-misleading language from *Casey*'s due process analysis properly in order to formulate its three-part informed consent test.<sup>190</sup> Critics have argued that it is inappropriate to impute constitutional analysis from one fundamental right—the Fourteenth Amendment—into another—the First Amendment.<sup>191</sup> The U.S. Court of Appeals for the Sixth Circuit, however, is not alone in borrowing these factors from *Casey* for First Amendment guidance.<sup>192</sup> Both the Fifth and Eighth Circuits have also treated *Casey*'s truthful,

<sup>185</sup> See *EMW*, 920 F.3d at 428–29 (relying on *NIFLA* and *Casey* to determine whether a compelled disclosure advances informed consent).

<sup>186</sup> See *id.* at 429 (outlining the framework for assessing whether a physician's speech disclosure facilitates informed consent, thereby burdening speech only as an effect of permissibly regulating conduct).

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> See *id.* (stating that the court will not harshly examine a regulation if it satisfies the relevant, truthful, and non-misleading test).

<sup>190</sup> See *id.* at 448 (Donald, J., dissenting) (criticizing the majority for creating a categorical test that borrowed from the Supreme Court's due process portion of the *Casey* opinion). Judge Donald stated that the majority "conjure[d]" up a test that might apply to undue burden challenges, but not First Amendment claims. *Id.* at 447. There is little question that *Casey*'s truthful, non-misleading discussion occurred within the Court's Fourteenth Amendment due process analysis. See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 882–83 (1992) (plurality opinion) (discussing the truthful, non-misleading nature of the informed consent provision before stating that the information did not pose an undue burden), *rev'd*, 14 F.3d 848 (3d Cir. 1994). The *EMW* majority acknowledged this deficiency, but stated that *Casey* "built upon" this criteria in its First Amendment analysis. See 920 F.3d at 429 (discussing *Casey*). The majority did not explain why they were confident that the *Casey* plurality had tacitly considered these factors. *Id.*

<sup>191</sup> *EMW*, 920 F.3d at 448 (Donald, J., dissenting) (noting that the majority confused a Fourteenth Amendment standard with a First Amendment consideration); *Stuart v. Camnitz*, 774 F.3d 238, 249 (4th Cir. 2014) (holding that reliance upon the truthful, non-misleading standard was misplaced for First Amendment purposes).

<sup>192</sup> See *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 577–78 (5th Cir. 2012) (explaining that disclosing the fetal heartbeat, sonogram images, and their descriptions was truthful, non-misleading information); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 734–35 (8th Cir. 2008) (en banc) (applying the truthful, non-misleading analysis to an abortion-related informed consent provision). *Planned Parenthood Minnesota, N.D., S.D. v. Rounds* involved a law that required doctors to provide patients with a statement asserting, among other things, that "the abortion [would] terminate the life of a . . . human being . . . the pregnant woman [had] an existing relationship with that unborn human . . . the relationship enjoy[ed] protection by the United States



non-misleading analysis as the governing standard for weighing First Amendment challenges to abortion regulations.<sup>193</sup> Their reasoning—that the Court may have very well considered the truthful, non-misleading nature of the informed consent provision in both its due process and free speech analyses—is not altogether implausible.<sup>194</sup>

The Fifth and Eighth Circuits also cite *Casey*'s limited First Amendment discussion as evidence of the deferential judicial scrutiny that the Supreme Court applies to physician compelled speech.<sup>195</sup> As further justification, these courts emphasize the incongruity that would result from upholding an informed consent provision under the Fourteenth Amendment's undue burden test, only then to invalidate it under the First Amendment.<sup>196</sup> Such results risk eroding the undue burden framework that the *Casey* Court viewed as an appropriate barometer for balancing women's rights to obtain abortions with states' interests in promoting maternal and fetal health.<sup>197</sup>

Constitution and under the laws of South Dakota," and the abortion procedure risks included depression and a heightened risk of suicide." 530 F.3d at 726. The dissent noted that this proposition rested on dubious scientific grounds. *Id.* at 750 (Murphy, J., dissenting).

<sup>193</sup> See *Lahey*, 667 F.3d at 575–76 (holding that the procedure promoted informed consent by providing truthful, non-misleading information); *Rounds*, 530 F.3d at 734–35 (upholding the state's physician disclosure requirement because it provided truthful, non-controversial information that was relevant to the abortion procedure).

<sup>194</sup> See *Lahey*, 667 F.3d at 577–78 (citing the factual, non-misleading nature of the conveyed information as relevant factors in *Casey*'s First Amendment analysis); *Rounds*, 530 F.3d at 733 n.8 (noting that *Casey*'s undue burden framework applies to all challenges to abortion regulations, and subsequently importing its due process factors of truthful, non-misleading information into the Eighth Circuit's First Amendment analysis).

<sup>195</sup> See *Lahey*, 667 F.3d at 575 (interpreting the brevity of *Casey*'s First Amendment review as a signal that courts should be extremely deferential to state legislatures).

<sup>196</sup> See *Rounds*, 530 F.3d at 733 n.8 (noting that, in *Planned Parenthood v. Miller*, 63 F.3d 1452, 1456 n.7 (8th Cir. 1995), the Eighth Circuit first recognized *Casey*'s undue burden framework as the "definitive statement of the constitutional law on abortion").

<sup>197</sup> See *Lahey*, 667 F.3d at 577–78 (stating that if the disclosures are truthful and non-misleading, then they do not violate a woman's right to privacy). The *Lahey* court noted that this right to privacy is found in the Fourteenth Amendment. *Id.* at 577. It also raised the importance of ensuring an appropriate medium between the state's interest and women's rights. *Id.* Here, the Fifth Circuit interpreted *Casey* as rejecting a "clash of rights" view that could allow a regulation to withstand a Fourteenth Amendment due process challenge but violate the First Amendment. *Id.* The Fifth Circuit did not, however, identify any portion of the *Casey* opinion that supported this proposition. *Id.* It cited to the Supreme Court's decision in *Gonzales v. Carhart*, which rejected a due process challenge to a law requiring doctors to describe the means of performing an abortion. 550 U.S. 124, 157 (2007). In *Gonzales*, the Supreme Court did not mention the truthful, non-misleading standard in its analysis, though it did note that states have an important role in setting standards for physician conduct in the medical profession, and described *Casey* as striking a balance between this interest and women's rights. *See id.* (discussing *Casey*'s holding in the context of its own due process analysis, and concluding that *Casey* permitted states to express their preference for childbirth); *see also Rounds*, 530 F.3d at 733 n.8 (treating *Casey* as the controlling precedent for abortion decisions, including those in the context of First Amendment challenges).

Choosing to apply *EMW*'s three-part test may lead courts to uphold ultrasound narration laws.<sup>198</sup> Courts recognize that ultrasounds and their descriptions are inherently truthful, even if states intend the information to influence patients' decisions.<sup>199</sup> Moreover, they are relevant because they relate to the abortion procedure.<sup>200</sup> Therefore, courts would only invalidate regulations that compel factually incorrect disclosures, though even this qualification is uncertain given that courts have upheld informational disclosures resting on questionable scientific data.<sup>201</sup>

### B. The *EMW* Dissent's Approach

In the *EMW* dissent, Judge Bernice Donald criticized the majority's approach and outlined a viable alternative.<sup>202</sup> She ceded that the test for truthful, non-misleading analysis controls for Fourteenth Amendment challenges, but argued that these factors were not the appropriate standard to apply in the First Amendment context.<sup>203</sup>

Judge Donald first addressed how the majority had erred in its reliance on *Casey* to fashion a categorical test.<sup>204</sup> As she noted, the *Casey* plurality only discussed the truthful, non-misleading standard in its Fourteenth Amendment due process analysis.<sup>205</sup> Thus, inferring that the *Casey* plurality had implicitly

<sup>198</sup> See 920 F.3d 421, 446 (6th Cir. 2019) (applying rational basis review and upholding the challenged regulation). The Sixth Circuit noted that providing sonogram and heartbeat results to patients furthered the state's legitimate interest, recognized in *Casey*, by ensuring that the patient understood the full implications of her decision, including the impact on unborn life. *Id.* at 442.

<sup>199</sup> See *id.* at 429 (noting that sonograms, fetal heartbeats, and their descriptions are inherently truthful and non-misleading); *Lakey*, 667 F.3d at 577–78 (providing that ultrasound images and their descriptions are truthful and non-misleading).

<sup>200</sup> See *EMW*, 920 F.3d at 446 (stating that ultrasound narrations are relevant to abortions).

<sup>201</sup> See *Rounds*, 530 F.3d at 750 (Murphy, J., dissenting) (noting that the regulation at issue required physicians to disclose to patients that abortions increased incidences of depression and suicidal thoughts, but that there was uncertain scientific support for these assertions).

<sup>202</sup> See 920 F.3d at 447 (Donald, J., dissenting) (discussing the harmful free speech implications of the majority's approach). Judge Donald condemned the categorical framework formulated by the majority because it was, she argued, too weak to protect physicians' First Amendment rights adequately, and therefore resulted in upholding a Kentucky statute that "has no basis in the practice of medicine." *Id.* at 447–48.

<sup>203</sup> See *id.* at 448 (stating that the majority's approach may apply to due process challenges, wherein the court is charged with determining whether a regulation unduly burdens women's rights, but arguing that this test ultimately fails to capture the First Amendment's protections).

<sup>204</sup> See *id.* (describing the incorrect nature of the per se informed consent test that the majority created as rigid, deviating from medical standards, and harmful to patients).

<sup>205</sup> See *id.* (contending that the factors the majority drew upon were only relevant to *Casey*'s undue burden due process analysis); see also *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 882–83 (1992) (plurality opinion) (discussing the truthful, non-misleading standard immediately before concluding that the disclosure requirement at issue did not unduly burden women's rights in violation of the Fourteenth Amendment), *rev'd*, 14 F.3d 848 (3d Cir. 1994).

considered these factors in its First Amendment analysis was speculative.<sup>206</sup> Furthermore, from a fundamental rights perspective, Judge Donald argued that borrowing an analysis reserved for one type of constitutional challenge, in order to assess another alleged constitutional violation, was a dubious practice.<sup>207</sup> In her belief, the *EMW* majority incorrectly focused on what it considered to be an undesirable result: the possibility that an abortion regulation would survive a due process challenge under the undue burden framework, but then fail under a First Amendment challenge.<sup>208</sup> According to Judge Donald this proposition is not only acceptable, but desirable.<sup>209</sup> A law's ability to withstand one fundamental rights challenge should not preclude other constitutional challenges.<sup>210</sup>

Judge Donald offered an alternative formula for determining whether a regulation facilitates informed consent, thereby burdening speech incidental to regulating conduct.<sup>211</sup> Instead of deferring to legislators, she posited that courts should defer to traditional medical understandings of informed consent in order to assess whether a regulation serves that objective.<sup>212</sup> By deferring to experts rather than lawmakers, courts would promote accepted standards of medical care while reducing the risk of states using informed consent as a facade to

<sup>206</sup> See *EMW*, 920 F.3d at 448 (Donald, J., dissenting) (noting that it is a mistake to transpose the analysis for one fundamental right to assess another); *Stuart v. Camnitz*, 774 F.3d 238, 249–50 (4th Cir. 2014) (stating that a regulation surviving the Fourteenth Amendment's undue burden analysis should not foreclose the possibility that the same regulation unconstitutionally burdens another fundamental right).

<sup>207</sup> *EMW*, 920 F.3d at 448 (Donald, J., dissenting). Judge Donald relied on a colorful hypothetical to underscore this assertion. *Id.* Consider a law requiring gun owners to participate in a mandatory gun buyback program. *Id.* A court could not reject a Second Amendment challenge on the basis that the owners received just compensation. *Id.* Relying on Takings Clause precedent to analyze a separate fundamental right would be inappropriate. *Id.* Judge Donald equated this example to the majority's misappropriation of the due process test for their First Amendment analysis. *Id.*

<sup>208</sup> See *id.* (discussing the intersection of the Fourteenth and First Amendments in the abortion context). This notion that a "clash of rights" would erode the undue burden test was an explicit consideration in the Fifth Circuit's decision in *Lakey*. See 667 F.3d 570, 577 (5th Cir. 2012).

<sup>209</sup> *EMW*, 920 F.3d at 448 (Donald, J., dissenting) (exploring the problematic consequences introduced by the majority's approach).

<sup>210</sup> See *id.* (offering an alternative framework for judicial analysis). Judge Donald, like Justice Sandra Day O'Connor, believed that a law satisfying due process under the Fourteenth Amendment did not necessarily preclude a First Amendment violation. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 830 (1986) (O'Connor, J., dissenting) (concluding that the question of First Amendment constitutionality is independent from due process considerations), *overruled by Casey*, 505 U.S. 833; *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 472 n.16 (1983) (O'Connor, J., dissenting) (noting that informed consent provisions may violate the First Amendment), *overruled by Casey*, 505 U.S. 833.

<sup>211</sup> See *EMW*, 920 F.3d at 454 (Donald, J., dissenting) (maintaining that the majority had substituted its personal beliefs, for those of medical professionals, in a way that was inconsistent with the practice of medicine).

<sup>212</sup> See *id.* at 449 (instructing that the proper approach for determining whether a disclosure requirement facilitates informed consent required turning to national standards of medical care).

impose their ideology on vulnerable patients.<sup>213</sup> Fully understanding this approach requires an exploration of the informed consent doctrine more generally, and evaluates whether ultrasound narrations serve this end.<sup>214</sup>

### 1. Informed Consent in the Medical Profession

The medical community has long considered informed consent to be a fundamental component of the doctor-patient relationship.<sup>215</sup> Informed consent refers to the discussions between a doctor and patient that are aimed at providing the patient with a sufficient basis to comprehend the nature, risks, and benefits of a prospective medical intervention, as well as ensuring that patients are aware of available alternatives.<sup>216</sup> Informed consent is twofold: a physician must ensure that a patient is fully informed and then the patient must voluntarily affirm their commitment to undergo a medical procedure.<sup>217</sup>

At the core of medical ethics are four moral pillars: respecting patient autonomy, practicing beneficence, avoiding maleficence, and promoting justice.<sup>218</sup>

<sup>213</sup> See *id.* at 460 (noting the importance of looking to traditional medical standards of informed consent, rather than kowtowing to legislative classifications). Judge Donald highlighted the Court's recent admonition in *NIFLA*, wherein it held that state labels should not be the sole determinant of which level of judicial scrutiny applied. *Id.* The majority, she contended, had ignored this instruction, effectively providing a roadmap for state legislators to follow going forward. *Id.*

<sup>214</sup> See *infra* notes 215–240 and accompanying text.

<sup>215</sup> Brief for Amici Curiae American College of Obstetricians and Gynecologists, the American Medical Association, the North American Society for Pediatric and Adolescent Gynecology, the American College of Osteopathic Obstetricians and Gynecologists, and the American Academy of Family Physicians Supporting Petitioners at 7, *EMW Women's Surgical Ctr., P.S.C. v. Meier*, 140 S. Ct. 655 (2019) (No. 19-417), 2019 WL 6689678 [hereinafter Brief for Amici Curiae American College of Obstetricians and Gynecologists]. The underlying values of informed consent originated in part from religion, Western ethical philosophy, and American culture. *Id.* at 6. As early as the nineteenth century, medical professionals generally treated consent as a prerequisite for performing major surgical procedures. *Id.* at 6–7. Informed consent gained near-universal recognition after World War II, partly due to professional revulsion at Adolf Hitler's use of experimental research on non-consenting persons. *Id.* at 7. In 1981, the American Medical Association—the largest organization of physicians and medical students in the United States—published its opinion on informed consent. *Id.* at 7–8. The American Medical Association stated that patient autonomy requires providing patients with sufficient information to weigh the risks and benefits of a procedure properly. *Id.*

<sup>216</sup> *Id.* at 12. Dr. Faden asserts that the extent to which information is necessary should be left to the discretion and judgment of medical professionals. *Id.* Traditionally, informed consent provisions should be decision-neutral. See Corbin, *supra* note 43, at 1289 (discussing the doctrine of informed consent). That is, in keeping with its name, doctors should inform rather than persuade. *Id.* As such, emotional appeals are generally at odds with the objectives of informed consent. *Id.* at 1324.

<sup>217</sup> See Brief for Amici Curiae American College of Obstetricians and Gynecologists, *supra* note 215, at 6–7 (discussing the traditional medical understanding of informed consent).

<sup>218</sup> *Id.* at 5 (citing TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* (8th ed. 2019)). Patient autonomy refers to patients' rights to make decisions about their medical care without their health care provider trying to influence their decisions. See *id.* Courts have long recognized the important goal of individual autonomy that informed consent preserves. See *Canterbury v. Spence*, 464 F.2d 772, 782 n.27 (D.C. Cir. 1972) (noting that informed consent is necessary to promote patient autonomy); see also *Crain v. Allison*, 443 A.2d 558, 562 (D.C. 1982) (describing the

Informed consent promotes the first three objectives.<sup>219</sup> Most medical professionals uniformly accept these goals as the objectives furthered by informed consent.<sup>220</sup> There is some disagreement, however, as to whether ultrasound narrations further these aims.<sup>221</sup>

### *a. Medical Professionals in Favor of Ultrasound Narration Laws*

Some medical professionals argue that ultrasound narration laws facilitate informed consent by promoting patient autonomy and limiting potential harm.<sup>222</sup> Supporters contend that the decision to terminate a pregnancy is a unique medical intervention.<sup>223</sup> Outside influences are rife—be it coercion by loved ones, societal pressures, or misinformation—and ultrasound narration regulations counterbalance their effects.<sup>224</sup>

minimum information that physicians must provide to achieve informed consent). Informed consent entails disclosure of all material risks. *Canterbury*, 464 F.2d at 786–87. “Material” refers to information that a reasonable patient would consider significant to their decision. *Id.* at 787. Patient autonomy is thus a central theme of informed consent. *See id.* Beneficence and avoiding malfeasance are related concepts. Brief for Amici Curiae American College of Obstetricians and Gynecologists, *supra* note 215, at 6–7. Doctors should promote patient health and avoid harming patients—the Hippocratic Oath immortalizing the latter obligation. *Id.* Unlike the loftier philosophical goals of autonomy and justice, promoting beneficence and avoiding malfeasance are not modern goals; early doctors practiced medicine solely to help patients. *Id.* The net harm of physicians’ actions should never outweigh the accrued benefits of such conduct. *Id.* at 16.

<sup>219</sup> Brief for Amici Curiae American College of Obstetricians and Gynecologists, *supra* note 215, at 6–7. Justice refers to the idea that doctors should treat all patients equitably. *Id.* Justice is not a core concern of the informed consent doctrine, though one could certainly argue that equitable treatment requires handling patients in accordance with the predominant medical standard of care. *Id.*

<sup>220</sup> *See id.*

<sup>221</sup> *See infra* notes 222–240 and accompanying text.

<sup>222</sup> *See, e.g.,* Declaration of Dr. John Seeds, M.D., FACOG In Support of Defendants’ in Opposition to Plaintiffs’ Motion for a Temporary Restraining Order at 5–6, *EMW Women’s Surgical Ctr., P.S.C. v. Beshear*, 283 F. Supp. 3d 629 (W.D. Ky. 2017) (No. 3:17-cv-00016), [hereinafter Declaration of Dr. John Seeds] (offering a doctor’s professional opinion that the ultrasound narration laws promote informed consent in the abortion context), *rev’d*, 920 F.3d 421 (6th Cir. 2019).

<sup>223</sup> *See* Declaration of Dr. John Seeds, *supra* note 222, at 5; *see also EMW*, 283 F. Supp. 3d 629 (No. 3:17-cv-00016) (arguing that ultrasound narration laws facilitate informed consent) *rev’d*, 920 F.3d 421. With respect to abortion, the Supreme Court has adopted an atypically paternalistic view of the informed consent doctrine. *See* Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 *DUKE J. GENDER L. & POL’Y* 223, 224 (2009). It has embraced the state’s role in conveying the importance of motherhood on women, effectively assuming that women could not have done so themselves. *Id.* *Casey* is considered to be the catalyst for this doctrinal shift. *Id.* at 252.

<sup>224</sup> *See* Declaration of Dr. John Seeds, *supra* note 222, at 4 (focusing on the unique aspects of the abortion procedure that warrant disclosure of all relevant information). Dr. Seeds, a non-party declarant, has a distinguished pedigree. *Id.* He has been a board-certified gynecologist since 1978 and has served on the Ethics Committee of the American Congress of Obstetricians and Gynecologists. *Id.* He is the author of over one hundred peer-reviewed articles. *Id.* at 5. In the abortion context, he asserts that a pregnant woman serves as a decision-maker for the unborn child and needs to have accurate information about the fetus to make an informed decision on behalf of herself and her unborn child. *Id.* at 10. Due to the atypical gravity of the patient’s decision regarding whether to have an abortion, in-

Supporters argue that, rather than unduly influencing a patient's decision, ultrasound narrations offset the dangers of providing incomplete information.<sup>225</sup> The irreversible nature of abortions compounds the gravity of these decisions and compels the disclosure of *all* relevant information.<sup>226</sup> By providing such a thorough disclosure, states promote the voluntariness of patients' consent and protect their future wellbeing by ensuring that they do not make an ill-informed decision that they may later regret.<sup>227</sup> Patient discomfort may be an unavoidable consequence in some instances, but according to supporters of display and describe laws, it should not outweigh the overarching concerns with patient autonomy and welfare at the heart of the informed consent doctrine.<sup>228</sup>

### *b. Medical Professionals Against Ultrasound Narration Laws*

Conversely, many medical professionals believe that ultrasound narration laws do not promote informed consent.<sup>229</sup> They maintain that impressing unnecessary information upon women, without providing them with a choice

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formed consent in this setting requires a greater standard of care than doctors normally employ for other medical procedures. *Id.* He asserts that the national standard of care for abortion procedures is to perform an ultrasound and to describe the sonographic results to the patient. *Id.* at 12.

<sup>225</sup> See *id.* at 26 (stating that physicians must provide all relevant information, and concluding that the Kentucky regulation at issue served this end). Dr. Seeds describes the failure to provide all relevant information as "coercion by ignorance." *Id.*

<sup>226</sup> See *id.* at 9 (providing the factors that make informed consent a particularly important component of the abortion procedure, including the irreversible nature and "two patients" involved).

<sup>227</sup> See SPECIAL INVESTIGATIONS DIV., *supra* note 135, at 1–14 (comparing women who received abortions to those who continued unintended pregnancies to full term). This study found that there was no increased rate of psychological treatment between women who had received an abortion and those who had chosen childbirth. *Id.* Another major study found that most women who had chosen abortions did not regret their decisions and, if confronted with the choice again, would still have chosen abortion. Brenda Major et al., *Psychological Responses of Women After First-Trimester Abortion*, 57 ARCHIVES GEN. PSYCHIATRY 777, 780–81 (2000).

<sup>228</sup> See Declaration of Dr. John Seeds, *supra* note 222, at 27 (discussing how ultrasound narration laws typically affect patients). Dr. Seeds discredits the notion that they often cause psychological trauma to patients, and asserts that there is no credible evidence to substantiate this argument. *Id.* at 13. To bolster his own contention, Dr. Seeds cites several medical studies that focus on pregnant women and the ultrasound requirement prior to abortions. *Id.* He asserts that these studies support the presumption that most women would like to undergo an ultrasound. *Id.* Notably, though, none of these studies focus on the effects of *describing* the ultrasound. See *id.*

<sup>229</sup> See Rebuttal Declaration of Mark D. Nichols, M.D., In Support of Plaintiffs' Motion for a Temporary Restraining Order at 1, *EMW*, 283 F. Supp. 3d 629 (No. 3:17-cv-00016) [hereinafter Nichols Declaration] (responding to the declarations provided by Dr. Seeds, Dr. Baker, and Dr. Hager), *rev'd*, 920 F.3d 421. Dr. Nichols is a board-certified gynecologist who has practiced gynecological and obstetric care, including abortions, for over thirty years. *Id.* He has performed over one thousand abortions on women. *Id.* at 3. He has published numerous peer-reviewed articles and delivered over two hundred lectures at various professional conferences and universities. *Id.* In Dr. Nichols's opinion, display and describe laws do not promote informed consent. *Id.* at 1.

about receiving that information, subverts the fundamental goals of respecting patient autonomy and promoting patient welfare.<sup>230</sup>

Securing informed consent in the abortion context requires doctors to provide accurate information to their patients about the risks and benefits associated with the procedure, as well as alternatives to abortion.<sup>231</sup> Performing an ultrasound before an abortion may be common, but the ultrasound's purpose is to allow physicians to evaluate the uterus and the fetus.<sup>232</sup> There is no professional standard of care dictating that compliance with informed consent requires doctors to describe the fetus's features.<sup>233</sup> This is a legislative creation.<sup>234</sup>

Critics of ultrasound narration laws believe that for informed consent purposes, it is improper to provide too little information, but also equally inappropriate in some circumstances to overinform a patient.<sup>235</sup> These laws exploit

<sup>230</sup> See Brief for Amici Curiae American College of Obstetricians and Gynecologists, *supra* note 215, at 19 (discussing how display and describe laws run counter to principles of medical ethics and the objectives of informed consent). Dr. Faden notes that by providing emotionally charged, unnecessary information to patients, the state is manipulating women in a uniquely vulnerable position. *Id.* She emphasizes that physicians could offer to share this information with patients who request it. *Id.* at 15. But she further argues that the longstanding principles of medical ethics instruct that when a patient expresses their preference not to hear information, physicians must respect this preference. *Id.*

<sup>231</sup> See *Crain v. Allison*, 443 A.2d 558, 562 (D.C. 1982) (describing the basic information a physician must provide to facilitate informed consent). The *Crain* court stated that a physician, at a minimum, must provide the nature of the condition and treatment, available alternatives, and the risks and benefits associated with these respective approaches. *Id.*

<sup>232</sup> See *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 455 (6th Cir. 2019) (Donald, J., dissenting) (noting that ninety-eight percent of pregnancy centers use an ultrasound to assess the pregnancy, but adding that this does not require describing the results to patients).

<sup>233</sup> See NAT'L ABORTION FED'N, 2010 CLINICAL POLICY GUIDELINES 3, [http://prochoice.org/pubs\\_research/publications/downloads/professional\\_education/CPG2010.pdf](http://prochoice.org/pubs_research/publications/downloads/professional_education/CPG2010.pdf) [<https://perma.cc/5UZG-UQ59>]. The standards of care differ between informed consent and abortion counseling. *Id.* The latter focuses on providing women with sufficient information to assist with "decision making and contraceptive choices, values clarification, or referral to other professionals." *Id.* Informed consent, on the other hand, focuses on whether the patient is making a fully informed and voluntary decision, meaning that she understands the medical risks and alternatives to the procedure. *Id.*

<sup>234</sup> See Nichols Declaration, *supra* note 229, at 7 (discussing informed consent in the abortion context and drawing upon Dr. Nichols's experience performing thousands of abortions). Dr. Nichols notes that the informed consent process is "highly individualized." *Id.* There is a basic amount of relevant information that must be provided to the patient. *Id.* Beyond this threshold, however, physician discretion and patient preferences should govern how much detail is provided and in what manner. *Id.* Dr. Nichols employs the example of a cesarean section, or C-section, to illustrate this point. *Id.* After discussing the risks and benefits of a C-section with a patient, some women may wish to hear more about the intricacies of the procedure. *Id.* Others, comfortable knowing the medical risks associated with the procedure, may express their desire to be spared of the more graphic details. *Id.* It would be inappropriate for a doctor to delve into an animated discussion of the procedure (*i.e.*, where the incision will be made, to what depth, and with what tool) if this increases patient discomfort. *Id.* Doing so might unduly influence a patient's decision, leading them to forgo the surgery when that may be the safest option. *Id.*

<sup>235</sup> See Ruth Macklin, *Understanding Informed Consent*, 38 ACTA ONCOLOGICA 83, 85 (1999) (conducting a study in which researchers provided too little or too much information to participants, and concluding that both tend to confuse participants). Studies suggest that lengthening informed

women's vulnerable state, using tactics designed to manipulate them and elicit disturbing emotions.<sup>236</sup> Such manipulation removes the voluntariness at the core of patient autonomy.<sup>237</sup> Similarly, a law that requires doctors to continue providing information, without regard for the psychological and emotional damage that it inflicts upon patients, forces physicians to violate their obligation to do no harm.<sup>238</sup> The combined effect of these consequences can lead to an irreparable fissure in the doctor-patient relationship.<sup>239</sup> In sum, rather than facilitating informed consent, critics argue that ultrasound narration requirements undermine the fundamental goals of the medical profession.<sup>240</sup>

### III. COURTS SHOULD DEFER TO THE MEDICAL PROFESSION'S UNDERSTANDING OF INFORMED CONSENT

As outlined above, two competing approaches—a categorical test and an ad hoc analysis deferring to medical standards—are now available to courts for assessing whether ultrasound narration laws serve a valid purpose in promoting informed consent.<sup>241</sup> This is a critical distinction and one that will likely

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consent disclosures is negatively correlated with patient comprehension. Brief for Amici Curiae American College of Obstetricians and Gynecologists, *supra* note 215, at 12–13. These effects are magnified when the patient is distressed. *Id.* Dr. Faden states that for high-stakes procedures, such as deciding to terminate a pregnancy, it is important to provide the basic information that is fundamental to appreciate the risks and benefits of consenting to the procedure. *Id.* It is as important for a doctor not to over inform, thereby unduly influencing a patient's decision, as it is for a doctor to provide sufficient information. *Id.* at 13.

<sup>236</sup> See Brief for Amici Curiae American College of Obstetricians and Gynecologists, *supra* note 215, at 4, 19 (stating that informed consent requires both conveying adequate information and promoting the voluntariness of the patient's decision).

<sup>237</sup> *Id.* at 19. Dr. Faden concludes that the coercive nature of ultrasound narration requirements undermines the voluntariness of the patient's choice. *Id.* at 4.

<sup>238</sup> See *id.* at 19 (determining that ultrasound narration laws force physicians to violate their ethical duty to do no harm). Dr. Faden contends that requiring a woman, in a physically and mentally vulnerable state, to view the ultrasound, listen to a description, and listen to the heartbeat, is designed to manipulate women into forgoing an abortion and elicit visceral reactions. *Id.*

<sup>239</sup> See *id.* at 21 (discussing the detrimental effects that display and describe regulations have on the doctor-patient relationship). It irreparably subverts the patient-clinician relationship in two ways: (1) it needlessly inserts emotional conflict into the relationship; and (2) it morphs what is supposed to be a collaborative relationship into an oppositional one. *Id.* at 21, 23.

<sup>240</sup> See *id.* at 19 (asserting that ultrasound narration requirements undermine the objectives and ethical principles of the medical profession); *id.* at 22 (stating that display and describe laws can traumatize patients and destroy the doctor-patient relationship).

<sup>241</sup> Compare *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 428–29 (6th Cir. 2019) (stating that the law facilitated informed consent and would only warrant rational basis review if it involved relevant, truthful, and non-misleading information), with *id.* at 448–49 (Donald, J., dissenting) (condemning the majority's test as an erroneous and inappropriate application of the Fourteenth Amendment undue burden factors to a First Amendment challenge).



determine whether a display and describe law stands.<sup>242</sup> Adopting the *EMW Women's Surgical Center, P.S.C. v. Beshear* majority's approach favors concluding that the regulation burdens speech as a consequence of permissibly regulating the abortion procedure.<sup>243</sup> This finding would trigger less-exacting judicial scrutiny and, in turn, increase the likelihood that a statute is upheld.<sup>244</sup> Conversely, if a court defers to the traditional medical understanding of informed consent, it may conclude that ultrasound narration laws do not burden speech incidental to regulation of the medical profession.<sup>245</sup> In that case, strict scrutiny would apply, and likely deem the law invalid.<sup>246</sup>

Although the simplicity of the *EMW* majority's approach is attractive, deferring to medical understandings better promotes informed consent in the abortion context.<sup>247</sup> To illustrate why this is the better approach, Section A of this Part first discusses the shortcomings of the *EMW* majority's approach and then highlights the comparative advantages of deferring to medical understandings of informed consent.<sup>248</sup> Finally, in applying this latter approach, Sections B and C demonstrate how ultrasound narration laws fail to satisfy strict scrutiny—the appropriate standard of review.<sup>249</sup>

### *A. Shortcomings of the EMW Majority Opinion: Constitutional Concerns and Circumventing Casey*

The majority's three-part test is at once simple and perilous.<sup>250</sup> To illustrate its precarious nature, consider one particularly troublesome prong: the

<sup>242</sup> Compare *id.* at 446 (majority opinion) (applying rational basis review and upholding the law in question), with *id.* at 453 (Donald, J., dissenting) (asserting that strict scrutiny should be applied, and concluding that the law was unconstitutional).

<sup>243</sup> See *id.* at 428–29, 446 (majority opinion) (outlining the three-part test for informed consent, and upholding the law).

<sup>244</sup> See Nat'l Inst. of Fam. & Life Advocates v. Schneider (*NIFLA I*), 484 F. Supp. 3d 596, 620 (N.D. Ill. 2020) (applying the *EMW* test to uphold a law requiring that CPCs discuss the benefits of abortion with patients who inquire about the procedure). The district court distinguished the law at issue from *NIFLA* by noting that California's FACT required CPCs to advise *all* patients on the availability of state-subsidized abortion services, regardless of whether those patients had inquired about abortions. *Id.* at 613. The law before the Illinois district court, on the other hand, only required that CPCs discuss the benefits and availability of abortions with patients who had requested such information. *Id.* at 607.

<sup>245</sup> See *EMW*, 920 F.3d at 449 (Donald, J., dissenting) (determining that the appropriate test for informed consent requires consideration of accepted professional standards of care). Judge Donald argued that because *Casey* does not provide a universal framework for assessing informed consent, courts "must naturally turn to the medical community for that definition." *Id.*

<sup>246</sup> See *id.* at 453. Justice Donald argues passionately, and convincingly, that ultrasound narration laws cannot withstand strict scrutiny. *Id.* at 461.

<sup>247</sup> See *infra* notes 250–328 and accompanying text.

<sup>248</sup> See *infra* notes 250–287 and accompanying text.

<sup>249</sup> See *infra* notes 288–328 and accompanying text.

<sup>250</sup> See *EMW*, 920 F.3d at 447 (Donald, J., dissenting) (addressing the weaknesses of the majority's approach).

truthful, non-misleading analysis.<sup>251</sup> This standard endangers fundamental rights and reflects an interpretive misstep from *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>252</sup>

### 1. Constitutional Issue

Before addressing the problematic logic behind *EMW*'s reliance on *Casey*, it is important to consider the test's constitutional implications.<sup>253</sup> The truthful, non-misleading benchmark is dangerously amorphous.<sup>254</sup> For illustrative purposes, consider a law that would require physicians to display and describe pictures of aborted fetuses to patients as part of their ultrasound narration requirement.<sup>255</sup> This law would comport with the *EMW* test: (1) it relates to the abortion procedure by detailing its consequences; (2) like ultrasounds, the photographs are technically truthful and non-misleading; and (3) it is relevant to a woman's decision to abort the fetus as she can appreciate the effects of her decision.<sup>256</sup> Few could argue that such a law would not cause patients physical discomfort—if not psychological trauma—while providing scant benefits.<sup>257</sup> This hypothetical law also would promote ideological ends that the

<sup>251</sup> See *id.* at 448 (noting that the truthful, non-misleading nature of the ultrasound narration law compelled a decision in favor of upholding it). The Sixth Circuit stated that *NIFLA* compelled upholding laws that functioned similar to the informed consent provision at issue in *Casey*. *Id.* at 428 (majority opinion). It then pulled *Casey*'s truthful, non-misleading language to serve as part of its test for informed consent. *Id.* at 428–29.

<sup>252</sup> See *id.* at 447 (Donald, J., dissenting) (maintaining that the majority's three-part test does not accurately capture the First Amendment's protections).

<sup>253</sup> See *id.* at 461 (concluding that the ultrasound narration laws trample on physicians' First Amendment rights in order to promote the state's ideological agenda). Judge Donald ended her impassioned critique of the majority approach by quoting Benjamin Franklin. *Id.* According to Judge Donald, Franklin cautioned that when free speech is taken away, the Constitution is irreparably weakened, resulting in tyranny. *Id.* Judge Donald, continuing this thought, ended her dissent with an emphatic statement: “[The ultrasound narration law] is a restriction on speech that has no basis in the practice of medicine. It should be subjected to heightened scrutiny and deemed unconstitutional, lest our constitution dissolve, and tyranny be erected on its ruins.” *Id.*

<sup>254</sup> See *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, No. A-11-CA-486-SS, 2012 WL 373132, at \*1 (W.D. Tex. Feb. 6, 2012) (considering a Texas ultrasound narration law after the Sixth Circuit remanded the case). Judge Sparks noted that although he was obligated to follow the Fifth Circuit's direction, he disagreed with its conclusion. *Id.* In doing so, he explained that the appellate court's reading of *Casey*'s truthful, non-misleading language principles grants a “remarkable scope of state power” in the abortion setting. *Id.* at \*2.

<sup>255</sup> See *id.* at \*3 (attempting to demonstrate the incredible scope of permissible regulations under the truthful, non-misleading standard). Judge Sparks invoked this powerful example to highlight the Sixth Circuit's flawed reasoning. *Id.*

<sup>256</sup> See *EMW*, 920 F.3d at 428–29 (outlining the majority's test for informed consent).

<sup>257</sup> See Declaration of Carolyn Jones, *supra* note 1, at 3 (describing the less graphic, but nonetheless invasive nature of a display and describe procedure that a patient underwent and its profound effects on her).

compelled speech doctrine prohibits.<sup>258</sup> But under the *EMW* majority's universal informed consent test, this law would qualify as only an incidental free speech burden to regulating conduct.<sup>259</sup>

The *EMW* majority was altogether too willing to reject the physicians' argument that heightened scrutiny should apply because ultrasound narration laws compel ideological speech.<sup>260</sup> To be sure, *Casey* embraces the proposition that states may express their preference for childbirth over abortion.<sup>261</sup> But the *Casey* Court also noted an important restraint on this ability—reasonableness.<sup>262</sup> *Casey* does not endorse conscripting physicians and subverting the medical profession's ethical standards to promote states' ideological viewpoints.<sup>263</sup> Such an interpretation is incompatible with the compelled speech doctrine, which seeks to protect individuals from having to parrot the state's ideology.<sup>264</sup>

<sup>258</sup> See *Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (considering the validity of New Hampshire's requirement that state license plates feature the state's motto). In one of the most influential compelled speech decisions, the Supreme Court emphasized that the First Amendment protects minority viewpoints, and determined that states cannot force individuals to promote ideological messages with which they disagree. *Id.* The Court stated, in language particularly salient to the abortion context, that "where 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." *Id.* at 717.

<sup>259</sup> See 920 F.3d at 446 (upholding the Kentucky ultrasound narration law). Judge Sparks shared his disappointment with what he viewed to be an unconstitutional result. *Lakey*, 2012 WL 373132, at \*3. "The concept that the government may make puppets out of doctors . . . is not one this Court believes is consistent with the Constitution . . ." *Id.*

<sup>260</sup> See 920 F.3d at 435 (noting that *Casey* forecloses the argument that a speech's ideology should warrant heightened scrutiny). The majority focused on *Casey*'s language that the state could express its preference as a part of reasonable informed consent. *Id.* at 435–36. But the Court simultaneously ignored how ultrasound narration laws differed from the informed consent provisions at issue in *Casey*, effectively forcing doctors to engage in ideological speech that did not facilitate patients' informed decision-making. *Id.* Judge Donald emphasized that *Casey*, unlike the statute in question, contained a therapeutic exception that allowed doctors to exercise their professional judgment and take patient preferences into consideration. *Id.* at 451 (Donald, J., dissenting). She argued that the majority had "cherry-pick[ed]" provisions along its path to conclude mistakenly that the Kentucky statute resembled the law at issue in *Casey*. *Id.*

<sup>261</sup> See 505 U.S. 833, 884 (1992) (plurality opinion) (noting that states could draft laws that promote informed consent even if in doing so, the state conveys its preference for childbirth), *rev'd*, 14 F.3d 848 (3d Cir. 1994).

<sup>262</sup> *Id.* In the sentence immediately following the Court's assertion that states may express their preference for childbirth, the Court noted that they must do so in a reasonable manner. *Id.* The law at issue in *Casey* pales in comparison to the ideological, emotionally manipulative nature of ultrasound narration laws. See *EMW*, 920 F.3d at 451 (Donald, J., dissenting) (comparing *Casey*'s informed consent provision to ultrasound narration laws). Because ultrasound narration laws go beyond informed consent, they do not qualify for the type of informed consent that *Casey* permits—a reasonable one that informs the mother's decision. *Id.*

<sup>263</sup> See *Lakey*, 2012 WL 373132, at \*3 (arguing that such a reading of *Casey* essentially consumes physicians' First Amendment rights).

<sup>264</sup> See *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (considering the purpose of restricting government-compelled speech). Justice Robert Jackson stated unequivocally that the state cannot use private citizens to "prescribe what shall be orthodox in . . . matters of opinion." *Id.*

To comply with the First Amendment, courts cannot accept the government's stated purpose as gospel.<sup>265</sup> Under the *EMW* majority's approach, legislatures can create almost blanket immunity by citing informed consent as a law's purpose.<sup>266</sup> Such unbridled deference to the legislature evokes images of a modern Trojan Horse, wherein a seemingly beneficial device is used to conceal a more nefarious government objective.<sup>267</sup>

## 2. Interpretive Issue

Aside from abrogating physicians' free speech rights, a simpler deficiency undermines the *EMW* majority's test—an error in judicial interpretation.<sup>268</sup> The *EMW* court mistakenly relied on *Casey* to impute the truthful, non-misleading standard into its First Amendment analysis.<sup>269</sup>

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<sup>265</sup> See KROTOSZYNSKI, *supra* note 51, at 176 (tracing the continued dissipation of First Amendment protections). Krotoszyński focuses on several areas in which the Supreme Court, headed by Justice Roberts, has retracted free speech protections offered by earlier courts. *Id.* One of those areas is in the abortion context, wherein Krotoszyński contends that states are using physicians as “sock puppet[s]” to express their ideological preferences. *Id.* The author notes that the dangers of weakening the First Amendment are at their apex when the government effectively conceals its role as speaker by commandeering private citizens. *Id.* at 178. Krotoszyński's prescribed solution for this concern is a more strenuous judicial review, looking beyond simply the state's proffered legislative intent to determine the legislation's true purpose. *Id.* at 178–79.

<sup>266</sup> See *id.* at 178–79 (discussing issues with government-compelled physician speech). Krotoszyński contends that lower courts are increasingly deferring to legislators when they examine compelled professional speech. *Id.* at 182. He contends that this increased deference poses dangers to both the speaker (the physician) and the listener (the patient). *Id.* As applied to the speaker, compelled speech that deviates from professional norms deprives physicians of their autonomy. *Id.* For the listener, the dangers are similarly troubling. Corbin, *supra* note 43, at 1328–29. First, whenever the government uses private individuals to convey its ideological expressions, there is a substantial risk that a person will wrongly ascribe those views to the speaker, and not the government. *Id.* Even if patients recognize that the government requires that doctors provide such information, the more people that convey a message—thereby appearing to endorse it—the more compelling it may seem. *Id.* at 1295. Because of doctors' expertise and the information gap between the average patient and a physician, patients are more apt to trust their doctors' judgments. *Id.* at 1338. If patients perceive a doctor as endorsing the government's position (rightfully or wrongfully), they are more likely to grant undue credence to this position. *Id.*

<sup>267</sup> See *United States v. Kahriger*, 345 U.S. 22, 38 (1953) (Frankfurter, J., dissenting) (emphasizing the impropriety of allowing the state's labeling choice to function as “verbal cellophane”), *overruled by* *Marchetti v. United States*, 390 U.S. 39 (1968). Justice Frankfurter advocated for a more searching judicial inquiry, one that did not accept the government's nominal purpose at face-value. *Id.*

<sup>268</sup> See 920 F.3d 421, 448 (6th Cir. 2019) (Donald, J., dissenting) (considering the problems with the majority's reading of *Casey*); *Lakey*, 2012 WL 373132, at \*3 (arguing that *Casey* does not advocate for rubber-stamping truthful, non-misleading disclosures).

<sup>269</sup> See 920 F.3d at 448 (Donald, J., dissenting) (emphasizing that *Casey* does not provide a simple formula to assess whether a regulation facilitates informed consent). Judge Donald contends that the *Casey* majority took a case-specific approach, which resembled a traditional ad hoc balancing test. *Id.* In ad hoc balancing, judges examine and rule on each case based on its unique set of facts. See Vile, *supra* note 184. The ad hoc approach favors a stronger application of constitutional protections. *Id.* The primary criticism of the ad hoc approach stems from its potentially inconsistent application.

The majority admittedly pulled the language of the truthful, non-misleading standard from *Casey*'s due process discussion.<sup>270</sup> Even viewing *Casey* in the light most favorable to the majority, it is at best unclear whether the *Casey* Court considered the truthful, non-misleading nature of the informed consent provision in its free speech analysis.<sup>271</sup> Given the absence of this language in the Court's First Amendment discussion, it is more plausible that the *Casey* Court did not consider the truthful, non-misleading nature to be a relevant free speech factor.<sup>272</sup> Had the *Casey* Court adopted a new governing standard for testing informed consent provisions, effectively trailblazing a novel constitutional precedent, it likely would have signaled such an intention.<sup>273</sup> The ab-

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*Id.* Whereas a doctrinal test is relatively predictable, ad hoc balancing tests invite more subjective analysis by judges. *Id.*

<sup>270</sup> See *EMW*, 920 F.3d at 429 (addressing the dissent's argument that it pulled the truthful, non-misleading language from the due process portion of the *Casey* opinion). The majority conceded that most of *Casey* focused on the due process analysis, but stated that the First Amendment analysis grew out of this discussion. *Id.* The majority does not cite any language in *Casey*'s paragraph-long First Amendment discussion that suggests it built upon the truthful, non-misleading nature. *Id.* *NIFLA* also casts doubt on this conclusion. See 138 S. Ct. 2361, 2378 (2018) (considering a First Amendment challenge to California's FACT Act, which sought to compel disclosures from CPCs). In considering whether the law governing CPCs facilitated informed consent, the Supreme Court never mentioned the phrase "truthful, non-misleading." *Id.* Furthermore, the cases that *Casey* cites within its brief First Amendment analysis provide little clarity. See 505 U.S. 833, 884 (1992) (plurality opinion), *rev'd*, 14 F.3d 848 (3d Cir. 1994). The *Casey* Court also noted that the supporting cases, *Wooley v. Maynard* and *Whalen v. Roe*, are seemingly at odds with one another. *Id.* In *Wooley*, the Supreme Court applied strict scrutiny to a statute compelling ideological speech. 430 U.S. 705, 717 (1977). Conversely, in *Whalen*, the Court upheld a compelled physician disclosure requirement for certain drugs as a permissible exercise of the state's police powers. 429 U.S. 589, 603–04 (1977). Some legal theorists, including noted First Amendment scholar Robert Post, suggest that the *Casey* Court may have signaled that state requirements compelling ideological speech are subject to strict scrutiny, but that the specific law at issue in *Casey* did not qualify for this category. See Post, *supra* note 33, at 946, 957 (exploring the meaning of *Casey*'s First Amendment analysis and noting that plainly ideological speech should never withstand the strict scrutiny commanded by the First Amendment). Under this reading of *Casey*, ultra-sound narration requirements could arguably fit within the ideological speech category warranting strict scrutiny, as they depart in significant respects from the *Casey* statute. *Id.* at 946, 956–57.

<sup>271</sup> See *Casey*, 505 U.S. at 882–83 (discussing the truthful, non-misleading nature of the Pennsylvania law's disclosure requirement in its due process analysis). Compare *EMW*, 920 F.3d at 429 (stating that, although the Supreme Court discussed the traditional, non-misleading standard in its undue burden analysis, it is still the relevant consideration for a First Amendment claim), *with id.* at 450 (Donald, J., dissenting) (relying on *Casey*'s structure to suggest that the *Casey* Court did not consider the truthful, non-misleading factor in its First Amendment analysis).

<sup>272</sup> See *EMW*, 920 F.3d at 452 (Donald, J., dissenting) (highlighting the absence of the truthful, non-misleading language from *NIFLA*—the most recent Supreme Court decision to address informed consent); see also *NIFLA*, 138 S. Ct. at 2361–78 (considering an informed consent law and neglecting to mention the law's truthful, non-misleading nature).

<sup>273</sup> See KROTOSZYNSKI, *supra* note 51, at 2–3 (discussing the Rehnquist Court's approach to First Amendment cases). Krotoszynski notes that the Rehnquist Court—the Supreme Court sitting at the time of *Casey*—generally favored doctrinal tests over ad hoc balancing because the categorical tests provided a rule-based, linear approach. *Id.* No such fixed test appeared in *Casey*'s brief First Amendment discussion, however. See 505 U.S. at 884. This suggests that the Court adopted a case-specific,

sence of any such indication is telling and, therefore, proceeding to apply the standard, in spite of an express intent, is ill-advised.<sup>274</sup> When lower courts rely on guesswork to fashion rigid tests for constitutional challenges, they jeopardize fundamental rights.<sup>275</sup>

The language within *Casey*'s First Amendment analysis also suggests that a universal test for informed consent is inappropriate.<sup>276</sup> The Court stated that it found no constitutional issue with the informed consent requirement "mandated by the State *here*."<sup>277</sup> This language does not suggest that it adopted a universal test for courts to assess subsequent compelled physician speech.<sup>278</sup>

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balancing approach and concluded that the informed consent provision at issue did not violate the First Amendment. See KROTOSZYNSKI, *supra* note 51, at 2–3.

<sup>274</sup> See KROTOSZYNSKI, *supra* note 51, at 176 (discussing lower courts' application of doctrinal tests). Krotoszynski contends that reliance of lower courts on categorical, rule-based tests often abrogates First Amendment rights. *Id.* By constraining judicial discretion, they may promote consistency; however, this ultimately comes at the expense of traditional First Amendment protections. *Id.* at 16. Radzinski states that the Roberts Court's hostility toward judicial discretion demonstrates that "[t]he ghost of Hugo Black [an avid proponent of judicial restraint] still haunts the pages of the U.S. Reports." *Id.* at 224 (emphasis omitted).

<sup>275</sup> See *id.* at 15–18 (exploring the continuing dissolution of First Amendment protections). Krotoszynski traces the modern evolution of how courts treat the First Amendment. *Id.* at 16. He notes that the Warren Court broadened First Amendment protections, albeit gradually, in many areas. *Id.* Notably, it expanded First Amendment protections for government employees. *Id.* The Burger Court, which succeeded the Warren Court, was more tentative in its First Amendment analysis, declining to follow or limiting some of the Warren Court's holdings. *Id.* The Rehnquist and Roberts Courts were more aggressive in their rebuke of the Warren-era expansions. *Id.* at 17. In addition to scaling back many of the protections the Warren Court established, these later Courts dispelled with the case-specific balancing test approach and replaced it with a more categorical approach. *Id.* This approach broadened First Amendment safeguards in some areas but it came at the expense of those protections offered to professionals. *Id.* at 15. The rigid doctrinal approach provides little room for judicial discretion. *Id.* at 17. Krotoszynski contends that a more case-specific approach reflects the need to balance legitimate government necessities with traditional First Amendment protections offered to private citizens. *Id.* at 226. This would stall the continued erosion of professionals' First Amendment rights. *Id.*

<sup>276</sup> See 505 U.S. at 884 (considering the First Amendment free speech rights of Pennsylvania physicians); *EMW*, 920 F.3d at 449 (Donald, J., dissenting) (interpreting *Casey*'s First Amendment analysis as solely relating to the specific statute at issue); *Wollschlaeger v. Governor*, 848 F.3d 1293, 1311 (11th Cir. 2017) (applying strict scrutiny to physician compelled speech after concluding that *Casey* did not hold that all physician compelled speech should receive rational basis review); *Stuart v. Camnitz*, 774 F.3d 238, 249 (4th Cir. 2014) (treating *Casey*'s First Amendment analysis as an individual determination, rather than a universal standard governing all compelled physician speech).

<sup>277</sup> See *Casey*, 505 U.S. at 884 (emphasis added) (concluding that the Pennsylvania disclosure statute did not violate physicians' First Amendment rights).

<sup>278</sup> See *EMW*, 920 F.3d at 449 (Donald, J., dissenting) (discussing the scope of *Casey*'s holding). Both the Eleventh and Fourth Circuits have interpreted *Casey* as applying a case-specific approach, rather than creating a categorical test. See *Wollschlaeger*, 848 F.3d at 1311 (considering a Florida law that banned doctors from inquiring into whether patients owned firearms, and noting that rational basis review was an inappropriate test for evaluating then infringement of fundamental rights, such as free speech); *Stuart*, 774 F.3d at 243, 249 (reviewing *Casey*'s First Amendment analysis and concluding that the Supreme Court "did not hold sweepingly that all regulation of speech in the medical context merely receives rational basis review").

Rather, it determined that the Pennsylvania statute at issue did not violate the U.S. Constitution in that specific instance.<sup>279</sup> Thus, *Casey* is a useful instrument for First Amendment analysis not because it provides a doctrinal test, but because it serves as a data point for comparison.<sup>280</sup>

If a regulation sufficiently resembles *Casey*, judicial deference requires upholding it against a First Amendment challenge.<sup>281</sup> But ultrasound narration laws depart in substantial respects from the informed consent regulation that the Supreme Court addressed in *Casey*.<sup>282</sup> The Pennsylvania statute in *Casey* required physicians to provide women seeking an abortion with information about how the abortion could be detrimental to the patient's health, the fetus's gestational age, and the availability of information regarding the fetus.<sup>283</sup> The regulation also provided that if the doctor thought it would have a severely adverse effect on the patient, the doctor could choose not to provide certain information.<sup>284</sup>

By contrast, ultrasound narration laws require doctors to display an image of the fetus, describe its features, and play the heartbeat for the patient to hear.<sup>285</sup> Because display and describe laws depart substantially from *Casey*,

<sup>279</sup> See *Casey*, 505 U.S. at 884 (holding that the Pennsylvania disclosure statute did not violate physicians' First Amendment rights).

<sup>280</sup> See *Nat'l Inst. of Family & Life Advocates v. Becerra (NIFLA)*, 138 S. Ct. 2361, 2373–74 (2018) (considering whether California's informed consent provision resembled *Casey*); *EMW*, 920 F.3d at 453–54 (Donald, J., dissenting) (stating that *Casey* and *NIFLA* provide useful points of comparisons for statutes that purportedly facilitate informed consent); *Stuart*, 774 F.3d at 252–53 (comparing ultrasound narration laws to the informed consent provision at issue in *Casey*, and finding that ultrasound narration laws were far more invasive).

<sup>281</sup> See *EMW*, 920 F.3d at 451 (Donald, J., dissenting) (noting that courts would be obligated to apply rational basis review if they were considering a fundamentally similar statute to the one before the *Casey* Court). The *Casey* Court considered an informed consent requirement that compelled doctors to disclose the risks of abortion and childbirth, the stage of fetal development, and alert the woman that printed materials were available that would provide more information about the fetus as well as childbirth resources. 505 U.S. at 881.

<sup>282</sup> See *EMW*, 920 F.3d at 451 (Donald, J., dissenting) (comparing the provisions at issue in *Casey* with those of Kentucky's ultrasound narration requirement). Judge Donald determined that the ultrasound narration requirement differed in significant respects, the variances of which she contended the majority had ignored. *Id.*

<sup>283</sup> See 505 U.S. at 881 (outlining Pennsylvania's informed consent requirements).

<sup>284</sup> *Id.* at 883–84. According to the *Casey* Court, this exception was important because it allowed physicians to exercise their professional judgment. *Id.* The Fourth Circuit likewise found the absence of this discretion, which it referred to as therapeutic privilege, to be a salient factor in determining whether a law facilitated informed consent. *Stuart*, 774 F.3d at 254. The lack of therapeutic privilege increased the likelihood that ultrasound narrations would cause harm, thereby undermining informed consent. *Id.*

<sup>285</sup> See KY. REV. STAT. ANN. § 311.727 (West 2020); N.C. GEN. STAT. § 90-2182 (2020); TEX. HEALTH & SAFETY CODE ANN. § 171.012 (West 2020). The Kentucky law offers an exception for medical emergencies, but only those that “require an immediate abortion.” KY. REV. STAT. ANN. § 311.727. This differs from the therapeutic privilege exception that the *Casey* Court found to be relevant. 505 U.S. at 904. The Pennsylvania law allowed physicians to exercise discretion if “he or she reasonably believed that furnishing the information would have resulted in a severely adverse effect

they are not materially identical statutes that bind subsequent courts.<sup>286</sup> Rather than fashioning a blanket test for informed consent, courts should defer to accepted medical standards of care in order to determine whether a regulation comports with informed consent, which ultrasound narrations fail to do.<sup>287</sup>

### *B. Ultrasound Narration Laws Do Not Facilitate Informed Consent*

It is necessary to acknowledge that some practitioners do believe that ultrasound narration regulations serve a vital role in facilitating informed consent.<sup>288</sup> But their reasoning for why these procedures must be mandatory—in effect disregarding patient preferences and removing physician discretion—is lacking.<sup>289</sup> Their opponents argue more compellingly that the mandatory nature of these laws contravenes physicians' ethical obligations and worse, endangers patients.<sup>290</sup>

The impropriety of ultrasound narration laws is evident when considering the three objectives that the informed consent doctrine strives to promote: respecting patient autonomy, practicing beneficence, and avoiding malfea-

on the physical or mental health of the patient.” 18 PA. CODE § 3205(c) (2020). Additionally, Pennsylvania's gestational age disclosure requirement was relevant because, in some instances, it affected which abortion method a doctor would apply. See Stephanie Watson, *What Are the Different Types of Abortion?*, HEALTHLINE (Dec. 6, 2018), <https://www.healthline.com/health/types-of-abortion#medical-abortion> [<https://perma.cc/PZN7-ULX3>] (exploring the different procedures used for abortion at various stages of the pregnancy). Additionally, although Pennsylvania doctors need only inform patients of the availability of information concerning adoption and other services, they are not required to express the state's ideological preference for childbirth. See 18 PA. CODE § 3205 (providing the requirements for informed consent under Pennsylvania law).

<sup>286</sup> See *EMW*, 920 F.3d at 453–54 (Donald, J., dissenting) (concluding that ultrasound narration laws materially differ from the informed consent provision at issue in *Casey*).

<sup>287</sup> See *id.* (urging the court to look to medical professionals for guidance, rather than substituting a rigid doctrinal test for physicians' expertise); KROTOSZYNSKI, *supra* note 51, at 193 (advocating for courts to protect the First Amendment and apply it with greater vigor instead of allowing the legislature to exploit private citizens as proxy speakers). Other constitutional scholars have criticized the Supreme Court's First Amendment jurisprudence in the abortion context. See Chemerinsky & Goodwin, *supra* note 24, at 111–23. Chemerinsky and Goodwin offer a harsh critique of the Roberts Court and what they consider to be its partisan-driven application of constitutional analysis, condemning the Supreme Court's sophistry in the abortion setting. *Id.* at 121. They argue that the Court adopts a result-driven approach and bends the law to fit its restrictive view of women's reproductive rights. *Id.* at 119. Chemerinsky and Goodwin refer to this inverted, outcome-before-analysis method as “constitutional gerrymandering.” *Id.* at 66.

<sup>288</sup> See Declaration, *supra* note 223, at 3, 5–6 (exploring how ultrasound narration laws promote informed consent). The primary rationale offered is that abortion is a uniquely serious decision that requires that all relevant information be disclosed. *Id.*

<sup>289</sup> See *id.* Though Dr. Baker discusses in detail why the regulations promote informed consent, he does not offer a rationale for why the disclosures must be mandatory. *Id.*

<sup>290</sup> See Brief for Amici Curiae American College of Obstetricians and Gynecologists, *supra* note 215, at 15 (exploring the drawbacks of mandatory ultrasound narration laws). Dr. Faden contends that the preferred standard of care considers patient preferences and allows the physician to exercise discretion. *Id.* Other medical professionals offer similar critiques. Nichols Declaration, *supra* note 229, at 5.



sance.<sup>291</sup> In the abortion context, ultrasound narration laws are at odds with the American Medical Association's Code of Medical Ethics.<sup>292</sup> The group urges physicians to communicate respectfully with patients and to tailor their disclosures to meet patient needs and individual preferences.<sup>293</sup>

Ultrasound narration requirements leave no room for physicians to consider individual preferences.<sup>294</sup> A physician must provide disclosures without regard for the context surrounding the pregnancy—be that rape, incest, or some other personal reason—and without considering the patient's motivation for terminating the pregnancy, such as genetic defects or the mother's health.<sup>295</sup> Traditional understandings of informed consent provide that if doctors convey the risks associated with a procedure and available alternatives to the intervention, then they have satisfied their moral and ethical obligations.<sup>296</sup>

<sup>291</sup> See *EMW*, 920 F.3d at 456 (Donald, J., dissenting) (discussing the dangerous nature of ultrasound narration laws); *Stuart v. Camnitz*, 774 F.3d 238, 238 (4th Cir. 2014) (determining that ultrasound narration laws, as formulated, would cause more harm than they would alleviate); see also Brief for Amici Curiae American College of Obstetricians and Gynecologists, *supra* note 215, at 4 (maintaining that display and describe laws undermine informed consent by disrespecting patients and their autonomy).

<sup>292</sup> See *AMA Code of Medical Ethics' Opinions on Informing Patients*, AMA J. ETHICS (July 14, 2012), <https://journalofethics.ama-assn.org/article/ama-code-medical-ethics-opinions-informing-patients/2012-07> [<https://perma.cc/T3F9-PNUB>] (outlining informed consent standards).

<sup>293</sup> See *id.* Generally, withholding relevant details from patients without their consent does not comport with best practices on informed consent. *Id.* The American Medical Association urges that doctors ask patients to clarify their wishes regarding communication and then accommodate these express wishes and preferences, as this accommodation is vital to promoting patient autonomy. *Id.*

<sup>294</sup> See Brief for Amici Curiae American College of Obstetricians and Gynecologists, *supra* note 215, at 19 (detailing how ultrasound narration laws fail to satisfy traditional notions of informed consent). Abortion is a unique medical procedure in that it bears profound religious and political significance for many women. Carmen Fishwick, *Why We Need to Talk About Abortion: Eight Women Share Their Experiences*, THE GUARDIAN (Oct. 9, 2015), <https://www.theguardian.com/world/2015/oct/09/why-we-need-to-talk-about-abortion-eight-women-share-their-experiences> [<https://perma.cc/MX5N-RZHT>]. Rigid informed consent laws discount this variance. See *id.*

<sup>295</sup> See generally KY. REV. STAT. ANN. § 311.727 (West 2020) (ignoring the circumstances surrounding the pregnancy); N.C. GEN. STAT. § 90-2182 (2020) (same); TEX. HEALTH & SAFETY CODE ANN. § 171.012 (West 2020) (same). Though women obtain abortions for a myriad of reasons, one study found that women rarely cited rape or incest as a reason for their abortion. See *Finer et al.*, *supra* note 5, at 110 (citing rape as the impetus for receiving an abortion in just 1% of cases, and incest in only 0.5% of cases). Women cited professional, educational, or financial difficulties that would accompany childbirth far more frequently. *Id.*

<sup>296</sup> See Brief for Amici Curiae American College of Obstetricians and Gynecologists, *supra* note 215, at 19 (exploring the drawbacks of mandatory ultrasound narration laws); Nichols Declaration, *supra* note 229, at 5 (outlining how ultrasound narration laws hinder informed consent and patient autonomy). Rather than informing patients, these regulations seek to persuade women. Corbin, *supra* note 43, at 1329. Their persuasive effect is amplified by the context in which the doctor's speech occurs. *Id.* Even though in its early stages the fetus bears very little similarity to a baby, the ultrasound image has profound symbolism. *Id.* at 1332. Patients do not simply see an anatomical picture—"the fetal image has the cultural force of a portrait." Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 379 (2008). Likewise, the heartbeat is synonymous with life. Corbin, *supra* note 43, at 1331. At the early stages of pregnancy—when

Respecting a patient's preferences not to provide information beyond this threshold better promotes patient autonomy.<sup>297</sup> Furthermore, ultrasound narration laws undercut physician autonomy by forcing the doctors to violate their profession's ethical standards.<sup>298</sup>

These laws also force doctors to ignore their obligations to practice beneficence and avoid harming their patients.<sup>299</sup> Though preventing women from enduring the psychological harm caused by regretting an abortion is a common justification for ultrasound narration laws, data suggests that this is a largely unfounded concern.<sup>300</sup> Instead, physicians attest that ultrasound narration laws

embryos begin having heartbeats—the fetus is “still less than half-an-inch long and weighs less than an aspirin.” *Id.* But states nevertheless want the patient to make an emotional connection to the fully formed life. *Id.* at 1332. Abortion opponents believe that it is more difficult for a woman to terminate the pregnancy if she sees the life-like features of that fetus than if she believes that the fetus is not yet a sentient being. *Id.*

<sup>297</sup> See Brief for Amici Curiae American College of Obstetricians and Gynecologists, *supra* note 215, at 19 (arguing that ultrasound narration laws undermine the fundamental goals of the medical profession).

<sup>298</sup> Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1269–70 (2016) (exploring the effects of reducing professional speech protections). Haupt theorizes that one of the greatest harms resulting from continued reduction of professionals' First Amendment rights is their depleted autonomy. *Id.* Autonomy in the professional context, Haupt contends, refers to an individual's ability to satisfy accepted professional standards. *Id.* Forcing physicians to deviate from these universal medical canons robs them of their autonomy and illegitimizes their work. Corbin, *supra* note 43, at 1299; Haupt, *supra*, at 1274.

<sup>299</sup> Anna Silman, *What It's Like to Endure a Forced Ultrasound Before Your Abortion*, THE CUT (Dec. 13, 2019), <https://www.thecut.com/2019/12/forced-ultrasound-abortion-what-its-like.html> [<https://perma.cc/Z7AL-QJWH>]. Jen Ferris's story highlights how traumatizing this experience can be. *Id.* At nineteen years old, Ferris became pregnant. *Id.* She did not seek an abortion for medical reasons. *Id.* Rather, she wanted to avoid becoming the third young mother in her family, like her mother and grandmother had been. *Id.* After braving a crowd of protestors to enter the clinic, staff immediately separated Ferris from her boyfriend. *Id.* Alone, she was forced to watch several videos about the abortion process. *Id.* Then she endured a narrated ultrasound. *Id.* Clinic workers displayed an ultrasound image of the fetus and described its human characteristics. *Id.* In a final act of humiliation, clinic workers blasted the fetus's heartbeat over speakers at an uncomfortable volume. *Id.* Ferris still remembers the painful experience and, reflecting on it years later, described the state as essentially being present in the operating room with her. *Id.*

<sup>300</sup> See Susan A. Cohen, *Still True: Abortion Does Not Increase Women's Risk of Mental Health Problems*, GUTTMACHER INST. (June 25, 2013), <https://www.guttmacher.org/gpr/2013/06/still-true-abortion-does-not-increase-womens-risk-mental-health-problems> [<https://perma.cc/QJE6-5428>] (discussing common misconceptions about the effects of abortion on patients' mental health). Cohen traces the origins of the theory that abortion can adversely affect patients' psychological health. *Id.* She begins by discussing Ronald Reagan's Surgeon General, C. Everett Koop, who served during the peak abortion years. *Id.* Despite being an ardent moral opponent of abortions, Koop refused to let his personal views cloud his professional judgment. *Id.* He noted that abortions were not physically dangerous. *Id.* As to patients' subsequent mental health, he said their effects were “miniscule from a public health perspective.” *Id.* This conclusion is backed by the weight of scientific evidence. *Id.* In 1989 the American Psychological Association (APA) performed an extensive study on the subject and found that abortions “[do] not pose a psychological hazard for most women.” *Id.* The APA conducted a subsequent study almost twenty years later and reached the same conclusion. *Id.* In 2008, researchers at Johns Hopkins, a leading public health institution, confirmed these findings. *Id.* The Johns Hop-

themselves cause patients substantial psychological distress.<sup>301</sup> Their rigid formulation and unbending application mean that, in practice, physicians must narrate the ultrasound to patients who may be sobbing, begging them to stop, or covering their eyes and ears.<sup>302</sup> The immediate harm that this causes to the patient is evident, however, there is also an indiscernible aggregate effect of such laws.<sup>303</sup> By treating patients' mental distress as a necessary consequence of promoting its pro-life agenda, the state effectively commandeers the doctor-patient relationship.<sup>304</sup> Beyond just sapping the individual patient's trust, such regulations undermine societal faith in the sanctity of that relationship.<sup>305</sup>

Perhaps the greatest indicator that ultrasound narration laws do not facilitate informed consent is their one-sided nature.<sup>306</sup> Conspicuously absent from the requirements is any mandated discussion of the unique dangers of giving

kins Bloomberg School of Public Health team noted that it was only those studies with the most questionable scientific approach that found this negative correlation. *Id.* The Academy of Medical Royal Colleges also confirmed that patients who received an abortion for an unwanted pregnancy were at no greater risk for subsequent mental health issues than those patients who had chosen childbirth. *Id.*

<sup>301</sup> See Nichols Declaration, *supra* note 229, at 5 (outlining how ultrasound narration laws hinder informed consent and patient autonomy). Carolyn Jones described in detail the trauma she suffered during an ultrasound narration. Declaration of Carolyn Jones, *supra* note 1, at 3. Jen Ferris's testimony shed similar light on the harmful effects of ultrasound narrations. See Silman, *supra* note 299.

<sup>302</sup> See Declaration of Carolyn Jones, *supra* note 1, at 3 (recalling how the physician performing the ultrasound had to continue to describe the fetus's healthy heartbeat in the face of Jones's inconsolable grief). In *Stuart*, the court noted that, in addition to aggravating patients' grief, the act of covering one's eyes or ears is humiliating. 774 F.3d 238, 253 (4th Cir. 2014).

<sup>303</sup> See Brief for Amici Curiae American College of Obstetricians and Gynecologists, *supra* note 215, at 19 (discussing the doctor-patient relationship). Reduced to its most fundamental level, the basic purpose of the doctor-patient relationship is to provide patients with relief from suffering. *Id.* at 5. Aggravating, rather than alleviating suffering, is wholly inconsistent with this fundamental tenet of the relationship. *Id.*

<sup>304</sup> See *id.* at 19. The American College of Gynecologists notes that physicians' primary owed duty in the abortion context is to the patient. *Id.* at 16. The inflexible nature of ultrasound narration laws runs wholly counter to this patient-centric approach. *Id.* at 16–17. It violates the sanctity of the doctor-patient relationship by supplanting patients' autonomy and physician discretion with state ideology. *Id.*

<sup>305</sup> *Id.* at 17. One Texas abortion provider, Dr. Jessica Rubino, condemned her state's "draconian" abortion regulations. Paige Alexandria, *'If I Don't Lie, It's Illegal': How Forced Counseling Affects Abortion Patients*, REWIRE NEWS GRP. (Feb. 19, 2020), <https://rewire.news/article/2020/02/19/if-i-dont-lie-its-illegal-how-forced-counseling-affects-abortion-patients/> [<https://perma.cc/QLP3-NRUZ>]. Dr. Rubino emphasized the conflicting obligations that such laws impose on physicians. *Id.* She asserted that, generally, "[w]hen you go to the doctor, you expect your physician to give you expert, sound medical advice." *Id.* Ideally, as Dr. Rubino noted, the same would be true regardless of what procedure a patient is seeking. *Id.* But according to Dr. Rubino, Texas legislators tailored the ultrasound narration and informed consent disclosures to mislead patients. *Id.* Dr. Rubino feels trapped by the ultrasound narration laws, stating: "If I don't lie, it's illegal. If I don't tell them the truth, I'm a bad doctor and committing malpractice—also illegal. It's a lose-lose [situation]." *Id.*

<sup>306</sup> See KY. REV. STAT. ANN. § 311.727 (West 2020) (providing the disclosures necessary for informed consent to abortion); N.C. GEN. STAT. § 90-2182 (2020) (same); TEX. HEALTH & SAFETY CODE ANN. § 171.012 (West 2020) (same).

birth in the United States.<sup>307</sup> America has the highest maternal mortality rate in the developed world.<sup>308</sup> And peak rates are concentrated in those states that aggressively restrict abortion.<sup>309</sup> Women living in poverty are more likely to seek abortions; but when these women do choose childbirth, they are at a greater risk of maternal mortality in comparison to their wealthier counterparts.<sup>310</sup>

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<sup>307</sup> See KY. REV. STAT. ANN. § 311.727; N.C. GEN. STAT. § 90-2182; TEX. HEALTH & SAFETY CODE ANN. § 171.012. Although these laws use visual and oral stimuli to emphasize the destructive nature of abortions, they only ask that doctors discuss with patients the risks of carrying pregnancies to term. See KY. REV. STAT. ANN. § 311.727 (providing the necessary disclosures that physicians must make before all abortions); N.C. GEN. STAT. § 90-2182 (same); TEX. HEALTH & SAFETY CODE ANN. § 171.012 (same). No statutes mandate that providers disclose the United States' uncommonly high maternal mortality rate. KY. REV. STAT. ANN. § 311.727; N.C. GEN. STAT. § 90-2182; TEX. HEALTH & SAFETY CODE ANN. § 171.012. If, as ultrasound narration supporters declare, fully informed consent requires disclosure of *all* relevant factual information, this information would be included. See Declaration of Dr. John Seeds, *supra* note 222, at 26 (“[F]ailure to disclose all relevant medical information is coercion by ignorance.”).

<sup>308</sup> See Nina Martin, *U.S. Has the Worst Rate of Maternal Deaths in the Developed World*, NPR (May 12, 2017), <https://www.npr.org/2017/05/12/528098789/u-s-has-the-worst-rate-of-maternal-deaths-in-the-developed-world> [<https://perma.cc/PP42-MNQW>] (ranking developed countries' maternal mortality rate). The United States has a maternal mortality rate (MMR) of 26.4 deaths per one hundred thousand births—more than double the next highest country, the United Kingdom. *Id.* The United Kingdom has an MMR of 9.2. *Id.* See Chemerinsky & Goodwin, *supra* note 24, at 76 (outlining the shockingly dismal state of childbirth in America). Chemerinsky and Goodwin contend that the United States is the most dangerous developed country for childbirth. *Id.*; see also U.S. “Most Dangerous” Place to Give Birth in Developed World, *USA Today Investigation Finds*, CBS NEWS (July 26, 2018), <https://www.cbsnews.com/news/us-most-dangerous-place-to-give-birth-in-developed-world-usa-today-investigation-finds/> [<https://perma.cc/38XN-QTX7>] (considering national maternal mortality rates, and concluding that each year about seven hundred women die during childbirth and another fifty thousand are severely injured). Similarly, infant mortality rates are startlingly high. See *Maternal Mortality Rate*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2223rank.html> [<https://perma.cc/M3TY-GHBN>] (comparing nations based on their maternal and infant mortality rates). As Chemerinsky and Goodwin emphasize, the United States' infant mortality rate is equal to that of Serbia, a country historically in flux and currently undergoing a democratic backslide. See Chemerinsky & Goodwin, *supra* note 24, at 75 n.79.

<sup>309</sup> See Chemerinsky & Goodwin, *supra* note 24, at 77 (outlining the dangers of restricting abortion or providing one-sided information in the abortion context). Texas, one of four states with an ultrasound narration law, is the most dangerous place to give birth in the United States. Sophie Novack, *Texas' Maternal Mortality Rate: Worst in Developed World, Shrugged Off by Lawmakers*, TEX. OBSERVER (June 5, 2017), <http://www.texasobserver.org/texas-worst-maternal-mortality-rate-developed-world-lawmakers-priorities/> [<https://perma.cc/8KUB-REJZ>] (considering Texas's doubling maternal mortality rate). Chemerinsky notes that Mississippi and Louisiana, two states that severely restrict abortions, are closely behind Texas. Chemerinsky & Goodwin, *supra* note 24, at 77–78.

<sup>310</sup> See Jenna Jerman et al., *Characteristics of U.S. Abortion Patients in 2014 and Changes Since 2008*, GUTTMACHER INST. (May 2016), <https://www.guttmacher.org/report/characteristics-us-abortion-patients-2014> [<https://perma.cc/MF44-L552>] (studying abortion trends at a national level). In 2014, about seventy-five percent of the patients who received abortions were poor. *Id.* Likewise, most women who die during childbirth fall below the poverty line. *Maternal Health in the United States*, MATERNAL HEALTH TASK FORCE, <https://www.mhtf.org/topics/maternal-health-in-the-united-states/> [<https://perma.cc/L6NT-5Y67>] (studying maternal mortality and determining that poor women were at a much greater risk of dying than wealthier women). Additionally, Black women are three to four times more likely to die in childbirth than white women. *Id.*

This reality leads to an unfortunate but unavoidable inference: more low-income women are likely to undergo the ultrasound narration process, a practice tailored to persuade them to choose childbirth, which carries risks of its own.<sup>311</sup> By shrouding true intentions behind the facade of informed consent, states manipulate patients into forgoing abortions—a markedly safe procedure—and neglect to inform them of the dangers of childbirth, thereby endangering them to further state ideology.<sup>312</sup>

### C. Why Ultrasound Narration Laws Fail to Survive Strict Scrutiny

Because these laws fail to facilitate informed consent, they do not fit within the *National Institute of Family and Life Advocates v. Becerra* (NIFLA)'s exception for speech incidentally burdened as part of regulating conduct.<sup>313</sup> Therefore, strict scrutiny is the appropriate standard by which courts must assess ultrasound narration regulations, which these regulations in turn fail to satisfy.<sup>314</sup>

In order to survive strict scrutiny, a law must further a compelling governmental interest and be narrowly tailored to achieve that interest.<sup>315</sup> States cite two goals that ultrasound narration laws purportedly serve.<sup>316</sup> First, legislators aim to reduce the likelihood that women will be uninformed and one day regret their decisions.<sup>317</sup> Second, they promote the state's goal of protecting fetal life.<sup>318</sup> Even conceding that these are compelling state interests, ultra-

<sup>311</sup> See Jerman et al., *supra* note 310 (studying abortion trends at a national level).

<sup>312</sup> See GOPAL K. SINGH, U.S. DEP'T OF HEALTH & HUM. SERVS., MATERNAL MORTALITY IN THE UNITED STATES, 1935-2007: SUBSTANTIAL RACIAL/ETHNIC, SOCIOECONOMIC, AND GEOGRAPHIC DISPARITIES PERSIST 1, 2 (2010) (studying maternal mortality rates in the United States and noting that, across races, higher poverty rates were correlated with higher maternal mortality rates). Abortion is fourteen times safer than childbirth. See Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215, 216 (2012) (studying the relative safety of abortion and childbirth). Undergoing an abortion is no more dangerous than receiving a shot of penicillin. Michele Goodwin & Erwin Chemerinsky, *Pregnancy, Poverty, and the State*, 127 YALE L.J. 1270, 1326 (2018).

<sup>313</sup> See 138 S. Ct. 2361, 2372 (2018) (providing the two exceptions to strict scrutiny); *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F. 3d 421, 453, 460 (6th Cir. 2019) (Donald, J., dissenting) (considering whether the law fit within NIFLA's two exceptions to strict scrutiny).

<sup>314</sup> See NIFLA, 138 S. Ct. at 2372 (noting that strict scrutiny applies to all compelled speech regardless of the setting, professional or otherwise).

<sup>315</sup> See *id.* (discussing the strict scrutiny standard).

<sup>316</sup> *EMW*, 920 F.3d at 433 (considering the two oft-cited goals of display and describe laws: promoting informed consent by reducing the likelihood that women will regret their abortions and protecting the fetal life).

<sup>317</sup> See *id.* at 430 (considering the state's interest in preventing psychological harm); Declaration, *supra* note 223, at 5 (noting that the permanent nature of abortions increases the likelihood that a patient may later regret the decision).

<sup>318</sup> See *EMW*, 920 F.3d at 430 (providing that the state has a separate interest in protecting fetal life).

sound narration laws cannot withstand strict scrutiny because they are not tailored to achieve those objectives.<sup>319</sup>

As to the first interest—preventing psychological harm—the rigid nature of ultrasound narration laws will in many cases *cause* emotional distress, as evidenced by Carolyn Jones’s experience.<sup>320</sup> Removing physician discretion means that doctors cannot exercise their judgment about what information they should convey to a vulnerable patient.<sup>321</sup> Regardless of the context, individualized care is a fundamental principle of American medicine.<sup>322</sup> Because the circumstances surrounding pregnancies and the reasons for which women seek abortions vary widely, it is even more inappropriate and dangerous to treat patients uniformly.<sup>323</sup> Ultrasound narration requirements deprive patients of this entitlement to individualized care and will subject some women to trauma, all to promote the states’ ideological viewpoint with respect to childbirth.<sup>324</sup> As to the second objective—protecting fetal life—few women end up changing their minds after receiving ultrasounds, meaning that the law fails to promote states’ goals of promoting childbirth, and instead burdens patients and physicians alike.<sup>325</sup>

There are far more humane and proper ways for states to express their preference for childbirth, methods that do not require coercing vulnerable patients and exploiting captive listeners.<sup>326</sup> If states want to continue this practice

<sup>319</sup> See *id.* at 449 (Donald, J., dissenting) (concluding that strict scrutiny should apply and noting that the law failed to satisfy its demanding inquiry).

<sup>320</sup> See Silman, *supra* note 299 (noting that the worst part of her abortion experience, which included facing anti-abortion protestors outside the clinic, was the narrated ultrasound experience); Declaration of Carolyn Jones, *supra* note 1, at 3 (highlighting the torturous ultrasound narration proceeding).

<sup>321</sup> See Nichols Declaration, *supra* note 229, at 11 (outlining how ultrasound narration laws hinder informed consent and patient autonomy). Dr. Nichols emphasizes that professional standards of care mandate that patients, regardless of the context, be treated as capable decision-makers. *Id.* at 6. Physicians must be able to exercise discretion that reflects their professional judgment and the patient’s express preferences in order to provide patients with relevant information. *Id.* at 11.

<sup>322</sup> See *EMW*, 920 F.3d at 460 (concluding that the law failed to meet strict scrutiny due to its harmful effects and negligible benefits); Nichols Declaration, *supra* note 229, at 5 (discussing the importance of providing individualized care in the abortion context).

<sup>323</sup> Compare Declaration of Carolyn Jones, *supra* note 1, at 3 (seeking an abortion due to pregnancy complications that would injure the child), with Silman, *supra* note 299 (obtaining an abortion because the mother was too young to raise a child).

<sup>324</sup> See *Stuart v. Camnitz*, 774 F.3d 238, 251 (4th Cir. 2014) (holding that ultrasound narration laws failed to survive even intermediate scrutiny). The *Stuart* court noted that states have a substantial interest in maintaining the medical profession’s integrity, and ultrasound narration laws undermine this goal. *Id.* at 254.

<sup>325</sup> See Eliana Dockterman, *Will Looking at an Ultrasound Before an Abortion Change Your Mind?*, TIME (Jan. 9, 2014), <https://time.com/469/will-looking-at-an-ultrasound-before-an-abortion-change-your-mind/> [<https://perma.cc/B5KU-PVNM>] (discussing a study published in a renowned medical journal that showed the insignificant impact ultrasounds have on the abortion decision).

<sup>326</sup> See Jessica Arons & Shira Saperstein, *The Right Way to Reduce Abortion*, CTR. FOR AM. PROGRESS (Jan. 20, 2006), <https://www.americanprogress.org/issues/women/news/2006/01/20/1796/the->

without infringing upon physicians' First Amendment rights, an appropriate balance could be struck by requiring physicians to ask patients if they want to hear this information.<sup>327</sup> In doing so, states would promote patient autonomy and individualized care, without subjecting disinterested patients to this experience or conscripting physicians to impress unwanted information on these patients.<sup>328</sup>

### CONCLUSION

In sum, the Fifth and Sixth Circuits understand *Casey* as providing a categorical test for reviewing informed consent provisions under the First Amendment. This interpretation blends due process and free speech analyses and, in effect, sacrifices the latter fundamental right so that the undue burden analysis can apply to all abortion challenges. The more prudent approach involves deferring to the traditional medical understanding of informed consent when analyzing First Amendment challenges to compelled physician speech. This would allow legislation promoting public health to receive lower judicial scrutiny, while reserving strict scrutiny for laws that exploit the doctor-patient relationship in an attempt to further states' ideological agendas.

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right-way-to-reduce-abortion/ [https://perma.cc/5U9P-E7J7] (arguing that the correct way to promote childbirth is to increase insurance coverage and public funding so that women have access to better care, and to allocate funds to provide young mothers with educational and employment opportunities after giving birth); *AMA Code of Medical Ethics' Opinions on Informing Patients*, *supra* note 292 (explaining that informed consent requires disclosing all pertinent information, while accommodating patients' express preferences to decide what information is relevant and necessary to convey).

<sup>327</sup> See Brief for Amici Curiae American College of Obstetricians and Gynecologists, *supra* note 215, at 19 (discussing the negative consequences resulting from the mandatory nature of ultrasound narration laws). A more flexible approach that afforded physicians the discretion to accommodate patient preferences would be more consistent with informed consent standards. *Id.*

<sup>328</sup> See Nichols Declaration, *supra* note 229, at 7 (arguing that informed consent should be flexible and "highly individualized," thereby promoting physician discretion and patient autonomy).