NOTE

REIMAGINING *NIFLA V. BECERRA*: ABORTION-PROTECTIVE IMPLICATIONS FOR FIRST AMENDMENT CHALLENGES TO INFORMED CONSENT REQUIREMENTS

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ABSTRACT

The Supreme Court's 2018 decision in NIFLA v. Becerra *struck down a California law requiring Crisis Pregnancy Centers to post notices informing visitors of the reproductive healthcare services made available by the State of California, including abortions. While the statute was aimed at combating deceptive practices at Crisis Pregnancy Centers, the Court held that the notices were impermissible forms of compelled content-based speech and thus in violation of the First Amendment. The decision is widely seen as a victory for the conservative right. While progressives have feared* NIFLA *will usher in an era of further restrictions on the regulatory state in favor both of unfettered commercial interests and of anti-abortion political agenda, the decision may prove to be a pyrrhic victory for the right. This Note argues that, despite the Court's unveiled effort to cabin the speech-protective implications to commercial speech—and not forms of professional speech—*NIFLA*'s strained decision outlines a path toward heightened scrutiny for evaluating physicians' First Amendment challenges to suspect pre-abortion informed consent regulations.* NIFLA *can serve to unify the interrelated but distinct legal treatment of limited First Amendment protections in commercial speech and informed consent and, in doing so, etches a path for applying heightened scrutiny to pre-abortion informed consent regulations that may place more than an incidental burden on speech. Ultimately, this Note argues that* NIFLA *supports an independent First Amendment review of pre-abortion disclosure laws, separate in doctrine and analysis from Fourteenth Amendment challenges, and proposes a framework for courts to analyze physicians' First Amendment*

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claims. By disentangling the two doctrines and focusing on the discrete rights and interests at play in each, First Amendment challenges can serve as independent grounds for invaliding pre-abortion disclosure laws, even if a court finds that the same laws do not place an undue burden on access to abortion under the Fourteenth Amendment.

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INTRODUCTION

The Supreme Court's landmark ruling in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[1] had a seismic impact on the legal landscape across an array of abortion-related issues.[2] However, the implications of the plurality decision remain unsettled in a less discussed area: First Amendment claims by medical professionals challenging compelled speech in the form of state-mandated, pre-abortion disclosures. Subsequent appellate decisions illustrate conflicting interpretations regarding whether and how *Casey* provides a doctrinal framework for evaluating First Amendment challenges to state laws that compel speech in an effort to discourage abortion.[3] Underpinning this constitutional question is the Court's treatment of two distinct yet interrelated exceptions to applying heightened scrutiny when evaluating state regulations restricting (or compelling) content-based commercial speech and licensed-professional speech.[4] Compelled disclosures for commercial advertising and by medical professionals obtaining informed consent are subject only to rational basis review as part of the State's police power. The exact boundaries and qualifying standards for these exceptions to heightened scrutiny, however, are fluid and still evolving. As courts remained conflicted and generally skeptical of First Amendment claims by abortion providers in the years following *Casey*, anti-abortion politicians and advocates have seized upon informed consent regulations as a powerful mechanism to discourage abortion.[5]

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[1] 505 U.S. 833 (1992) (plurality opinion).

[2] *See* Caitlin E. Borgmann, *Abortion Exceptionalism and Undue Burden Preemption*, 71 WASH. & LEE L. REV. 1047, 1054-56 (2014).

[3] *See, e.g.*, Stuart v. Camnitz, 774 F.3d 238, 242 (4th Cir. 2014) ("At issue here is a North Carolina statute that requires physicians to perform an ultrasound, display the sonogram, and describe the fetus to women seeking abortions."); Planned Parenthood Minn., N.D., S.D. v. Rounds, 686 F.3d 889, 892 (8th Cir. 2012) (en banc) ("In June 2005, Planned Parenthood sued to prevent the Act from taking effect, contending that several of its provisions constituted an undue burden on abortion rights and facially violated patients' and physicians' free speech rights, while other provisions were unconstitutionally vague."); Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 573 (5th Cir. 2012) ("The amendments challenged here . . . require the physician 'who is to perform an abortion' to perform and display a sonogram of the fetus, make audible the heart auscultation of the fetus for the woman to hear, and explain to her the results of each procedure and to wait 24 hours, in most cases, between these disclosures and performing the abortion.").

[4] The Court in *NIFLA v. Becerra*, 138 S. Ct. 2361, 2372 (2018), eliminated the categorical exception for professional speech, taking issue with the contention that it ever existed. Although this denial of a categorical exception seems splashy, it is unlikely to have a major impact on the doctrine. *See* Claudia E. Haupt, *The Limits of Professional Speech*, 128 YALE L.J.F. 185, 188-89 (2018).

[5] *See* Rebecca Dresser, *From Double Standard to Double Bind: Informed Choice in Abortion Law*, 76 GEO. WASH. L. REV. 1599, 1609 (2008) ("After *Casey* affirmed that states could require physicians to supply pregnant women with material designed to discourage abortion as a means of ensuring that women's choices were 'mature and informed,' state

As of September 2019, eighteen states have enacted legislation—under the banner of informed consent—compelling abortion providers to inform women seeking abortions about at least one of the following: the purported link between abortion and breast cancer (five states), the ability of the fetus to experience pain (thirteen states), or the long-term mental health effects of obtaining an abortion (eight states).[6]

Against this backdrop of unsettled law on compelled speech and the politicization of informed consent disclosures, the recent 2018 Supreme Court decision in *National Institute of Family and Life Advocates (*NIFLA*) v. Becerra*[7] struck down a California law mandating disclosures by Crisis Pregnancy Centers ("CPCs")[8] as an unconstitutional restriction of the CPCs' First Amendment rights.[9] In an ironic manifestation of the convoluted legal landscape where free-speech principles and abortion regulation intersect, anti-abortion advocates found themselves opposing (successfully) state-mandated compelled speech as a violation of their speech rights just as those same activists argued (again, largely successfully) against a similar First Amendment argument when it was marshalled by abortion physicians to oppose anti-abortion motivated pre-abortion disclosure requirements.[10] While the former challenge involves

legislatures moved to do just that."); Amanda McMurray Roe, Note, *Not-So-Informed Consent: Using the Doctor-Patient Relationship to Promote State-Supported Outcomes*, 60 CASE W. RES. L. REV. 205, 206 (2009) ("Instead of promoting autonomous choice, [informed consent statutes] mandate that doctors provide particular disclosures about certain procedures."); Kali Ann Trahanas, Comment, *How the Undue Burden Standard Is Eroding Informed Consent*, 10 SETON HALL CIR. REV. 231, 232 (2013) (asserting that some informed consent statutes require disclosure of "one-sided moral and political information, as opposed to the objective medical information of which these statutes are rightly and typically comprised").

[6] *See An Overview of Abortion Laws*, GUTTMACHER INST., www.guttmacher.org/state-policy/explore/overview-abortion-laws [https://perma.cc/65EA-5EBF] (last updated Feb. 1, 2020).

[7] 138 S. Ct. 2361 (2018).

[8] Crisis pregnancy centers are nonprofit, often faith-based evangelical Christian organizations designed to dissuade pregnant women with unwanted or crisis pregnancies from obtaining abortions by obscuring their pro-life objective. *See* Daniel J. Faria, Note, *Advertising for Life: CPC Posting Laws and the Case of Baltimore City Ordinance 09-252*, 45 COLUM. J.L. & SOC. PROBS. 379, 384-85 (2012). For example, NARAL Pro-Choice America has reported that CPCs list themselves in phonebooks and online under "abortion" and "abortion services," "direct staff members to refrain from letting callers know that they will not receive access to contraception or referrals to abortion providers," locate themselves near abortion clinics and deliberately operate under names similar to those abortion clinics. *Id.* "NARAL argues that the purpose of such methods is to attract women to CPCs before they are aware that abortion counseling or contraception will not be provided." *Id.* at 385.

[9] *NIFLA*, 138 S. Ct. at 2370.

[10] *See* Leading Case, *National Institute of Family & Life Advocates v. Becerra*, 132 HARV. L. REV. 347, 356 (2018) ("Because abortion as a topic is inherently controversial, the

compelled commercial speech and the latter challenge involves compelled physician speech, both implicate First Amendment doctrine with undeniably similar and arguably intersecting foundations.

Scholarly writing on *NIFLA* has focused on its potential implications for curtailing governmental regulation of compelled commercial speech.[11] Specifically, consensus presents *NIFLA* as narrowing the compelled commercial speech exception established in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*[12] with its analysis of controversiality as a key factor in necessitating heightened scrutiny of regulatory compelled speech.[13] Two main thrusts of the academic writing predicting the impact of *NIFLA* involve discussions of its potential deregulatory impact on commercial enterprises and its utility as legal fodder for the continued weaponization of First Amendment claims by religious and socially conservative groups aimed at furthering their political agenda.[14]

NIFLA also significantly impacts the contested boundaries and doctrinal integrity of professional speech as an exception to robust First Amendment

government can never compel disclosures outside of the actual procedure, so it can regulate only abortion providers and not anti-choice health care providers.").

[11] *See, e.g.*, Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering Against Abortion Rights:* NIFLA v. Becerra, 94 N.Y.U. L. REV. 61, 66 (2019) ("*NIFLA v. Becerra* is only secondarily about speech. . . . The Court ignored legal precedent, failed to weigh the interests at stake in its decision, and applied a more demanding standard based on content of speech."); Tyler Rauh, Note, *Regulating Sugar-Sweetened Beverages*, 27 U. MIAMI BUS. L. REV. 269, 292-94 (2019) (analyzing impact of *NIFLA* on soda regulations); Cory L. Andrews, *The Dog that Didn't Bark in the Night: SCOTUS's* NIFLA v. Becerra *and the Future of Commercial Speech*, FORBES (July 5, 2018, 11:02 AM), https://www.forbes.com/sites/wlf/2018/07/05/the-dog-that-didnt-bark-in-the-night-scotuss-nifla-v-becerra-and-the-future-of-commercial-speech/ [https://perma.cc/NK4J-JJM3].

[12] 471 U.S. 626 (1985).

[13] *See* Lauren Fowler, Note, *The "Uncontroversial" Controversy in Compelled Commercial Speech*, 87 FORDHAM L. REV. 1651, 1651 (2019) ("[T]he Court's position in *NIFLA* poses a significant obstacle to government efforts to protect public health and ignores *Zauderer*'s firm grounding in listeners' informational interests."); Leading Case, *supra* note 10, at 352-53 ("[T]he *Zauderer* standard has generated significant confusion and extensive analysis. . . . [Scholars] have seized on the word 'uncontroversial,' some arguing that it should refer to the possibility of disagreement over a compelled disclosure's truth, and some supporting heightened judicial scrutiny of compelled factual disclosures when the context or relevance of the disclosure is controversial." (footnote omitted)).

[14] *See* Leading Case, *supra* note 10, at 351 ("Taken as written, *NIFLA* represents a dramatic expansion of the scope of First Amendment protection for commercial speech that threatens the entire foundation of a broad range of consumer protections."); *see also* Chemerinsky & Goodwin, *supra* note 11, at 67 ("It is impossible to understand the Court's decision in NIFLA v. Becerra except as a reflection of the conservative Justices' hostility to abortion rights and their indifference to the rights and interests of women, especially poor women."); Brendan Williams, NIFLA v. Becerra*: Abortion Speech Only as Free as the Supreme Court Wants It to Be*, 13 CHARLESTON L. REV. 89, 92 (2018).

protection. Limited scholarship has focused on this topic, and scholars that do address it emphasize a narrow view of the ruling's future application, suggesting that professional speech will remain a salient and relevant category of less protected speech even in the wake of *NIFLA*.[15] Focusing on the link between compelled speech and abortion, scholars have discussed the analytical contradictions and inconsistencies in the contrasting treatment of the First Amendment rights of physicians providing abortions and of the CPC staff discouraging abortions.[16] These scholars reject the integrity of the decision and view *NIFLA* as a harbinger of a period in which a politicized Court will act with undisciplined hostility toward questions of abortion access and reproductive liberty.[17]

Existing legal scholarship does not analyze *NIFLA* within the framework of First Amendment doctrine at the intersection of abortion and compelled speech in order to understand the potential abortion-protective implications of this abortion-restrictive decision.[18] This Note attempts to do just that and, in the process, to develop a doctrinal framework for evaluating First Amendment challenges to pre-abortion disclosure requirements by mapping the critical points of intersection and divergence between *Casey* and *NIFLA* and, more

[15] *See, e.g.*, Haupt, *supra* note 4, at 186; Robert McNamara & Paul Sherman, NIFLA v. Becerra*: A Seismic Decision Protecting Occupational Speech*, 2017 CATO SUP. CT. REV. 197, 197 (2017-2018).

[16] *See, e.g.*, Chemerinsky & Goodwin, *supra* note 11, at 61 (noting inconsistency between *NIFLA* ruling and prior Supreme Court decisions allowing compelled physician speech that discouraged abortions); Helen Norton, Essay, *Pregnancy and the First Amendment*, 87 FORDHAM L. REV. 2417, 2429 n.72 (2019) ("This Essay explains why, from a listener's perspective, *Casey* and *NIFLA* cannot both be right."); Williams, *supra* note 14, at 89-95; Leading Case, *supra* note 10, at 355 ("If the Court did not intend *NIFLA* to signal the defeat of all commercial disclosure requirements, then the rationales underlying the decision seem intended to justify differential treatment of abortion opponents and reproductive rights supporters.").

[17] *See* Chemerinsky & Goodwin, *supra* note 11, at 61 (noting current Supreme Court's hostility toward abortion).

[18] At least one other commentator has argued that *NIFLA* sets out a framework for First Amendment protection of physician speech in the abortion context through necessitating a method for determining whether informed consent statutes are legitimate and thus exempted from heightened scrutiny. *See generally* Thea Raymond-Sidel, Note, *I Saw the Sign:* NIFLA v. Becerra *and Informed Consent to Abortion*, 119 COLUM. L. REV. 2279 (2019).

However, this Note is the first to argue that *NIFLA* implicitly ties compelled commercial speech principles to informed consent requirements, thus necessarily attaching limitations to the scope of legitimate informed consent, establishing a path for adopting a test from commercial speech doctrine that is deeply rooted in First Amendment compelled commercial speech principles. Furthermore, this Note is the first to disentangle the Court's treatment of challenges to abortion regulations by women under the Fourteenth Amendment based on their right to bodily autonomy and by physicians under the First Amendment based on their speech rights, and to analyze the seepage of the undue burden standard into courts' analysis of First Amendment claims against pre-abortion disclosure regulations.

broadly, the regulation of informed consent and compelled commercial speech. Part I provides background on the doctrinal history of First Amendment protections against content-based compelled speech. Specifically, it discusses two exceptions to the heightened-scrutiny standard of government-compelled professional speech that warrant only deferential rational basis review: commercial speech and informed consent. Part II extends this two-part analysis into the current legal landscape, addressing first how appellate courts remain split on the implications of *Casey* on physicians' First Amendment protections against compelled disclosures and turning second to *NIFLA* and its significant narrowing of the State's powers to restrict commercial speech through disclosure requirements. Part III bridges the worlds of CPCs and abortion clinics by arguing that *NIFLA* can serve to unify the interrelated but distinct legal treatment of limited First Amendment protections in commercial speech and informed consent. In doing so, *NIFLA* etches a path for applying heightened scrutiny to informed consent regulations that may place more than an incidental burden on speech. Ultimately, this Note argues that *NIFLA* supports an independent First Amendment analysis of pre-abortion disclosure laws, separate in doctrine and analysis from Fourteenth Amendment challenges, and proposes a framework for courts to analyze physicians' First Amendment claims. By disentangling the two doctrines and focusing on the discrete rights and interests at play in each, First Amendment challenges can serve as independent grounds for invalidating pre-abortion disclosure laws, even if the same laws are found not to unduly burden access to abortion under the Fourteenth Amendment.

I. COMPELLED SPEECH DOCTRINE AND INFORMED CONSENT

A. *Compelled Commercial Speech:* Zauderer *and the Evolving Scope of First Amendment Protections for Compelled Commercial Speech*

Commercial speech was first afforded First Amendment protection in the 1976 Supreme Court decision *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[19] which reversed the longstanding precedent that commercial advertising received no constitutional protection.[20] Even after recognizing commercial speech as deserving of some First Amendment protections, the Court's free speech considerations were extremely limited and "commensurate with [commercial speech's] subordinate position in the scale of First Amendment values."[21] Thus, the Supreme Court applied a lower level of

[19] 425 U.S. 748 (1976).

[20] *Id.* at 770 (holding that Virginia statute prohibiting pharmacists from advertising prices of their drugs was in violation of consumers' constitutionally protected right under First Amendment to free flow of information); *see also* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 2 (2000) ("[Commercial speech remains] a notoriously unstable and contentious domain of First Amendment jurisprudence.").

[21] Robert Post, *Compelled Commercial Speech*, 117 W. VA. L. REV. 867, 872 (2015); *see also* Bd. of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989).

scrutiny to commercial speech, validating and upholding "modes of regulation that might be impermissible in the realm of noncommercial expression."[22] The Court further refined its approach to commercial speech in 1980 with its decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission*.[23] *Central Hudson* established intermediate scrutiny as the standard for evaluating constitutional challenges to commercial speech regulations.[24] *Central Hudson* also confused the doctrine by introducing a four-prong test for evaluating whether commercial speech should be subjected to intermediate scrutiny, which scholars criticize as "so vague and abstract as to fail entirely to express any specific constitutional values."[25]

In *Central Hudson* and its progeny, the Court presents commercial speech as distinct from traditional First Amendment doctrine because its direct constitutional value is derived from the consumer or listener rather than the speaker.[26] This distinction has important implications on the limits of its protection. First, unlike most content-based speech, the First Amendment protection for commercial speech does not extend to untruthful or misleading information because commercial speech is only constitutionally relevant insofar as it conveys valuable information to the consumer and thus "false or misleading commercial speech simply d[oes] not fall within that category."[27] Second, compelled commercial speech is not always subjected to the same heightened scrutiny as prohibited commercial speech because "[r]egulations that force a speaker to disgorge *more* information to an audience do not contradict the constitutional purpose of commercial speech doctrine" to protect against deceitful practices.[28] The Supreme Court further developed this exception to

[22] *Fox*, 492 U.S. at 477 (quoting Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978)).

[23] 447 U.S. 557 (1980).

[24] *Id.* at 566 ("At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.").

[25] Post, *supra* note 20, at 5. The *Central Hudson* test requires the government to affirmatively prove that (1) the restriction relates to lawful activity and is not misleading, (2) the asserted government interest is substantial, (3) the restriction advances the asserted interest, and that (4) the restriction is not more extensive than necessary to serve it. *Central Hudson*, 447 U.S. at 564; *see* Post, *supra* note 21, at 881 ("The difficulty with the *Central Hudson* test is that it offers little guidance about how a court should apply its last three prongs.").

[26] *Central Hudson*, 436 U.S. at 563-64.

[27] Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 782 (1999).

[28] Post, *supra* note 21, at 877 ("For purposes of First Amendment doctrine, there is a constitutional symmetry between restrictions on public discourse and compulsions to

compelled commercial speech doctrine in *Zauderer*.[29] In holding that a requirement that attorney advertising include fee information was constitutional, the Court branched away from the *Central Hudson* standard to establish a test directed specifically at compelled commercial disclosures.[30] The *Zauderer* test expanded the regulatory powers of the State to restrict commercial speech by applying rational basis review to compelled disclosures that are "purely factual and uncontroversial," not unduly burdensome, and reasonably related to the goods or services.[31] While the Court has struggled at times to determine when and how the more lenient *Zauderer* test excepts compelled commercial speech from heightened scrutiny,[32] several subsequent decisions apply *Zauderer* to validate commercial speech regulations by subjecting free speech claims to deferential rational basis review.[33]

Virginia State Board of Pharmacy and *Central Hudson* affirmed the application of First Amendment doctrine to commercial speech while still excluding it from traditionally broad free speech protections. *Zauderer* extended this exclusion from broad protection by establishing a path for rational basis review of compelled commercial speech—a concept anathema to almost all First Amendment legal thinking. However, *Zauderer*'s reign has weakened in the past decade, as courts have shifted toward limiting the scope of this exclusion by

participate in public discourse. But this symmetry does not exist within the domain of commercial speech.").

[29] Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 629 (1985).

[30] *See* Post, *supra* note 21, at 882 ("*Zauderer* consciously repudiated the *Central Hudson* test in the context of compelled commercial speech.").

[31] *Zauderer*, 471 U.S. at 650-51 (holding that State "ha[d] only required [commercial actors] to provide somewhat more information than they might otherwise be inclined to present," and thus "advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers" and they are not "unjustified or unduly burdensome").

[32] *See, e.g.*, Sorrell v. IMS Health Inc., 564 U.S. 552, 557 (2011) (finding that Vermont statute prohibiting pharmacies from selling, using, or disclosing identifying information about physician proscribing practices without physician's consent was subject to heightened scrutiny as content- and speaker-based restriction on speech, and holding that law violated First Amendment).

[33] *See, e.g.*, Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 23 (D.C. Cir. 2014) (en banc) ("In applying *Zauderer*, we first must assess the adequacy of the interest motivating the country-of-origin labeling scheme."); N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114, 118 (2d Cir. 2009) ("[T]he First Amendment is not violated, where as here, the law in question mandates a simple factual disclosure of caloric information and is reasonably related to New York City's goals of combating obesity."); Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 316 (1st Cir. 2005) ("This is a test akin to the general rational basis test governing all government regulations under the Due Process Clause. The test is so obviously met in this case as to make elaboration pointless."); CTIA—The Wireless Ass'n v. City of Berkeley, 139 F. Supp. 3d 1048, 1069-70 (N.D. Cal. 2015) (applying rational basis test).

interpreting the "non-controversial and factual" prongs of the *Zauderer* test more stringently.[34]

> [I]n reaction to the trend of greater deference to commercial actors—a number of courts either have relied on the hitherto relatively unused requirement that a disclosure be factual and uncontroversial to strike down regulations or have excluded otherwise-permissible disclosures from *Zauderer*'s scope because they encroached too significantly on a commercial actor's ability to speak.[35]

This judicial chord reaches a crescendo in *NIFLA*.[36]

B. *Speech in the Context of State-Regulated Professions: Physician Speech, Informed Consent, and Abortion*

Similar to commercial speech, speech uttered by professionals in the context of practicing their licensed professions exists on a continuum of First Amendment protection.[37] States, through their police powers, have the authority to regulate certain forms of professional speech—using mechanisms like licensing requirements and informed consent laws—to ensure that "clients and patients . . . receive accurate, comprehensive, and reliable advice in accordance with the insights of the relevant knowledge community."[38] Medicine is subject

[34] *See* Dayna B. Royal, *The Skinny on the Federal Menu-Labeling Law & Why It Should Survive a First Amendment Challenge*, 10 FIRST AMEND. L. REV. 140, 184-89 (2011); Note, *Repackaging* Zauderer, 130 HARV. L. REV. 972, 984 (2017) (noting courts' increased reliance on "controversial and factual" prongs to question constitutionality of disclosures).

[35] Note, *supra* note 34, at 984 (footnotes omitted).

[36] *See infra* Section II.B.

[37] Here I refer to speech in the practice of a profession, not speech by professionals. Professor Robert Post explains that "[t]he difference between professional speech and speech by a professional is constitutionally profound," because "[w]hen a physician speaks to the public, his opinions cannot be censored and suppressed, even if they are at odds with preponderant opinion within the medical establishment." Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 949. However, "when a physician speaks to a patient in the course of medical treatment, his opinions are normally regulated on the theory that they are inseparable from the practice of medicine." *Id.*; *see also* Halberstam, *supra* note 27, at 843 ("The threshold determination for enforcement of professional norms will therefore be whether the speech is uttered in the course of professional practice and not merely whether the speech was uttered by a professional.").

[38] Haupt, *supra* note 4, at 190. This concept of professional speech is particularly relevant in fields where there is knowledge asymmetry, such as between doctors and patients. *See id.* (noting that rationale behind licensing standards aligns with patients' interests in speaking to qualified professionals).

to reasonable regulation by the State, and thus, First Amendment challenges to informed consent regulations typically face rational basis review.[39]

Like commercial speech, the narrower free speech protections are rooted in the distinct philosophic value of the speech in question.[40] First Amendment scholar Robert Post argues that because "in the context of medical practice we insist upon competence, not debate," traditional values underpinning First Amendment protections carry little weight.[41] Rather than welcome disparate opinions, in the examination room "[w]e closely monitor the messages conveyed by professional speech, and we sanction viewpoints that are false when measured by the 'knowledge . . . ordinarily possessed and exercised by physicians in good standing.'"[42] As he points out, doctors are routinely held liable in malpractice actions for speaking or failing to speak.[43] Furthermore, compelled disclosures to achieve informed consent are widely required for the proper practice of medicine.[44] The tort doctrine of informed consent is centered on an affirmative requirement that doctors disclose material risks to patients prior to obtaining consent for treatment.[45] Courts have consistently and without difficulty affirmed informed consent requirements as "the legal recognition of the medical patient's protectible interest in autonomous decisionmaking."[46] Compelled disclosures, therefore, are legitimate regulatory restrictions imposed by the State in its oversight of medical practice insofar as they function legitimately and appropriately within the accepted practice of obtaining informed consent.

Physicians do not have a First Amendment claim against an accurate and relevant compelled disclosure merely because they disagree with the medical

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[39] *See* Barsky v. Bd. of Regents, 347 U.S. 442, 449 (1954) (holding that state has broad discretion over establishing and enforcing professional standards for practice of medicine and all professions concerned with health).

[40] *See* Post, s*upra* note 37, at 950 (noting that medical professional speech is subject to different regulatory framework and rationale than other professional speech).

[41] *See id.*

[42] *See id.* (omission in original) (quoting Larsen v. Yelle, 246 N.W.2d 841, 844 (Minn. 1976)).

[43] *See id.* at 950-51.

[44] *See id.* at 950.

[45] *See* Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1288 (2014) ("Standard informed consent requirements are neutral as to what decision the patient makes. They are designed to ensure that patients understand the proposed procedure, its physical risks and benefits, and the risks and benefits of the alternatives."); Ian Vandewalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics*, 19 MICH. J. GENDER & L. 1, 5 (2012) ("The key element of informed consent is that the doctor must disclose material risks to the patient.").

[46] *See, e.g.*, Arato v. Averdon, 858 P.2d 598, 605 (Cal. 1993) (in bank) (commenting on varied application of informed consent doctrine).

information, even if their disagreement has some scientific support.[47] Nor are physicians protected under the First Amendment if they have ideological aversions to discussing a medical treatment (such as an alternative procedure) that the State requires them to disclose.[48] The concept of informed consent is anchored in the belief that a patient should be able to make his or her own decisions about treatment, and the resulting state power exists to provide patients with information necessary to make informed decisions.[49] Therefore, while the individual free speech rights of an anticonsensus physician are nearly nonexistent, the content—specifically, the veracity and relevancy—of the compelled speech is critical to its constitutional legitimacy.[50] Post again stresses that "[t]he doctrine of informed consent compels physician speech only insofar as the content of that speech is consistent with the knowledge of 'the medical community.'"[51]

Courts have not provided a coherent doctrine defining whether there are First Amendment constraints on state regulations of professional speech.[52] Justice

[47] *See* Post, *supra* note 37, at 951 ("We would be puzzled by a physician who sought to preserve his constitutionally protected 'individual freedom of mind' by refusing to provide his patients necessary and accurate diagnoses, citing for his justification *Wooley*'s conclusion that 'the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.'" (footnote omitted) (quoting Wooley v. Maynard, 430 U.S. 705, 714 (1977))).

[48] *See id.* at 969 ("Informed consent doctrine rests on the premise that '[i]t is the prerogative of the patient to choose his treatment,' and that 'a doctor may not withhold from the patient the knowledge necessary for the exercise of that right.'" (alteration in original) (quoting Miller v. Kennedy, 522 P.2d 852, 861 (Wash. Ct. App. 1974))).

[49] *See id.* (noting that jurisdictions are split in defining what information must be disclosed to patients for their informed consent).

[50] *See id.* at 953 ("[T]he constitutional protections accorded to professional speech differ from the constitutional protections accorded to other forms of speech, and the category of professional speech can be determined only by reference to the legitimate practice of medicine." (footnote omitted)).

[51] *See id.* at 970 (quoting Febus v. Barot, 616 A.2d 933, 935-36 (N.J. Super. Ct. App. Div. 1992)).

[52] *See id.* at 944-45 ("Scholars have taken widely different views about the constitutional status of physicians speech. Some hold 'that doctor-patient discourse about medical treatment is fully protected, non-commercial speech' because 'freedom of expression . . . supports a mature individual's sovereign autonomy in deciding how to communicate with others.' Other commentators advance the opposite view, that 'the First Amendment applies' only 'in limited circumstances within the doctor-patient relationship,' because 'the state retains the power to regulate the professional conduct of physicians, even when speech may be used to carry the conduct out.'" (omission in original) (footnotes omitted) (first quoting Paula Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice*, 74 B.U. L. REV. 201, 242 (1994) [hereinafter Berg, *Doctor-Patient Discourse*]; then quoting Paula E. Berg, *Lost in a Doctrinal Wasteland: The Exceptionalism of Doctor-Patient Speech Within the Rehnquist Court's First Amendment Jurisprudence*, 8 HEALTH MATRIX 153, 174 (1998); and then quoting Katharine McCarthy, Conant v. Walters*:*

White, in an early assertion of what came to be called professional speech, argued in his concurrence in *Lowe v. SEC*[53] that "[t]he power of government to regulate the professions is not lost whenever the practice of a profession entails speech"; therefore, the communications within "the personal nexus between professional and client" should not be subject to First Amendment protections.[54] While some lower courts applied Justice White's broad definition centered on the context of the communication, the doctrinal foundation and standard of review for professional speech continues to lack any coherent footing.[55] Subsequent Supreme Court cases suggest that restrictions on professional speech—including compelled disclosures—are not wholly exempt from First Amendment protection.[56]

In *Rust v. Sullivan*[57] the Court upheld federal regulations restricting recipients of certain funding for facilities offering family planning services from offering abortion counseling and providing abortion referrals or information.[58] In evaluating the First Amendment challenge, the Court emphasized that Congress appropriated the funds for "family planning" and not prenatal care, and thus, the regulations "simply insist[] that public funds be spent for the purposes for which they were authorized."[59] The Court concluded that "the Government ha[d] not discriminated on the basis of viewpoint; it ha[d] merely chosen to fund one activity to the exclusion of the other."[60] However, the Court kept open the

A Misapplication of Free Speech Rights in the Doctor-Patient Relationship, 56 ME. L. REV. 447, 464-65 (2014))); *see also* Halberstam, *supra* note 27, at 772 ("Current First Amendment analysis lacks a coherent view of speech in the professions.").

[53] 472 U.S. 181 (1985).

[54] *See id.* at 228, 232 (White, J., concurring) (arguing that government regulation of professional speech lacks legitimacy when no connection between client and professional exists).

[55] *See* Carl H. Coleman, *Regulating Physician Speech*, 97 N.C. L. REV. 843, 846, 848-49 (2019) (highlighting that lower courts have adopted various legal standards to apply to government efforts to control physician speech due to lack of guidance); Jennifer M. Keighley, *Physician Speech and Mandatory Ultrasound Laws: The First Amendment's Limit on Compelled Ideological Speech*, 34 CARDOZO L. REV. 2347, 2368 (2013) (noting lack of clarity on method of review for professional speech restrictions).

[56] *See, e.g.*, Fla. Bar v. Went for It, Inc., 515 U.S. 618, 635 (1995) (holding that restriction on targeted mail solicitation by attorneys to accident victims does not violate First Amendment); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992) (plurality opinion) (finding that "physician's First Amendment rights not to speak are implicated" in challenge to pre-abortion disclosure laws); Gentile v. State Bar of Nev., 501 U.S. 1030, 1080-81 (1991) (finding that professional rule barring extrajudicial statements satisfied First Amendment due to its "substantial likelihood" test).

[57] 500 U.S. 173 (1991).

[58] *Id.* at 178-80 (outlining guideline that Title X funding support only preventative family services).

[59] *Id.* at 196.

[60] *Id.* at 193.

possibility that the traditional physician-patient relationship could enjoy First Amendment protection "even when subsidized by the Government" if a regulation significantly impinges on that relationship or it "requires a doctor to represent as his own any opinion that he does not in fact hold."[61] Here, a physician's silence does not impute the State's voice because the limited "family planning" services offered under the federal grants were not "sufficiently all encompassing so as to justify an expectation on the part of the patient of comprehensive medical advice."[62] Implicitly, the *Rust* Court suggested that professional speech regulations that *do* conflate the State and physician's voice could be subjected to heightened First Amendment scrutiny.[63]

The professional speech exception to heightened scrutiny review of content-based compelled speech is grounded in the State's authority to regulate the practice and licensing of professional activity.[64] In the case of mandated disclosures, such regulatory state power inherently compels speech. Rational basis review of informed consent requirements is rooted in judicial recognition of this regulatory power. Thus, this deferential review hinges on the compelled disclosures being legitimate (in relevancy and appropriateness), accurate (scientifically supported and nonmisleading), and necessary to obtaining the consent of a patient to a medical procedure.[65] The limits of this State power, therefore, are tied to the legitimacy of the regulatory function, not the extent to which the speaker's (the physician's) right to free expression is constrained.[66]

[61] *Id.* at 200.

[62] *Id.* ("The program does not provide postconception medical care, and therefore a doctor's silence with regard to abortion cannot reasonably be thought to mislead a client into thinking that the doctor does not consider abortion an appropriate option for her.").

[63] *Id.*

[64] *See* Post, *supra* note 37, at 950, 971-72 ("[S]tate regulation is scrutinized under the same rational basis standard that applies to all regulations of medicine."). In order for informed consent to fulfill its regulatory purpose, it "must be designed in such a way as to accurately communicate the medical profession's knowledge." Haupt, *supra* note 4, at 191.

[65] *See* Post, *supra* note 37, at 952-53 ("State regulations of medicine are ordinarily subject merely to rational basis review, which means that the state can exercise political control over the practice of medicine in ways that are for all practical purposes beyond judicial supervision."); *see also* Halberstam, *supra* note 27, at 834 ("The medical and legal professions . . . have long been subject to licensing and supervision by the State 'for the protection of society,' and the Court has indicated that such regulations would be upheld if they 'have a rational connection with the applicant's fitness or capacity to practice' the profession." (footnote omitted) (first quoting Dent v. West Virginia, 129 U.S. 114, 122 (1889); then quoting Schware v. Bd. of Bar Exam'rs, 353 U.S. 232, 239 (1957))).

[66] *See* B. Jessie Hill, *Sex, Lies, and Ultrasound*, 89 U. COLO. L. REV. 421, 431 (2018) (discussing First Amendment analysis in context of abortion-disclosure laws and noting that "constitutional doctrine in this context is concerned primarily with the protection of the patient rather than with the expressive interests of the speaker"); Post, *supra* note 37, at 978-79 ("First Amendment concerns arise whenever the state proscribes physician speech in ways that prevent physician-patient relationships from serving as a source of accurate, reliable, professional knowledge, constitutional questions should also arise if the state corrupts

Just as with commercial speech, courts are oriented toward the audience and toward the purpose, substance, and accuracy of the compelled speech.[67]

Accordingly, challenges to compelled disclosures in informed consent cannot follow traditional free speech arguments, which focus on First Amendment principles, such as the autonomy of the speaker, or implications of content-based speech restrictions on public discourse.[68] Furthermore, states have developed, enacted, and updated informed consent disclosures over the twentieth and twenty-first centuries with little fanfare or controversy, as the substance of the laws are generally technical, nonideological, and informed by industry experts and medical consensus.[69] For these two reasons, physicians' First Amendment rights have received very little scrutiny by courts.[70]

This relative absence of legal debate on the topic[71] left the courts uncertain and inconsistent when the issue of abortion collided with that of informed consent. In the years following *Roe v. Wade*,[72] politicians motivated by anti-abortion ideology utilized the State's regulatory power over medical practice to enact heightened informed consent laws with the transparent aim of discouraging the practice of abortion.[73] However, physicians—even in the

physician speech by requiring doctors to transmit misleading information in the context of informed consent.").

[67] *See* Post, *supra* note 37, at 975 (outlining state concerns over preserving public discourse, preventing misleading information, and promoting public's right to receive information).

[68] *See* Halberstam, *supra* note 27, at 868 ("In contrast to the traditional public forum, however, professional speech and commercial speech appear under a different speech paradigm, in that content-based government regulation may enhance, rather than compromise, the speech practice.").

[69] *See* Post, *supra* note 37, at 972 ("Informed consent doctrine mandates the communication of medical knowledge to the end that a lay patient can receive the expert information necessary to make an autonomous, intelligent and accurate selection of what medical treatment to receive.").

[70] *See* Haupt, *supra* note 4, at 187 (noting that there exists "considerable uncertainty about the definition of professional speech"); Hill, *supra* note 66, at 431 (noting that "free-speech doctrine pertaining to professional speech is relatively undeveloped").

[71] This absence is relative to the debate surrounding commercial speech, which faced continual opposition by commercial actors for which the disclosures posed adverse business implications. *See, e.g.*, United States v. United Foods, Inc., 533 U.S. 405, 410 (2001) ("The subject matter of the speech may be of interest to but a small segment of the population; yet those whose business and livelihood depend in some way upon the product involved no doubt deem First Amendment protection to be just as important for them as it is for other discrete, little noticed groups in a society which values the freedom resulting from speech in all its diverse parts.").

[72] 410 U.S. 113 (1973).

[73] *See* Vandewalker, *supra* note 45, at 6 (describing strategy by anti-abortion activists to "decrease the number of abortions by placing onerous regulations on abortion where similar procedures are unregulated, making abortions more difficult and more expensive to provide"). The Court in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S.

context of practicing medicine within a constitutionally sanctioned regulatory scheme—are not wholly stripped of their First Amendment rights, and legal challenges ensued.[74] Absent a clear doctrinal framework for drawing the boundaries of the informed consent carveout, courts oscillated in their treatment of this issue and generally avoided any direct rulings on the First Amendment questions.

Early abortion doctrine (post-*Roe*, pre-*Casey*) addressed the constitutionality of informed consent laws for patients seeking abortions not through the lens of the First Amendment but instead as a violation of a woman's fundamental right to abortion under due process as established in *Roe*.[75] In *Akron v. Akron Center for Reproductive Health, Inc.*,[76] the Court held that laws requiring physicians to inform patients of the gestational age and developmental stage of the fetus, of the possible physical and emotional complications of the procedure, and that the unborn child is a human life from the moment of conception went beyond the bounds of informed consent and were an unconstitutional use of State regulatory power.[77] The Court held that "much of the information required [was] designed

747, 760-62 (1986), *overruled in part by Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (plurality opinion), and *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 442-49 (1983), *overruled in part by Casey*, 505 U.S. 833, addressed state abortion disclosure regulations aimed at persuading women not to have an abortion.

[74] *See, e.g.*, *Casey*, 505 U.S. at 884 (addressing First Amendment challenge to informed consent statute and acknowledging that physician's First Amendment right not to speak is implicated); *Thornburgh*, 476 U.S. at 760-62 (striking down pre-abortion disclosure requirements that compelled physicians to tell patients about State's position on abortion, facts about the fetus, and information about alternatives because they were "designed not to inform . . . but rather to persuade" and because "a rigid requirement that a specific body of information be given in all cases, irrespective of the particular needs of the patient, intrudes upon the discretion of the pregnant woman's physician and thereby imposes [an] 'undesired and uncomfortable straitjacket'" (first quoting *Akron*, 462 U.S. at 444; then quoting Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 67 n.8 (1976))).

Moreover, in *Rust v. Sullivan*, the Court found that DHHS regulations prohibiting physicians at federally funded clinics from counseling or providing information on abortions did not violate the First Amendment because "[g]overnment may make a value judgment favoring childbirth over abortion and . . . implement that judgment by the allocation of public funds. . . . In so doing the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of another." Rust v. Sullivan, 500 U.S. 173, 192-93 (1992) (first omission in original) (citation omitted) (citing Maher v. Roe, 432 U.S. 464, 474 (1977)). However, the Court raised the prospect of certain circumstances warranting First Amendment protections for physician-patient speech by analogizing it to the highly protected "sphere of free expression" at universities, where "the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by . . . the First Amendment." *Id.* at 200.

[75] *See Thornburgh*, 476 U.S. at 799-800; *Akron*, 462 U.S. at 417, 442-44.

[76] 462 U.S. 416 (1983).

[77] *Id.* at 442-45; *id.* at 445 ("Consistent with its interest in ensuring informed consent, a State may require that a physician make certain that his patient understands the physical and

not to inform the woman's consent but rather to persuade her to withhold it altogether."[78] Subsequently, the Court in *Thornburgh v. American College of Obstetricians & Gynecologists*[79] reaffirmed this doctrinal line between consent and persuasion established in *Akron* in striking down a Pennsylvania law requiring abortion doctors to provide patients with a state-issued pamphlet that urged women to learn about abortion alternatives prior to undergoing the procedure.[80]

Despite these cases being decided on due process grounds, scholars have argued that physicians' speech rights "[are] the proper doctrinal foundation for the holdings in *Thornburgh* and *Akron* that a state cannot wedge its distorting message into the privacy of the doctor-patient relationship and thereby alter, for the state's ends, the doctor and patient exchange."[81] By viewing, and arguably misinterpreting, these early post-*Roe* decisions through a due process lens rather than the more firmly recognized First Amendment doctrine, the Court set into motion a framework that addressed First Amendment challenges by abortion providers as either an afterthought or an overlapping concept with the modern legal framework for abortion rights review: the undue burden test established in *Casey* to evaluate a Fourteenth Amendment challenge.[82]

About a decade after the Supreme Court decided *Thornburgh*, the Court addressed the constitutionality of another Pennsylvania statute that contained nearly identical informed consent provisions.[83] In *Casey*, the Court effectively overruled *Akron* and *Thornburgh* by upholding parts of a Pennsylvania statute that required doctors to inform women seeking abortions about the nature of the procedure, the probable gestational age of the fetus, and the medical risks of abortion and childbirth, as well as to provide a state-issued pamphlet on

emotional implications of having an abortion. But Akron has gone far beyond merely describing the general subject matter relevant to informed consent.").

[78] *Id.* at 444.

[79] 476 U.S. 747 (1986).

[80] *Id.* at 760-65 (holding that "printed materials required by [the statute at issue] are nothing less than an outright attempt to wedge the Commonwealth's message discouraging abortion into the privacy of the informed-consent dialogue between the woman and her physician" and that "requirements of [the statute at issue] that the woman be informed by the physician of 'detrimental physical and psychological effects' and of all 'particular medical risks' . . . [are] the antithesis of informed consent").

[81] Robert D. Goldstein, *Reading* Casey*: Structuring the Woman's Decisionmaking Process*, 4 WM. & MARY BILL RTS. J. 787, 854 (1996); *see also* Halberstam, *supra* note 27, at 836 (discussing *Akron* and *Thornburgh* in context of First Amendment protection).

[82] Goldstein, *supra* note 81, at 854 ("By locating the basis for this holding primarily in the privacy rights of the woman, these cases missed a firmer anchoring in the free speech interests of patient, physician, and society.").

[83] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) (plurality opinion) (reaffirming central holding of *Roe v. Wade*).

childbirth, adoption, alternatives, and impact on the fetus.[84] The plurality opinion not only upended the constitutional framework for a woman's abortion right established in *Roe*[85] but was also the first abortion-related case to deal directly and independently with the First Amendment question of informed consent disclosures.[86] However, the specific discussion of the free speech question implicated by these disclosures was extremely brief, drawn narrowly to the facts of the case, and in many ways problematic.[87] The decision upheld the disclosures on due process grounds as "reasonable measure[s] to ensure an informed choice, one which might cause the woman to choose childbirth over abortion," and deemed the disclosures acceptable as long as they did not impose an undue burden on a woman seeking an abortion.[88]

The *Casey* plurality decided the First Amendment question only after finding the informed consent regulations constitutional on due process grounds, holding that the State could compel doctors to provide "truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus" because there was a State interest in doing so.[89] The opinion, in its due process analysis, found no constitutional issue with requiring physicians to "inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health," because "informed choice need not be defined in such narrow terms that all

[84] *Id.* at 882 ("To the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires . . . the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus, those cases go too far . . . .").

[85] While upholding the fundamental holding in *Roe* establishing abortion prior to viability as a constitutional right, the *Casey* plurality disposed of *Roe*'s trimester framework that applied strict scrutiny to first trimester abortion regulations and replaced it with the undue burden test. *Id.* at 870-76; *id.* at 872 (noting that trimester framework was "unnecessary and . . . sometimes contradicted the State's permissible exercise of its powers"). Unlike the trimester framework, the undue burden test established a legitimate state interest in protecting the potential life from conception and thus serves as a framework for balancing the State's interest with the woman's abortion right. *Id.* ("Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage [women] to know that there are philosophic and social arguments of great weight . . . in favor of continuing the pregnancy to full term . . . .").

[86] *Id.* at 884 (rejecting argument concerning First Amendment right of physician not to speak).

[87] *See id.* Post discusses the internal incoherence of the Court's First Amendment holding. Post, *supra* note 37, at 946 (noting that the two cases cited by the Court apply different levels of scrutiny in reviewing laws compelling speech).

[88] *Casey*, 505 U.S. at 883.

[89] *Id.* at 882.

considerations of the effect on the fetus are made irrelevant."[90] Next, the Court addressed the First Amendment challenge in a single paragraph:

> All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, see *Wooley v. Maynard*, 430 U.S. 705 (1977), but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, cf. *Whalen v. Roe*, 429 U.S. 589, 603 (1977). We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.[91]

This short dismissal acknowledged that the First Amendment rights of physicians were implicated under the challenged Pennsylvania statute, which required doctors to inform women of empirically sound facts and medically uncontroversial information, even if the statute was designed to encourage women to choose childbirth over abortion.[92] Yet this passage does not provide clear guidance on how to independently analyze First Amendment challenges to physician compelled speech, nor does it address how furthering the State's legitimate, yet ideological, interest in encouraging childbirth interacted with physicians' independent First Amendment rights.[93] As Post aptly points out, "The passage is puzzling because *Wooley* is a precedent in which the Court applied strict First Amendment scrutiny to a state statute that compelled ideological speech, whereas *Whalen* upheld a New York statute requiring physicians to disclose prescriptions for certain drugs," concluding that "[e]xactly how the strict First Amendment standards of *Wooley* are meant to qualify the broad police power discretion of *Whalen* is left entirely obscure."[94] First Amendment scholar David Halberstam suggests that "[t]o fuse these two models in a shorthand formulation provides little indication of how to resolve any professional's First Amendment claim other than the precise one at issue in

[90] *Id.* at 882-83.

[91] *Id.* at 884.

[92] *Id.* at 883 (acknowledging that State may express "preference for childbirth over abortion" through "legislation aimed at ensuring a decision that is mature and informed"); *see also* David Orentlicher, *Abortion and Compelled Physician Speech*, 43 J.L. MED. & ETHICS 9, 12 (2015) (arguing that required disclosures in *Casey* represent time when "speech mandates for abortion were limited and covered ground that was quite consistent with principles of informed consent").

[93] *See* Keighley, *supra* note 55, at 2356 ("Ultimately, while First Amendment issues were raised in *Casey*, neither the parties nor the Court fully explored the parameters of physicians' First Amendment rights against compelled speech.").

[94] Post, *supra* note 37, at 946 (footnote omitted); *see also* Halberstam, *supra* note 27, at 773 ("The passage tells us that physicians enjoy First Amendment rights, but provides little guidance about the weight given to the First Amendment interests involved.").

Casey."[95] The Court held that the disclosure law regulated speech "as part of the practice of medicine, subject to reasonable licensing and regulation by the State," and seemed to limit its holding to the facts presented, noting that "[w]e see no constitutional infirmity in the requirement that the physician provide the information mandated by the State *here*."[96]

While *Casey* failed to provide sufficient guidance for First Amendment questions, the decision was nonetheless a clear rebuke of the previous approach to informed consent in the context of abortion.[97] Next, this Note will discuss the current unsettled landscape and elucidate the problematic implications of *Casey*'s uninstructive consideration of the First Amendment question. For some courts, *Casey*'s quick dispatch of physicians' First Amendment rights was viewed as concrete precedent, one which then offered states the freedom to force physicians, without meaningful First Amendment recourse, to recite controversial, manipulative, and scientifically dubious and gratuitous information on the basis that the compelled speech in question occurs during the doctor-patient process of informed consent.[98] For others, *Casey*'s treatment of the First Amendment question was entangled in—and eclipsed by—its undue burden analysis, and thus free speech challenges to disclosures which are deemed "truthful and nonmisleading" become definitionally subject only to rational basis review.[99] Still others interpret *Casey* as mandating an independent First Amendment analysis of physician speech claims.[100] None of these approaches offers a viable legal framework and all contributed to the conflicting decisions to which this Note now turns. It is not until this Note returns in Section II.B to the Court's application and framing of commercial speech doctrine in *NIFLA* that a functional and stable doctrine to resolve this confusion and misapplication of *Casey* comes into focus.

[95] Halberstam, *supra* note 27, at 774.

[96] *Casey*, 505 U.S. at 884 (emphasis added).

[97] *Id.* at 882 ("To the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus, those cases go too far, are inconsistent with *Roe*'s acknowledgement of an important interest in potential life, and are overruled.").

[98] *See, e.g.*, Planned Parenthood Minn., N.D., S.D. v. Rounds, 686 F.3d 889, 893-94 (8th Cir. 2012) (en banc) (reviewing statute requiring physicians to inform abortion patients of increased risk of suicide); Keighley, *supra* note 55, at 2353 (noting that *Casey* "has been pointed to as evidence of states' unfettered ability to regulate physician speech").

[99] *See, e.g.*, Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 575 (5th Cir. 2012) ("The only reasonable reading of *Casey*'s passage is that physicians' rights not to speak are, when 'part of the practice of medicine, subject to reasonable licensing and regulation by the State[.]'" (alteration in original) (quoting *Casey*, 505 U.S. at 882)).

[100] *See* Stuart v. Camnitz, 774 F.3d 238, 249 (4th Cir. 2014).

II. THE CURRENT LEGAL LANDSCAPE: APPELLATE COURT DISCORD ON INFORMED CONSENT AND *NIFLA*'S IMPACT ON COMMERCIAL AND PROFESSIONAL SPEECH

This Part extends the two-part analysis into the current legal landscape, addressing first how the appellate courts remain split on the implications of *Casey* on physicians' First Amendment protections against compelled abortion disclosures and turning second to *NIFLA* and its significant narrowing of states' powers to restrict commercial speech through a very similar set of compelled disclosures.

A. *The Circuit Split:* Casey*'s Legacy & Informed Consent*

Through a review of three notable and conflicting cases in the Fourth, Fifth, and Eighth Circuits, this Section argues that much of the current confusion around the constitutional limits to pre-abortion informed consent and disclosure laws stems from a flawed application of *Casey*, which instead should be understood as narrow and nonprescriptive in its ruling on the First Amendment claim. Decisions by the Fifth and Eighth Circuits have interpreted *Casey* to either discard the First Amendment analysis entirely for a misapplied undue burden analysis[101] or to doctrinally subject all informed consent regulations to rational basis review so long as the compelled speech fits a loose definition of being truthful, nonmisleading, and—as applied in *Casey*'s undue burden analysis—reasonable.[102] The Fourth Circuit, on the other hand, held that *Casey*

[101] *See Lakey*, 667 F.3d at 576 (interpreting *Casey* and noting that "Eighth Circuit sitting en banc construed *Casey* . . . in the same way"). In *Casey*, the Court developed the undue burden standard to evaluate whether restrictions violated a woman's fundamental liberty to choose an abortion under the Due Process Clause of the Fourteenth Amendment. *Casey*, 505 U.S. at 851 ("These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."). The Court established the test to distinguish permissible regulations that "serve[] a valid purpose, one not designed to strike at the right itself," despite having the incidental effect of increasing the cost or decreasing the availability of the procedure, from impermissible regulations that strike at the "heart of the liberty protected by the Due Process Clause" by creating a substantial obstacle to a woman's ability to choose to have an abortion. *Id.* at 874.

[102] *See Rounds*, 686 F.3d at 893 ("In short, to succeed on either its undue burden or compelled speech claims, Planned Parenthood must show that the disclosure at issue 'is either untruthful, misleading or not relevant to the patient's decision to have an abortion.'"). For analysis of this decision, see Keighley, *supra* note 55, at 2350 ("[T]he en banc decision illustrates the costs of ignoring the First Amendment implications of state laws that compel physician speech."); Recent Case, *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, 686 F.3d 889 (8th Cir. 2012) (en banc), 126 HARV. L. REV. 1438, 1441-42 (2013) (discussing "doctrinal slippage" by court in *Rounds* by using undue burden test simultaneously for First Amendment and due process claims "allowed the *Rounds* majority to assume that its chosen construction of 'relative risk,' which made the statute true,

should not be interpreted sweepingly as a blueprint for First Amendment claims in the context of abortion regulations.[103] Instead, the Fourth Circuit disentangled the undue burden analysis from the First Amendment analysis and held that "[t]he fact that a regulation does not impose an undue burden on a woman under the due process clause does not answer the question of whether it imposes an impermissible burden on the physician under the First Amendment."[104] Instead, in evaluating the statute in light of the First Amendment challenge posed, the court applied intermediate scrutiny consistent with Supreme Court precedent on commercial speech.[105] However, while the Fourth Circuit's approach invoked the commercial speech doctrine, its analysis lacked discipline and failed to explain why intermediate scrutiny is appropriate.[106] The three circuits do not come to a consensus on a specific legal framework for evaluating the First Amendment claim, instead drawing from a patchwork of *Casey*, informed consent doctrine, and a misapplied undue burden analysis.

1. Eighth Circuit

In *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*,[107] the Eighth Circuit, sitting en banc, upheld an amendment to North Dakota's informed consent statute that required abortion providers to give patients a written statement that included—among other things—"[a] description of all known medical risks of the procedure and statistically significant risk factors to which the pregnant woman would be subjected, including . . . [d]epression and related psychological distress [and] . . . [i]ncreased risk of suicide ideation and suicide."[108] The court resolved both the Fourteenth Amendment substantive due process and First Amendment compelled speech claims against the suicide advisory by applying *Casey*'s three-pronged test for evaluating whether informed consent requirements impose an undue burden on a patient. The court did not discuss whether the First Amendment protections had independent significance: "[T]o succeed on either its undue burden or compelled speech claims, Planned Parenthood must show that the disclosure at issue 'is either untruthful, misleading or not relevant to the patient's decision to have an

nonmisleading, and relevant in a nominal sense, was also sufficient to satisfy First Amendment scrutiny" (footnote omitted)).

[103] *Stuart*, 774 F.3d at 249 ("The single paragraph in *Casey* does not assert that physicians forfeit their First Amendment rights in the procedures surrounding abortions, nor does it announce the proper level of scrutiny to be applied to abortion regulations that compel speech to the extraordinary extent present here.").

[104] *Id.*

[105] *Id.* ("A heightened intermediate level of scrutiny is thus consistent with Supreme Court precedent and appropriately recognizes the intersection here of regulation of speech and regulation of the medical profession in the context of an abortion procedure.").

[106] *Id.* at 250.

[107] 686 F.3d 889 (8th Cir. 2012) (en banc).

[108] *Id.* at 894.

abortion.'"[109] The suicide advisory, according to the *Rounds* majority, did not violate any of the three tests, even though it lacked any credible, peer-reviewed, scientific foundation.[110]

The Eighth Circuit's analysis centered on the statutory meaning of "increased risk" in the informed consent provision.[111] Avoiding conflict with the "untruthful" prong, the court held that the statute was constructed to warn of a "relative risk" and not a causal relationship between suicide and abortion.[112] Despite no scientific evidence of a causal link between abortion and suicide, the majority held that a correlation is not misleading because "the standard medical practice . . . is to *recognize* a strongly correlated adverse outcome as a 'risk' while further studies are conducted to clarify whether various underlying factors play causal roles."[113] Furthermore, the court held that the disclosures could be neither misleading nor irrelevant because Planned Parenthood failed "to show that abortion has been ruled out, to a degree of scientifically accepted certainty, as a statistically significant causal factor in post-abortion suicides."[114]

Rounds was premised on an assumption that *Casey*'s undue burden framework for protecting the due process rights of women seeking abortions also serves as the appropriate standard for evaluating whether a statute infringes on the First Amendment rights of abortion providers.[115] Although the *Casey* plurality did not conduct a thorough, independent analysis of the First Amendment claim in that case, it treated the First Amendment question as separate from the substantive due process issue and established that physicians' First Amendment rights are implicated in the context of informed consent laws.[116] Given the specific facts of *Casey*—which, unlike *Rounds*, concerned the compelled disclosure of scientifically sound, medically uncontroversial

[109] *Id.* at 893 (quoting Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 735 (8th Cir. 2008)); *see also* Recent Case, *supra* note 102, at 1441.

[110] *See* Recent Case, *supra* note 102, at 1441-43 (discussing disagreements among en banc Eighth Circuit regarding evidence of suicide risk).

[111] *Rounds*, 686 F.3d at 894 ("[T]he disclosure actually required by the suicide advisory depends upon the accepted usage of the term 'increased risk' in the relevant medical field. We turn to the medical literature and expert evidence in the record to discern the accepted usage . . . .").

[112] *Id.* ("The peer-reviewed medical literature in the record . . . consistently uses the term 'increased risk' to refer to a relatively higher probability of an adverse outcome in one group compared to other groups—that is, to 'relative risk.'").

[113] *Id.* at 899; *see also* Michael C. Dorf, *Can the Government Require Doctors to Provide Misleading Information to Patients Seeking Abortions? A Federal Appeals Court Says No, but Means Yes*, JUSTIA: VERDICT (Aug. 20, 2012), https://verdict.justia.com/2012/08/20/can-the-government-require-doctors-to-provide-misleading-information-to-patients-seeking-abortions [https://perma.cc/DTW3-QXU4].

[114] *Rounds*, 686 F.3d at 900.

[115] *See* Recent Case, *supra* note 102, at 1441.

[116] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992) (plurality opinion).

information—the Court could reasonably dispense with the First Amendment claim without establishing a clear doctrinal framework for analyzing the free speech questions surrounding physician speech. The disclosures fell squarely within the reasonable regulation of the medical profession and thus were subject only to rational basis review.[117] The suicide-advisory provision in *Rounds*, on the other hand, cannot be presumptively covered by the "reasonable licensing and regulation [of medicine] by the State"[118] because it mandates the disclosure of scientifically dubious information "that many doctors, exercising their medical judgment, would likely deem unnecessary or inappropriate in some clinical settings."[119] Unlike the disclosures mandated in *Casey*, which fell within the general conventions of existing informed consent regulations, the disclosures in *Rounds* are significantly more exceptional and controversial. Specifically, the suicide advisory, when contextualized within the decades of informed consent provisions, is appropriately characterized as a "unique, and largely unprecedented, legislative attempt to control the practice of medicine that allegedly compromised institutional norms and functions."[120] Yet the Eighth Circuit did not engage in a discussion of why abortion necessitated these heightened disclosures of negative risks or whether these disclosures were appropriate and necessary to obtaining informed consent (and thus, would earn the informed consent carveout to First Amendment protection). Instead, the court treated *Casey*'s three-pronged test broadly and viewed it as providing the sole criteria for invalidating a First Amendment claim.

2. Fifth Circuit

While *Rounds* was winding through the Eighth Circuit, the Fifth Circuit addressed a First Amendment challenge to Texas's informed consent requirements surrounding abortion in *Texas Medical Providers Performing Abortion Services v. Lakey*.[121] The challenged provisions "require[d] the physician 'who is to perform an abortion' to perform and display a sonogram of the fetus, make audible the heart auscultation of the fetus for the woman to hear, and explain to her the results of each procedure."[122] Abortion providers contended that the law violated their First Amendment rights by (1) compelling ideological speech through the display-and-describe requirement, which they alleged "serves no medical purpose, and indeed no other purpose than to discourage the abortion," and (2) violating their rights not to speak by

[117] *See id.* at 881-84 (analyzing statutory requirement of informed consent).

[118] *Id.* at 884.

[119] *See* Recent Case, *supra* note 102, at 1445. For more on disclosure requirements, see *Natanson v. Kline*, 350 P.2d 1093, 1106 (Kan. 1960) ("The duty of the physician to disclose . . . is limited to those disclosures which a reasonable medical practitioner would make under the same or similar circumstances."); *supra* Section I.B.

[120] Recent Case, *supra* note 102, at 1444.

[121] 667 F.3d 570, 574 (5th Cir. 2012).

[122] *Id.* at 573.

"[r]equiring the woman to certify the physician's compliance with these procedures."[123] The Fifth Circuit interpreted *Casey* as carving out an exception to traditional First Amendment doctrine in the context of informed consent abortion laws, and viewed that case as holding that "informed consent laws that do not impose an undue burden on the woman's right to have an abortion are permissible if they require truthful, nonmisleading, and relevant disclosures."[124] The court further resolved the ideological speech concern by swiftly asserting that informed consent statutes "are part of the state's reasonable regulation of medical practice and do not fall under the rubric of compelling 'ideological' speech that triggers First Amendment strict scrutiny."[125] By merely situating the compelled speech within the arena of informed consent, the court's ruling dismisses physicians' First Amendment challenges without serious consideration.

Ultimately, *Lakey* arrived at the same conclusion as *Rounds* (though more directly): abortion regulations—regardless of whether they implicate First Amendment rights—are subject only to the substantive due process undue burden analysis and thus are not entitled to heightened scrutiny if they are deemed truthful, relevant, and nonmisleading. The *Lakey* court explained: "If the disclosures are truthful and non-misleading, and if they would not violate the woman's privacy right under the *Casey* plurality opinion, then Appellees would, by means of their First Amendment claim, essentially trump the balance *Casey* struck between women's rights and the states' prerogatives."[126] This claim is revealing and deeply problematic. The court appears concerned with "balance," portraying the First Amendment challenge as a potential end-run to weaken the legitimate governmental interest in protecting the life of a fetus, yet ignores any admission or discussion of the fact that the challenged disclosures are radically different in substance and intent than those affirmed by *Casey*. Additionally, it ignores that the balance struck in *Casey* was between the woman's liberty interest and the state's interest in protecting the potential life of the fetus.[127] In *Lakey*, medical professionals alleged that their First Amendment rights were being infringed, necessitating a different balancing of interests. The State could legitimately argue in *Casey* that the disclosures contained truthful facts pertaining to a medical procedure and the risks therein.[128] By comparison, the

[123] *Id.* at 574.

[124] *Id.* at 576.

[125] *Id.*

[126] *See id.* at 577 (describing implications of fact that physicians "do not contend that the H.B. 15 disclosures inflict an unconstitutional undue burden on a woman's substantive due process right to obtain an abortion").

[127] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876-77 (1992) (plurality opinion).

[128] *See* Coleman, *supra* note 55, at 892 (describing disclosures in *Casey* and how to apply its holding going forward).

sonogram display in *Lakey* serves neither of those purposes and has persuasive or ideological intent, which necessitates some level of First Amendment review.

3. Fourth Circuit

About a year after *Lakey*, in *Stuart v. Camnitz*,[129] the Fourth Circuit considered the constitutionality of a similar display-and-describe statute.[130] Under this law, North Carolina required abortion providers to "perform an ultrasound on any woman seeking an abortion" and required physicians to both "display the sonogram so that the woman can see it, and describe the fetus in detail"—including its size, location, external members, and internal organs.[131] The provider was also required to offer the patient an opportunity to hear the fetal heartbeat.[132] The statute allowed a woman to "'avert[] her eyes from the displayed images' and 'refus[e] to hear the simultaneous explanation and medical description' by presumably covering her eyes and ears."[133] Unlike *Lakey*, the Fourth Circuit analyzed the First Amendment claim independent of the due process claim and *Casey*'s undue burden analysis, and ultimately applied heightened scrutiny because the statute was expressive, intended to convey a particularized message, and compelled content-based ideological speech.[134] The court concluded that "[t]he fact that a regulation does not impose an undue burden on a woman under the due process clause does not answer the question of whether it imposes an impermissible burden on the physician under the First Amendment."[135] By analyzing the physician's rights independent of the woman's fundamental liberty right, despite them both challenging the same informed consent statute, the court held that the truthful nature of the messaging was irrelevant because "an individual's 'right to tailor [his] speech' or to not

[129] 774 F.3d 238 (4th Cir. 2014).

[130] *Id.* at 243.

[131] *Id.* (citation omitted).

[132] *Id.*

[133] *Id.* (alterations in original).

[134] *Id.* at 249. In *Stuart*, the court held that "the display of the sonogram is plainly an expressive act entitled to First Amendment protection" because its clear and stated intent was to "use the visual imagery of the fetus to dissuade the patient from continuing with the planned procedure"—thus, it conveyed a particularized message. *Id.* at 245. Next, the court evaluated whether the speech was content based and held that "[a] regulation compelling speech is by its very nature content-based, because it requires the speaker to change the content of his speech or even to say something where he would otherwise be silent." *Id.* at 246. The court added that "[c]ompelled speech is particularly suspect because it can directly affect listeners as well as speakers" due to the risk that listeners will not realize that "the message is the state's, not the speaker's." *Id.*; *see also* Hill, *supra* note 66, at 435 ("False-narrative laws may therefore be understood as a form of symbolic government speech . . . . They convey a message to patients and to the public at large through requiring particular conduct, rather than through speech.").

[135] *Stuart*, 774 F.3d at 249.

speak at all 'applies . . . equally to statements of fact the speaker would rather avoid'" within the framework of the First Amendment.[136]

In response to the State's argument that the display-and-describe law falls within the State's power to regulate the practice of medicine, the court held that, as "[w]ith all forms of compelled speech, we must look to the context of the regulation to determine when the state's regulatory authority has extended too far."[137] The court held the First Amendment protection of professional speech exists on a continuum spanning from public dialogue (highly protected) to professional conduct (minimally protected).[138] Striking a balance between a relatively strong state interest in regulating medicine and the fact that the regulation is clearly content based, the court "borrow[ed] a heightened intermediate scrutiny standard used in certain commercial speech cases."[139] The court justified its approach by asserting that *Casey* did not categorically rule that "all regulation of speech in the medical context merely receives rational basis review."[140] The *Stuart* court held that *Casey*'s First Amendment analysis lacked any guiding framework for First Amendment challenges in the context of abortion beyond confirming that physicians have First Amendment protections and that their free speech rights must be weighed against the State's countervailing interest in regulating the medical profession.[141]

The Fourth Circuit applied intermediate scrutiny, placing the burden on the State to demonstrate "at least that the statute directly advances a substantial governmental interest and that the measure [was] drawn to achieve that interest."[142] While the State advanced a number of substantial government interests, the court noted that there is no "counterbalancing promotion of state interests" because abortion providers are required to speak even when the patient has "through ear and eye coverings rendered herself temporarily deaf and blind."[143] Because the patient does not receive any information, the compelled

[136] *Id.* at 246 (alterations in original) (citations omitted) (quoting Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 573 (1995)). Therefore, while the words compelled by the State are factual in the context of the statute, "that does not divorce the speech from its moral or ideological implication" of promoting a pro-life message while the patient is vulnerable. *Id.*

[137] *Id.* at 247 (stating that regulation of professions is within power of government, but individuals do not abandon all First Amendment rights when practicing profession).

[138] *Id.* at 248.

[139] *Id.* (noting that government's interest in regulating professional conduct is weaker in context of medicine because medical profession is self-regulating).

[140] *Id.* at 249.

[141] *Id.*

[142] *Id.* at 250 (quoting Sorrell v. IMS Health Inc., 564 U.S. 552, 572 (2011)).

[143] *Id.* at 252; *see* Hill, *supra* note 66, at 434 ("[T]he North Carolina law forced the provider to parrot the state's narrative of fetal personhood and to do so regardless of any possible impact of the narrative on the patient herself.").

speech cannot inform her decision.[144] Thus, the court concluded: "[F]orced speech to unwilling or incapacitated listeners does not bear the constitutionally necessary connection to the protection of fetal life."[145]

It is important to recognize the limitations of the court's ruling. The court did not articulate a clear set of rules for the "triggering" of heightened scrutiny of a compelled speech disclosure that is ostensibly located within the medical practice of informed consent. Instead, in the words of the decision, the court relies on a "borrowing" of the standard by asserting its applicability without clearly adhering to a legal framework.[146] The court justified heightened scrutiny through a series of partially developed arguments: the relevance of "context" (namely, the regulation's transparent intent to discourage abortion), the similarities with commercial speech cases (the decision "borrows" its standard without explaining the overlapping principles), and finally the nonprecedential nature of *Casey* (while true, not a reason in itself for heightened scrutiny to apply here).[147] The enmeshing of *Casey*'s undue burden approach rooted in due process with First Amendment challenges to informed consent requirements treats physician's rights as entangled with the rights of their patients. The next Section considers how a recent Supreme Court case can be read to clarify boundaries between permissible informed consent and unconstitutional restrictions on speech.[148]

B. NIFLA v. Becerra

In June 2018, the Supreme Court issued its long-awaited decision in *NIFLA v. Becerra*.[149] The case involved a First Amendment challenge to notice provisions in the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act ("Act"), which was intended to

[144] *Stuart*, 774 F.3d at 252 (noting that State's own expert witness agreed that physician's required speech to patient unwilling to listen does not aid informed consent).

[145] *Id.* at 253 (noting, moreover, that forced speech by physician can psychologically harm women and injure trust and communication between patient and physician).

[146] *Id.* at 248.

[147] *Id.*; *see also* Scott W. Gaylord, Comment, Casey *and the First Amendment: Revisiting an Old Case to Resolve a New Compelled Speech Controversy*, 66 S.C. L. REV. 951, 972-77 (2015) (discussing similarities and differences between First Amendment analysis in *Stuart* and *Zauderer*).

[148] In April 2019, the Sixth Circuit became the third federal court of appeals to address whether pre-abortion display-and-describe laws violate a physician's First Amendment rights. *See* EMW Women's Surgical Ctr., P.S.C. v. Beshear, 920 F.3d 421 (6th Cir. 2019). The court aligned with *Lakey*, holding that an abortion regulation is not subject to heightened scrutiny if it is truthful, nonmisleading, and relevant under *Casey*. *Id.* at 429. *EMW Women's Surgical Center* is the first appellate decision to address the constitutionality of laws after the Supreme Court's decision in *NIFLA v. Becerra*. For a discussion of the decision, the role of *NIFLA* in its analysis, and what it suggests about future First Amendment challenges to pre-abortion disclosures, see *infra* note 207.

[149] 138 S. Ct. 2361 (2018).

regulate CPCs.[150] California framed the Act as a protective measure against deceptive practices by the clinics that "are designed to intercept women with unintended or 'crisis' pregnancies to dissuade them from undergoing abortion."[151] While these centers are often affiliated with the religious right and national anti-abortion networks, "they typically advertise their services (most famously on highway billboards) using language and images that present themselves as unbiased, comprehensive health centers."[152] CPCs' tactics for attracting women often obscure their true mission: to prevent women from obtaining abortions.[153] The Act's licensed notice provision—which is the primary focus of this Note—required all licensed CPCs to disseminate or post a government-drafted notice declaring that "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion."[154] The Act was challenged by a coalition of CPCs under the umbrella organization National Institute of Family and Life Advocate ("NIFLA"), which identifies as a pro-life organization that objects to abortion on faith-based grounds.[155]

The crux of the Court's decision in *NIFLA* is its rejection that the compelled speech in the form of government-issued notices at issue was subject to rational basis review. While Justice Thomas, writing for the majority, recognized that the Court has "afforded less protection for professional speech in two circumstances [where] laws require professionals to disclose factual, noncontroversial information in their 'commercial speech,' [and where] States . . . regulate professional conduct, even though that conduct incidentally involves speech," he concluded that "[n]either line of precedents is implicated here."[156] The decision, in its opening, directly identified (and ultimately narrowed) the two First Amendment carveouts on which this Note focuses. The

[150] *See supra* Introduction (discussing intersection of free speech principles and abortion regulation in state-mandated disclosures by CPCs and state-mandated disclosures by abortion physicians).

[151] Sonya Borrero, Susan Frietsche & Christine Dehlendorf, *Crisis Pregnancy Centers: Faith Centers Operating in Bad Faith*, 34 J. GEN. INTERNAL MED. 144, 144 (2019) ("While CPCs have a right to exist and can provide valued emotional, spiritual, and material (e.g., diapers and formula) support for some women, they often engage in practices that are dubious at best and unethical at worst." (footnote omitted)).

[152] *Id.* (noting that some CPC staff members wear white lab coats, despite having no medical training).

[153] *Id.* ("CPCs often employ sophisticated strategies to draw in women who are seeking abortion services, including locating themselves near abortion clinics and using Internet search optimization techniques to elevate their visibility when people search for abortion services.").

[154] *NIFLA*, 138 S. Ct. at 2369 (quoting CAL. HEALTH & SAFETY CODE § 123472(a)(1) (West 2018)).

[155] *See* Faria, *supra* note 8, at 384-85.

[156] *NIFLA*, 138 S. Ct. at 2372 (citations omitted).

Court roots its First Amendment analysis in a presumption of heightened scrutiny that applies unless rational basis is triggered by one of the two specific carveouts. The Court then shifts to discussing why neither carveout is appropriately implicated in this case, and in this analysis Justice Thomas provides doctrinal guidance that extends to both exceptions.

The Court relied on *Zauderer*'s factual and uncontroversial requirement to determine rational basis review was inapplicable given the controversial nature of abortion.[157] In doing so, the Court offered some insight into the Court's understanding of "controversial" in the context of commercial disclosures.[158] The Court reasoned that, in modern America, abortion itself is definitionally controversial, and thus a disclosure of state-sponsored programs that provide abortions is "anything but an 'uncontroversial' topic."[159] One might misread this conclusion as suggesting that all disclosures related to abortion necessitate heightened scrutiny; however, the implications here are not so broad.[160]

The Court distinguished its expansion of commercial speech protections from being similarly applicable in the realm of traditional informed consent. Relying on *Casey*'s joint opinion, the Court explained that the regulation of physician speech through informed consent requirements is a legitimate carveout from free speech protections.[161] Further, Justice Thomas contrasted the facts of *Casey* (disclosures by a physician to specific patients pursuing an abortion) with those at issue in *NIFLA*, which in his view "applie[d] to all interactions between a covered facility and its clients, regardless of whether a medical procedure [was] ever sought, offered, or performed."[162] However, the purpose of this Note is not to take issue with *Casey* or to suggest that *NIFLA* undermines *Casey*'s holding. To the contrary, *NIFLA* rightfully recognized the carveout of "regulation[] of professional conduct that incidentally burden[s] speech."[163] The more profound implication is how *NIFLA* implicitly narrowed, or at least forced limits around, the carveout by creating a presumption that compelled professional speech warrants heightened scrutiny if it does not—under First Amendment doctrine—explicitly fall within the informed consent or commercial speech exception.

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[157] *Id.* at 2372 (noting, additionally, that notice "in no way relates to the services" that CPCs provide).

[158] *See* Note, *supra* note 34, at 984 ("No consistent understanding of what either 'factual' or 'controversial' means for the purposes of evaluating compelled commercial disclosures has emerged among commentators or circuit courts that have attempted to flesh out this prong of *Zauderer*'s test.").

[159] *NIFLA*, 138 S. Ct. at 2372.

[160] *See infra* Section III.B (proposing new framework under which disclosure laws that are not factual and uncontroversial under *Zauderer* would be subject to intermediate scrutiny).

[161] *NIFLA*, 138 S. Ct. at 2373 (noting that informed consent requirements are "firmly entrenched in American tort law" (quoting Cruzan v. Dir., Mo. Dept. of Health, 497 U.S. 261, 269 (1990))).

[162] *Id.* (stating that licensed notice does not facilitate informed consent because it is not tied to medical procedure).

[163] *Id.*

NIFLA narrowed the boundaries of informed consent to reach only legitimate informed consent requirements; it did not broaden permission to regulate physician speech so long as it is directed at a specific patient pursuing a specific treatment related to the speech.[164] Most notably, the Court reasoned that even if the Act's notice requirement fell within the parameters of California's power to regulate the practice of medicine, "the notice provide[d] no information about the risks or benefits of those procedures."[165] It thereby hypothesized that a compelling First Amendment challenge would exist even if the disclosure fell under the unprotected umbrella of professional conduct. Critically, the Court reaffirmed *Casey*'s First Amendment holding because the Pennsylvania statute appropriately regulated professional conduct—not speech—in requiring that the disclosures meet the central prongs of informed consent: the nature and specifics of the procedure, medical risks involved, and medical alternatives.[166] At the same time, the Court upheld *Casey*'s First Amendment holding insofar as the statute was a legitimate exercise of informed consent. However, it also cabined this exception by acknowledging that "drawing the line" between impermissible content-based regulations of professional speech and permissible content-based regulations of professional conduct can be difficult, recognizing that not all

[164] *Id.* at 2374 ("The dangers associated with content-based regulations of speech are also present in the context of professional speech. . . . Take medicine for example. 'Doctors help patients make deeply personal decisions, and their candor is crucial.' Throughout history, governments have 'manipulat[ed] the content of doctor-patient discourse' to increase state power and suppress minorities . . . ." (alteration in original) (first quoting Wollschlaeger v. Governor, 848 F.3d 1293, 1328 (11th Cir. 2017) (en banc); then quoting Berg, *Doctor-Patient Discourse*, *supra* note 52, at 202)).

[165] *Id.* at 2373-74.

[166] *Id.* Notably, the statute at issue in *Casey* included an exception to the informed consent requirement if a provider "reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient." Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 883-84 (1992) (plurality opinion). Though strikingly absent in *NIFLA*'s reaffirmation of *Casey*, the joint opinion in *Casey* relied on this statutory exception when upholding the constitutionality of the regulation on due process grounds because "the statute does not prevent the physician from exercising his or her medical judgment." *Id.* at 884. Also relevant, and noticeably absent from the *NIFLA* discussion, is the scope of permissible means for delivering the State's message. The statute at issue in *Casey* required physicians to inform patients of the availability of state-issued materials containing information that advanced the State's preference for childbirth over abortion, but did not require physicians to deliver this message in their own voice. *Id.* at 881. Because "*Casey* says nothing about the constitutional issues raised by state laws that compel physicians themselves to engage in speech acts that advocate childbirth over abortion," Keighley, *supra* note 55, at 2353, and compelling physicians to deliver the State's message raises concerns about misattribution, *see* discussion *infra* note 229, *Casey* can hardly be understood as addressing and resolving the complicated First Amendment questions raised by modern abortion disclosure laws.

informed consent requirements are inherently legitimate, and warning against the government co-opting the doctor-patient relationship for invidious aims.[167]

The Court achieved this narrowing by emphasizing that precedent "ha[s] long protected the First Amendment rights of professionals" and providing both examples and rationales.[168] The Court reminded of the "danger of content-based regulations 'in the fields of medicine and public health, where information can save lives,'" reorienting again to the value of the speech to the audience/listener.[169] Further, the Court recognized that "'[p]rofessional speech' is also a difficult category to define with precision" and rejected vehemently that merely being in a licensed and regulated profession strips those professionals of their First Amendment protections, warning that this misinterpretation would afford the State a "powerful tool to impose 'invidious discrimination of disfavored subjects.'"[170] The Court's affirmation of the First Amendment concerns at play in the compelled communication of medical "advice" clearly suggests that rational basis review cannot be achieved merely by positioning the speech restriction within the appropriate medical landscape (doctors communicating to their patients), and instead that both the appropriateness (relevancy, intent, purpose toward the audience) and accuracy (truthfulness, nonmisleading-ness) of the compelled speech are necessary to validate rational basis review. The Court concluded that the purpose of the two professional/commercial free speech carveouts is not to enable State restrictions which are inaccurate, ideological, misleading, controversial, or illegitimate in coercive purpose.[171]

Ultimately, the Court did not determine whether strict scrutiny applies, holding instead that the regulation fails even intermediate scrutiny.[172] By testing and invalidating the *NIFLA* regulation on the basis of intermediate scrutiny, the decision reaffirms that the choice facing the courts in cases around these two fraught carveouts is not a binary one between rational basis and strict scrutiny. Speech restrictions that are proximate to, but partially or fully situated outside,

[167] *NIFLA*, 138 S. Ct. at 2373-75 (asserting that "the people lose when the government is the one deciding which ideas should prevail").

[168] *Id.* at 2374 ("For example, this Court has applied strict scrutiny to content-based laws that regulate the noncommercial speech of lawyers, professional fundraisers, and organizations that provided specialized advice about international law." (citations omitted)).

[169] *Id.* (quoting Sorrell v. IMS Health Inc., 564 U.S. 552, 566 (2011)).

[170] *Id.* at 2375 (quoting Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 423-24 (1993)).

[171] *Id.* (rejecting wholesale exception of licensed professionals from ordinary First Amendment principles because it would give "[s]tates unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement," which the Court cautions would give State power to "choose the protection that speech receives under the First Amendment").

[172] *Id.* (declining to decide whether strict scrutiny applies where State did not identify "persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles").

the narrowly drawn domain of these speech carveouts necessitate heightened scrutiny and the Court's opinion etches a framework for evaluating both the "substantial state interest" and whether the regulation is "sufficiently drawn to achieve it."[173]

Finally, the concurring opinion by Justice Kennedy warrants mentioning. The purpose of his short concurrence is to "underscore that the apparent viewpoint discrimination here is a matter of serious constitutional concern."[174] Here, Kennedy found it appropriate to criticize the regulation in question on the basis of its transparent political motivation.[175] The opinion strives to make clear that, even if the law had been reenacted with broader coverage (i.e., to all clinics and not simply CPCs), it would still be deeply fraught and necessitate heightened scrutiny as a result of its ideological nature.[176] As Justice Kennedy noted: "For here the State requires primarily pro-life pregnancy centers to promote the State's own preferred message advertising abortions."[177] The self-congratulatory statement by the California Legislature for the "forward thinking" regulation is, in Kennedy's mind, a clear indication that the purpose and intent of the speech restriction is not legitimate regulation, but instead ideological advocacy—and therefore impermissible viewpoint discrimination.[178] As this Note turns next to connecting *NIFLA* to the unsettled boundaries of the informed consent exception in the abortion context, Kennedy's point will be relevant in considering the First Amendment implications of the ideological purpose of these laws enacted by anti-abortion politicians and conservative legislatures, just as *NIFLA* did in considering the abortion-protective politicians and liberal legislature that supported the FACT Act.

III. *NIFLA*'S FRAMEWORK FOR CHALLENGING ANTI-ABORTION DISCLOSURE REQUIREMENTS

NIFLA was received with consternation by many abortion rights advocates, reproductive health organizations, and legal scholars who found the Court's five-to-four split along ideological lines distressing; as constitutional scholar Edwin Chemerinsky and reproductive justice scholar Michele Goodwin jointly put it: "[T]he case reflects constitutional gerrymandering: five conservative, male judges exercising their hostility toward reproductive rights" with "[s]peech

[173] *Id.*

[174] *Id.* at 2378 (Kennedy, J., concurring).

[175] *Id.* at 2379 ("[H]istory of the Act's passage and its underinclusive application suggest a real possibility that these individuals were targeted because of their beliefs.").

[176] *Id.*

[177] *Id.*

[178] *Id.* ("[I]t is not forward thinking to force individuals to 'be an instrument for fostering public adherence to an ideological point of view [they] fin[d] unacceptable.'" (alterations in original) (quoting Wooley v. Maynard, 430 U.S. 705, 715 (1977))).

serv[ing] as a fig leaf in this process."[179] Justice Thomas managed to manipulate First Amendment principles so the Court could both dramatically increase commercial speech protections such that it could strike down a purely factual, nonmisleading commercial regulation aimed at protecting women from documented deceptive practices at CPCs, while simultaneously reaffirming and reinforcing limited speech protections for compelled abortion disclosure regulations with strikingly similar factual circumstances and legal foundations.[180]

This Note argues, however, that the Court's legal contortions in *NIFLA* taken to advance its ideological anti-abortion position present an opportunity for the abortion rights movement to reclaim the troubling decision as an important doctrinal weapon for advancing reproductive justice. Despite Justice Thomas's clear attempt to stave off abortion advocates from utilizing this option as a tool for challenging abortion regulations, this Note argues that the *NIFLA* Court's strained decision can be read as outlining a path toward heightened scrutiny for evaluating First Amendment challenges by abortion providers to suspect pre-abortion informed consent regulations. By denying a categorical exception to First Amendment protections for professional speech and reframing commercial speech and informed consent as two potentially less protected areas under the umbrella of professional speech, *NIFLA* unifies the doctrinal foundations of these two traditional exceptions.[181] Even within these exceptions, *NIFLA* implies a necessary vigilance against wholesale exception to heightened scrutiny due to "the inherent risk that the Government seeks not to advance a legitimate regulatory goal [through compelled professional speech], but to suppress

[179] Chemerinsky & Goodwin, *supra* note 11, at 95; *see also, e.g.*, Savannah R. Montanez, Note, *Pregnant and Scared: How* NIFLA v. Becerra *Avoids Protecting Women's Reproductive Autonomy*, 56 SAN DIEGO L. REV. 829, 852 (2019) (characterizing *NIFLA* as "yet another abrogation of women's constitutional right to access abortion"); Emma Green, *The Supreme Court Hands a Win to the Pro-Life Movement*, THE ATLANTIC (June 26, 2018), https://www.theatlantic.com/politics/archive/2018/06/the-supreme-court-hands-a-win-to-the-pro-life-movement/563738/ (noting that pro-life movement "may increasingly see the highest court in the land as their best bulwark of defense"); Press Release, EMILY's List, EMILY's List Statement on NIFLA v. Becerra (June 26, 2018), https://www.emilyslist.org/news/entry/emilys-list-statement-on-nifla-v.-becerra [https://perma.cc/5XYL-7TZZ] (stating that *NIFLA* "will harm women, full stop"); Press Release, NARAL, SCOTUS Turns Its Back on Women (June 26, 2018), https://www.prochoiceamerica.org/2018/06/26/scotus-turns-its-back-on-women/ [https://perma.cc/TJ95-AAX4] (explaining that "Supreme Court ruling condones deceptive tactics of fake women's health centers").

[180] See Chemerinsky & Goodwin, *supra* note 11, at 99-110; *id.* at 110 ("[I]t is clear that the Court has abandoned its precedents in holding that the California law should have been enjoined as violating the First Amendment. The distinctions of the earlier cases, namely *Zauderer* and *Casey*, are specious.").

[181] *NIFLA*, 138 S. Ct. at 2374 (declining to recognize categorical exception to First Amendment for professional speech, especially in context of commercial speech and informed consent).

unpopular ideas or information."[182] While this concern is addressed in commercial speech doctrine through application of the *Zauderer* test, no equivalent doctrine exists for informed consent to ensure—as *NIFLA* explicitly dictates—only legitimate exercises of State regulatory power be exempt from heightened scrutiny.[183] Thus, this Note argues that *NIFLA* imposes a need and presents a framework for courts to apply a threshold test in informed consent challenges to determine whether the law should be exempted from heightened scrutiny. The threshold inquiry would function, as *Zauderer* does in compelled commercial speech cases, to distinguish between legitimate informed consent regulations that only "incidentally burden speech" as part of the regulation of medicine and more suspect compelled disclosures that warrant greater scrutiny.

Utilizing *NIFLA* as a blueprint, this Note argues that *NIFLA* (1) outlines a clear, broadly applicable set of rules for triggering heightened scrutiny for informed consent that can *and should* be applied in First Amendment challenges to compelled pre-abortion disclosures and (2) raises an important principle for how heightened scrutiny, once triggered, should be applied. To fully unravel and articulate this new framework, this Section will focus on how *NIFLA* confronts two key aspects of the First Amendment question: content as a trigger for heightened scrutiny and value for the listener as underlying any compelling State interest. First, because under *NIFLA* only legitimate informed consent regulations are permissible forms of state regulation subject to deferential rational basis review,[184] evidence of controversy and ideology acts to trigger heightened scrutiny. Second, once an abortion regulation triggers heightened scrutiny under the First Amendment, the value of the speech to the listener must be central to any inquiry of whether the compelled disclosures impermissibly infringe on the free speech rights of abortion providers.

A. *Disentangling First Amendment Abortion Regulations from Fourteenth Amendment Jurisprudence: Applying* Zauderer *as a Threshold Test for Triggering Heightened Scrutiny*

Central to *NIFLA* is a stringent application of the *Zauderer* test that hinges on drawing the boundaries between unprotected, noncontroversial, and factual disclosures and suspect compelled ideological or controversial speech—the latter necessitating heightened scrutiny even if existing within the broader category of less protected commercial speech.[185] While *NIFLA* did not explicitly

[182] *Id.* (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994)).

[183] *Id.* at 2373.

[184] Laura Portuondo, *Abortion Regulation as Compelled Speech*, 67 UCLA L. REV. (forthcoming Jan. 2020) (manuscript at 15-16) (noting that *Zauderer* "has traditionally stood for rational basis review, as a form of 'deferential review' appropriate for many commercial regulations").

[185] *See* Stuart v. Camnitz, 774 F.3d 238, 250 (4th Cir. 2014) ("Under an intermediate standard of scrutiny, the state bears the burden of demonstrating 'at least that the statute

extend this heightened protection into the realm of informed consent, the implications on pre-abortion "informed consent" requirements are clear. First, the Court's application of a presumption of heightened scrutiny for professional speech outside the narrow exceptions of certain commercial speech and professional conduct, including legitimate informed consent, requires courts to conduct an independent First Amendment analysis when evaluating claims that pre-abortion disclosure infringes on physicians' speech rights.[186] Second, the Court's mere labeling of a statute as informed consent does not inherently qualify it for rational basis review and thus compelled ideological speech masquerading as informed consent requirements should trigger heightened scrutiny.[187]

1. *NIFLA* Supports a Separate Test: Evaluating Informed Consent Regulations Consistent with First Amendment Precedent, Not Fourteenth Amendment Abortion Precedent

NIFLA first engaged with the concept of informed consent by confirming an already widely accepted and uncontroversial notion: informed consent laws are constitutional exercises of state power necessary to the regulation of the practice of medicine and, as a result, First Amendment challenges should be subject to rational basis review.[188] However, the Court rejected the notion that any form of professional speech should be inherently subject to this lower standard because "that gives the States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement."[189] Instead, the Court doubled down on narrowing the scope of the professional speech exception and reinforced the implication that compelled speech in the professional context, including informed consent regulations, warrants some judicial evaluation to consider whether heightened review should be triggered.[190] The Court emphasized that physicians are not only entitled to First Amendment protection, but also that compulsion of physician speech should be scrutinized carefully given historical examples of governments that have "'manipulat[ed] the content

directly advances a substantial governmental interest and that the measure is drawn to achieve that interest.'" (quoting Sorrell v. IMS Health Inc., 564 U.S. 552, 572 (2011))).

[186] *See NIFLA*, 138 S. Ct. at 2373-74 (holding that outside commercial speech exempt by *Zauderer* and professional conduct that incidentally burdens speech like legitimate informed consent, "this Court's precedents have long protected the First Amendment rights of professionals").

[187] *See id.* at 2373 (limiting exemption for professional conduct to regulations that "incidentally burden speech").

[188] *Id.*

[189] *Id.* at 2375 (noting that definition of "profession" for First Amendment purposes requires more than state licensing because "States cannot choose the protection that speech receives under the First Amendment").

[190] *Id.* at 2374 (asserting that "dangers associated with content-based regulations of speech," which necessitated heightened scrutiny in *NIFLA*, "are also present in the context of professional speech," medicine, and public health).

of doctor-patient discourse' to increase State power and suppress minorities."[191] Justice Thomas expounded extensively on the risk of the State exerting totalitarian impulses through compelled speech, invoking examples from the Cultural Revolution, Nazi Germany, and Ceausescu's Romania.[192] Justice Kennedy's concurrence underscores this same concern in rooting his application of heightened scrutiny in what he perceived as ideological statements by the California legislature concerning the Act.[193] *NIFLA* implicitly held that First Amendment protections cannot be blanketly denied to a group based on professional status and that simply locating the speech compulsion within an act of professional regulation does not alone entitle it to rational basis review.[194]

In the absence of an established threshold test to establish when heightened scrutiny should apply in evaluating physicians' First Amendment challenges to pre-abortion disclosure laws, courts have substituted in *Casey'*s truthful, nonmisleading, and relevant test.[195] Nominally *Casey*'s test appears to parallel *Zauderer'*s objective: to identify suspect compelled disclosure requirements (and subject them to heightened scrutiny) from the sea of ordinary and permissible compelled disclosures. However, because *Casey'*s test was developed and interpreted in the context of a Fourteenth Amendment due process analysis, courts have ascribed broad and flexible meanings to "truthful,

[191] *Id.* (alteration in original) (quoting Berg, *Doctor-Patient Discourse*, *supra* note 52, at 201). In his discussion of the perils surrounding compelling physician speech, Justice Thomas relies on Professor Paula Berg's 1994 article on a First Amendment theory of doctor-patient communication. Potentially revealing of Thomas's position on the scope of First Amendment protections absent his ideological opposition to abortion, Berg criticizes the Rehnquist Court's decisions in *Rust* and *Casey* for upholding "viewpoint-based regulations on doctor-patient speech" and because they did "not sufficiently restrain the government from using doctor-patient discourse as a tool for indoctrination, nor did [they] protect patients' interest in receiving the information they need to exercise meaningfully their constitutional right to determine the course of their medical treatment." Berg, *Doctor-Patient Discourse*, *supra* note 52, at 206. In arguing that the doctrine in *Casey* and *Rust* is insufficiently speech protective, Berg proposes a First Amendment theory of doctor-patient discourse with the "practical objective of . . . aid[ing] courts in distinguishing between regulations that encourage the disclosure of information necessary for rational, autonomous medical choices, and those that impose official dogma upon medical choices." *Id.* at 207.

[192] *NIFLA*, 138 S. Ct. at 2374 ("For example, during the Cultural Revolution, Chinese physicians were dispatched to the countryside to convince peasants to use contraception." (quoting Berg, *Doctor-Patient Discourse*, *supra* note 19152, at 201)).

[193] *Id.* at 2379 (Kennedy, J., concurring) (suggesting that history of Act in question and selective application implies that pro-life groups "were targeted because of their beliefs"); *see supra* Section II.B (discussing Kennedy's concurrence).

[194] *NIFLA*, 138 S. Ct. at 2371-72 (majority opinion) ("Speech is not unprotected merely because it is uttered by 'professionals.' This Court has 'been reluctant to mark off new categories of speech for diminished constitutional protection.'" (quoting Denver Area E. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 804 (1996))).

[195] *See, e.g.*, Planned Parenthood Minn., N.D., S.D. v. Rounds, 686 F.3d 889, 893 (8th Cir. 2012) (en banc).

nonmisleading, and relevant"; these meanings lack any basis in First Amendment jurisprudence.[196] This important distinction in how each test is practically interpreted is highlighted in the following comparison of two cases. In both instances, the court is evaluating First Amendment challenges to compelled disclosure laws, the first (*Rounds*) in the context of a pre-abortion informed consent regulation and the second (*R.J. Reynolds Tobacco Co. v. Food & Drug Admin.*[197]) in the context of requiring tobacco companies to print graphic warnings on cigarette cartons. As discussed in Part II, the Eighth Circuit in *Rounds* applied *Casey'*s truthful, nonmisleading, and relevant test to evaluate a First Amendment challenge brought by abortion providers to a South Dakota requirement that abortion providers inform patients that "increased risk of suicide ideation and suicide" is a "known medical risk of the [abortion] procedure" to which they "would be subjected" by having an abortion.[198] The Eighth Circuit found the suicide advisory satisfied the truthful prong of *Casey* based solely on studies that demonstrated some relative correlation—but no reliable evidence of causation—between suicide risk and abortion.[199] Further illustrating the court's discretion in interpreting *Casey*'s test, the court does not analyze whether the compelled disclosure may be misleading to patients by identifying suicide as a medical risk without evidence of causation, but rather expands the definition of medical risk to include "strongly correlated adverse outcome[s] as a risk."[200] The court's approach in *Rounds* is clearly distinguished from a disciplined First Amendment inquiry; in finding that because "the [challenged] statute does not require the disclosure of any causal link," correlation is sufficient to satisfy the factual requirement and uphold the statute compelling physician speech.[201]

In stark contrast, under *Zauderer*, the D.C. Circuit in *R.J. Reynolds* held that government mandated graphic warnings on cigarette packaging *failed* the "factual" prong because "[w]hile none of these images are patently false, they certainly do not

[196] *See* Keighley, *supra* note 55, at 2351 ("A model of physicians' First Amendment rights that looks solely to the Court's undue burden framework in *Casey* fails to recognize that physicians, just like ordinary citizens, retain a protected autonomy interest in not being forced to be the state's mouthpiece on matters of ideological opinion and belief.").

[197] 696 F.3d 1205, 1217 (D.C. Cir. 2012), *abrogated on other grounds by* Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18 (D.C. Cir. 2014) (en banc). *R.J. Reynolds* addressed the scope of *Zauderer*'s exception, taking a narrow view and holding it was limited only to mandated disclosures aimed at addressing deception. *Id.* at 1216. However in 2014, the D.C. Circuit overturned the limited reading in *R.J. Reynolds*, expanding the scope of the *Zauderer* exception beyond compelled disclosures directly addressing issues of deception. *Am. Meat Inst.*, 760 F.3d at 20-22 (holding that "*Zauderer* in fact does reach beyond problems of deception").

[198] S.D. CODIFIED LAWS § 34-23A-10.1(1)(e) (2005) (providing pre-abortion informed consent requirement for physicians).

[199] *Rounds*, 686 F.3d at 893.

[200] *Id.* at 899.

[201] *Id.*

impart purely factual, accurate, or uncontroversial information to consumers."[202] The court elaborates that under *Zauderer*, only "clear statements that were both indisputably accurate and not subject to misinterpretation by consumers" satisfy the factual requirement.[203] The discrepancy between the strict adherence to a narrow definition of "truthful" in applying *Zauderer* in *R.J. Reynolds* and the loose and discretionary interpretation in applying *Casey* in *Rounds* is rooted in the doctrinal origins of each test and the fundamental right each test was established to protect.[204] The *Zauderer* test evolved from First Amendment doctrine premised on protecting against governmental regulation or compulsion of ideological speech. In applying *Zauderer*, the D.C. Circuit appropriately positioned its analysis toward evaluating compelled speech based on its value to the listener (to protect consumers from misleading or deceitful advertising) and thus required a narrow, disciplined inquiry into the objective truthfulness and character of the disclosure.[205] In applying *Casey*'s test—rooted in a Fourteenth Amendment due process challenge—the Eighth Circuit in *Rounds* was not bound by strict First Amendment principles of interpretation or existing precedent, which gave the court significant discretion to interpret the meaning of the prongs.[206] Therefore, the *Casey* test, which was established to

[202] *R.J. Reynolds*, 696 F.3d at 1217. The court also found that "the graphic warnings are not 'purely' factual because—as FDA tacitly admits—they are primarily intended to evoke an emotional response, or, at most, shock the viewer into retaining the information in the text warning." *Id.* at 1216; *see also* Corbin, *supra* note 45, at 1321-23 (remarking on "[m]anipulation via [e]motion" in mandatory warnings by tobacco companies whereby they rely on provocative images to evoke emotional response and make them less likely to be overlooked). Abortion display-and-describe ultrasound regulations are similarly aimed at persuasion by evoking emotion in a hope "that the fetal image will overwhelm the decision to abort by triggering something like a primitive maternal instinct." Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 358, 396-97 (2008); *id.* at 358 ("[T]he core and motivating belief [behind display-and-describe ultrasound requirements] is that a woman who sees her baby's image on a screen will be less likely to abort."). This is also a strategy employed by CPCs to achieve their explicit goal of preventing abortion. *See* Chemerinsky & Goodwin, *supra* note 11, at 90 ("NIFLA's website emphasizes their strategy, which is the recognized 'importance of using ultrasound in a pregnancy center setting for reaching abortion-minded women . . . and . . . pioneering,' a key tool in 'the pro-life movement.'" (omissions in original) (quoting *About NIFLA*, NAT'L INST. FAM. & LIFE ADVOCATES, https://nifla.org/about-nifla [https://perma.cc/CV8X-5TEQ] (last visited Feb. 12, 2020))). *But see* EMW Women's Surgical Ctr., P.S.C. v. Beshear, 920 F.3d 421, 441-42 (6th Cir. 2019) (holding that because *Casey* did not make any finding regarding emotional effect in its First Amendment analysis, "*Casey* thus implicitly recognized that discomfort to the patient from the mandated disclosure of truthful, non-misleading, and relevant information does not make an informed-consent law invalid under the First Amendment").

[203] *R.J. Reynolds*, 696 F.3d at 1216.

[204] *See id.*; *Rounds*, 686 F.3d at 899.

[205] *See R.J. Reynolds*, 696 F.3d at 1229-30.

[206] *See Rounds*, 686 F.3d at 904 (calling on legislature to more clearly delineate law in this area and deciding that disclosure met nonmisleading prong despite reflecting medical uncertainty). A similar analysis would hold in demonstrating the flawed nature of the

determine whether an informed consent statute placed an impermissible burden on a woman's right to an abortion, not whether it impermissibly infringed on the physician's First Amendment rights, is an ineffective guard against "the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information."[207] Rather, this Note argues, *Zauderer* is

nonmisleading prong as protective against physician speech. Professor Danielle Lang points out that the intent of the nonmisleading prong is to provide an additional layer of protection because it serves as "a vehicle for the courts to determine whether the dissuasion law disrupts autonomy in this manner, regardless of the technical truthfulness of the disclosures." Danielle Lang, *Truthful But Misleading? The Precarious Balance of Autonomy and State Interests in* Casey *and Second-Generation Doctor-Patient Regulation*, 16 U. PA. J. CONST. L. 1353, 1411-14 (2014). Cases like *Rounds* demonstrate the nonmisleading prong's limited effectiveness as currently interpreted. *See id.* at 1393 ("[S]everal lower courts' analyses focus solely on technical truthfulness and allow the nonmisleading component of the standard to drop out altogether.").

[207] NIFLA v. Becerra, 138 S. Ct. 2361, 2374 (2018) (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994)). The Sixth Circuit's post-*NIFLA* decision in *EMW*, interpreted *NIFLA* in the context of a First Amendment challenge to Kentucky's display-and-describe statute. While the court took much the same approach as *Lakey* in applying *Casey*'s undue burden standard to assess the constitutionality of the law as a restriction on speech, *EMW*, unlike *Lakey*, analyzed the First Amendment claim independently from the due process claim and took pains to frame its analysis as part of First Amendment doctrine. *See id.* at 429-35. The court avoided the statute falling outside *NIFLA*'s professional conduct exception to heightened scrutiny by interpreting *NIFLA* as imputing *Casey*'s "truthful, non-misleading, and relevant" standard and analysis, taken from the Court's due process analysis, directly into First Amendment doctrine concerning pre-abortion disclosures. *Id.* at 429. In doing so, *EMW* effectively adopts what this Note argues *NIFLA* requires—that the analysis of whether a compelled disclosure is truthful, nonmisleading, and relevant (whether nominally applying *Casey* or *Zauderer*) should be interpreted through a First Amendment, not due process, lens—but does so without the meaningful implication of having to apply the disciplined First Amendment doctrine to ensure only legitimate informed consent provisions are upheld. *Id.* ("Although much of the analysis in *Casey* addressed the plaintiffs' undue-burden claim, the joint opinion's First Amendment holding built upon its conclusion that the mandated informed-consent disclosures in that case met the criteria of being truthful, non-misleading, and relevant. . . . We therefore are applying *Casey* and *NIFLA* as they directly pertain to the First Amendment claim and not to any undue-burden claim under the Fourteenth Amendment."). Thus, despite applying much the same analysis and arriving at the same result, *EMW* sheds concerns about doctrinal integrity resulting from the intermingling of due process and First Amendment standards that arose out of *Lakey* and *Rounds*. *Id.* By interpreting *NIFLA* as affirming *Casey*'s undue burden analysis of the truthful, nonmisleading, and relevant nature of the Pennsylvania statute as firmly rooted First Amendment precedent, *EMW* bypasses the narrow and disciplined meanings of "truthful and nonmisleading" for which this Note argues. *Id.* However, by moving the discussion of compelled abortion disclosures squarely into the jurisdiction of First Amendment jurisprudence, the decision in *EMW* invites further comparisons to constitutional standards of compelled commercial speech and suggests an opportunity to shift toward the more disciplined analysis advocated for in this Note. We can see this in *EMW* where compelled commercial speech doctrine crept into its analysis. In the court's evaluation of whether a sonogram "conveys objective medical facts," *EMW* relied

the appropriate threshold test to determine whether heightened scrutiny is warranted in the context of First Amendment claims. Not only does *Zauderer*'s doctrinal foundation in First Amendment compelled disclosures structurally align with informed consent inquiries, but *NIFLA*'s discussion of informed consent also demonstrates that compelled commercial disclosures and professional disclosures share the same boundary with ideological speech.[208]

2. Applying *Zauderer* to Pre-Abortion Disclosure Laws: Heightened Scrutiny for Controversial or Ideological Compelled Disclosures

The Court in *NIFLA* returns several times to the suspect nature of ideological content, political bias, or controversial substance and finds that compelled professional speech of this nature—commercial or medical—necessitates heightened scrutiny.[209] In *Casey*'s brief consideration of the First Amendment challenge brought by physicians who provide abortions, the Court effectively affirmed the informed consent exception to heightened scrutiny and subjected the disclosures only to rational basis review by finding them within "the practice of medicine, subject to reasonable licensing and regulation by the State."[210] The disclosures in *Casey*, while serving valid State ideological objectives to discourage abortions, were nonetheless noncontroversial, incontrovertible medical facts and germane to the procedure in question "no different from a requirement that a doctor give certain specific information about any medical procedure."[211] They were also communicated through state-authored pamphlets and not directly by physicians, which avoided any First Amendment concerns about the listener misattributing the source of the speech.[212] Thus, *Casey* did not

on a compelled commercial speech case that upheld graphic warnings on cigarette boxes by applying rational basis under *Zauderer*. *Id.* at 329-30.

[208] *NIFLA*, 138 S. Ct. at 2372.

[209] *Id.* at 2374-75.

[210] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992) (plurality opinion).

[211] *Id.* Some scholars dispute whether informing a woman of the gestational age of the fetus is sufficiently related to the situation because "[t]he disclosure at issue is not about what the consequences are, but what the embryo or fetus *looks like*, information which is not clearly relevant to patients' decisions." Vandewalker, *supra* note 45, at 9-10; *see also* Coleman, *supra* note 55, at 892 (explaining that because law at issue in *Casey* was limited to factual information, it did not preclude physicians from using their professional judgment, and included exception for disclosures having severe impact on patient's mental or physical health, *Casey* can be applied "in a manner that remains deferential to professional standards"); Keighley, *supra* note 55, at 2361.

[212] *See* Corbin, *supra* note 45, at 1328-29 ("Even where compulsory speech is not false or misleading, distortion may still occur if the message advocates a viewpoint and the audience misattributes it to the speaker. . . . The question is whether the patient will understand that this pro-life message is the government's and not her doctor's."); Keighley, *supra* note 55, at 2361 ("[T]he Court's holding should be read in context: the particular Pennsylvania statute before the Court, which did not require the physician to spread the state's anti-abortion message as though it was the physician's own opinion, did not violate the First Amendment. . . . The

necessitate an expansive explication of the triggers for heightened scrutiny in the First Amendment inquiry. However, the state-sponsored abortion-related advertisements in *NIFLA* received more nuanced attention by the Court (even if the disclosures themselves were similarly factual and informative) regarding the First Amendment question. The result is a clear repudiation of the use of rational basis review for compelled professional speech in either commercial speech or informed consent when the state-compelled speech is controversial in nature and/or ideological in substance.[213]

NIFLA suggests that a compelled disclosure that is deemed factual and nonmisleading may also be found to be ideological in intent and effect, thus triggering a heightened level of scrutiny.[214] This consideration of the ideological nature of compelled speech functions to define and narrow the boundaries of governmental powers within the realm of informed consent. *NIFLA* does not suggest that all informed consent provisions for pre-abortion disclosures should face heightened scrutiny given the controversial nature of abortion, but rather implicitly suggests that politically motivated, potentially untruthful or misleading, and ideologically constituted informed consent disclosures should face heightened scrutiny when challenged on First Amendment grounds. To distinguish these suspect regulations from ordinary and permissible informed consent, *NIFLA* offers a foundation for courts to apply *Zauderer* as a threshold test for determining the standard of review for First Amendment challenges to informed consent laws.

physician herself was not required to give this information about abortion alternatives and medical assistance benefits—she was just required to make the patient aware that this information could be found in the state pamphlet."); *see also Casey*, 505 U.S. at 881 ("The physician or a qualified nonphysician must inform the woman of the availability of printed materials published by the State describing the fetus and providing information about medical assistance for childbirth, information about child support from the father, and a list of agencies which provide adoption and other services as alternatives to abortion."). Additionally, Professor Berg explains that "[w]hile patients can simply discard printed materials, they have 'no choice but to sit and listen, or perhaps to sit and to try *not* to listen' when the state's message is communicated orally." Berg, *Doctor-Patient Discourse*, *supra* note 52, at 256 (footnote omitted) (quoting Public Utils. Comm'n v. Pollak, 343 U.S. 451, 469 (1952) (Douglas, J., dissenting)).

[213] *See NIFLA*, 138 S. Ct. at 2372-75 (finding that disclosure does not even meet intermediate scrutiny).

[214] The challenged disclosure in *NIFLA* stated: "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]." *Id.* at 2369. This is objectively true information about California's healthcare services. *Id.* at 2369-70, 2372 (dismissing applicability of *Zauderer*, which would have required rational basis review, because the notice "requires these clinics to disclose information about *state*-sponsored services—including abortion, anything but an 'uncontroversial' topic").

B. *Applying Heightened Scrutiny to Compelled Pre-Abortion Disclosures: Focus on Value to the Listener*

The effect of applying *Zauderer* to determine the level of scrutiny for First Amendment challenges by physicians to pre-abortion disclosures is to bifurcate the court's First Amendment and Fourteenth Amendment analysis of the regulation, treating each claim as an independent basis for which a court can find the regulation unconstitutional and strike it down. In this framework, First Amendment claims are no longer muddled by an undue burden analysis. Instead, disclosure laws that are not factual and uncontroversial under *Zauderer* are subject to, at a minimum, intermediate scrutiny. *NIFLA* describes intermediate scrutiny as an inquiry into whether the regulation serves a "substantial State interest" and whether the regulation is "sufficiently drawn to achieve it."[215] Accordingly, the Court's analysis of heightened scrutiny is bound by the rights and interests at issue in the First Amendment claims.

The State's power to enact reasonable regulations for the health, safety, and protection of the population necessitates limited First Amendment protections for certain forms of professional speech.[216] In the commercial context, the State is empowered to curtail or compel speech as a part of its regulation of industry, with its aim to protect consumers from misleading advertisements or to warn consumers against dangerous undisclosed risks.[217] For informed consent, the State's overriding interest lies in providing patients with accurate, relevant, and necessary information prior to making a medical decision.[218] In both cases, the constitutional value underpinning the lower level of First Amendment protection is derived from its impact on the audience or listener, not the speaker.[219]

When a court applies heightened scrutiny—even before it grapples with the issues of under- or over-inclusivity, efficacy, and alignment with intended goal—it must first accurately identify the individual rights and compelling governmental interests at play. *Casey* established the State's legitimate and

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[215] *Id.* at 2375.

[216] *Id.* at 2372.

[217] *See* Post, *supra* note 21, at 876 ("Although the state may not suppress public discourse because it is misleading or deceptive, it may censor deceptive or misleading commercial speech.").

[218] *See* Post, *supra* note 37, at 969 ("Informed consent doctrine rests on the premise that '[i]t is the prerogative of the patient to choose his treatment,' and that 'a doctor may not withhold from the patient the knowledge necessary for the exercise of that right.'" (alteration in original) (quoting Miller v. Kennedy, 522 P.2d 852, 861 (Wash. Ct. App. 1974))); discussion *supra* Section I.B ("Medicine is subject to reasonable regulation by the State, and thus, First Amendment challenges to informed consent regulations typically face rational basis review.").

[219] *See* Post, *supra* note 37, at 969.

compelling interest in preserving potential life from the point of conception.[220] When analyzing a due process challenge to abortion disclosures, *Casey* requires courts to apply the three-prong undue burden test (truthful, relevant, and nonmisleading), which is designed to permit regulations with the purpose and effect of discouraging abortion so long as they do not impose an undue burden on a woman's ability to access one.[221] The undue burden test in the context of informed consent requirements primarily balances the privacy and autonomy interests of the woman seeking the abortion with the interests of the State in preserving the potential life of the fetus, the health of the woman, and regulating the practice of medicine.[222] It is this same state interest in protecting potential life that incorrectly presents itself at the center of later appellate cases such as *Lakey* and *Rounds* in their First Amendment consideration.[223] This interest, while legitimate, is misplaced as the central issue in a compelled speech inquiry.

A pre-abortion disclosure that triggers heightened scrutiny must, at a minimum, have legitimate value to the listener in order to be sufficiently drawn to serve a substantial state interest and survive heightened scrutiny.[224] Absent any value to the patient, the State is compelling private abortion providers to "promot[e] an approved message" to advance the State's interest in protecting potential life without any direct effect of furthering that interest through influencing the patient's decision.[225] For example, in *Stuart*—where the

[220] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992) (plurality opinion) (rejecting *Roe*'s trimester framework to "promote the State's profound interest in potential life, through pregnancy").

[221] *Id.* at 872 ("Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself.").

[222] *Id.* at 884 ("The doctor-patient relation does not underlie or override the two more general rights under which the abortion right is justified: the right to make family decisions and the right to physical autonomy.").

[223] *See* Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570 (5th Cir. 2012); Planned Parenthood Minn., N.D., S.D. v. Rounds, 686 F.3d 889, 904 (8th Cir. 2012) (en banc).

[224] NIFLA v. Becerra, 138 S. Ct. 2361, 2371 (2018) ("By compelling individuals to speak a particular message, such notices 'alte[r] the content of [their] speech.' . . . By requiring petitioners to inform women how they can obtain state-subsidized abortions—at the same time petitioners try to dissuade women from choosing that option—the licensed notice plainly 'alters the content' of petitioners' speech." (alterations in original) (quoting Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 795 (1988))); *see supra* Section I.B.

[225] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 579 (1995); *see* Portuondo, *supra* note 184 (manuscript at 15-16, 21-23) (arguing that in wake of *NIFLA v. Becerra*, fetal protective laws should be challenged under First Amendment because, unlike informed consent statutes, they compel conduct that espouses idea—not state interest—of respect for potential human life). Portuondo argues that because these laws

challenged statute permitted women to become temporarily deaf and blind during the mandated sonogram and accompanying fetal description—the compelled speech and expression implicitly could not serve the interest of convincing a woman to favor pregnancy.[226]

Whether the compelled speech is narrowly drawn to sufficiently serve the legitimate government interest in protecting a fetus that may become a child and survive intermediate scrutiny hinges first on the value of the compelled speech for the listener, and second on whether the State can advance its interest without unduly infringing on a physician's First Amendment rights not to convey the State's message when it violates the physician's deeply held philosophic beliefs and medical integrity.[227] Thus, even where the patient is a captive audience and the content of the speech has value in informing a woman's choice, the court must also find that the pre-disclosure regulation is narrowly drawn to achieve the State interest in protecting the potential life and or ensuring informed medical decision-making. If a regulation is subject to heightened scrutiny under this framework, it inherently falls outside the realm of ordinary informed consent. Thus, the message need not be delivered by the physician and the State can pursue means of directly advancing its interest through regulations that have the purpose of favoring pregnancy over abortion without also burdening speech.[228]

Pre-abortion disclosure statutes further burden physician speech by creating confusion for the listener over whether the source of speech is their trusted

compel actions that have no purpose other than to express respect for potential life, under *NIFLA* they should be challenged as impermissible acts of compelled speech. *Id.*

[226] *See* Stuart v. Camnitz, 774 F.3d 238, 252 (4th Cir. 2014) ("[A] woman who has rendered herself temporarily deaf and blind . . . does not receive the information, so it cannot inform her decision.").

[227] Some scholars argue the First Amendment rights of a patient not to listen are implicated as well. *See, e.g.*, Post, *supra* note 37, at 973-75.

[228] In finding the notice requirement in *NIFLA* to be overly broad, the Court held that California could achieve its goal of "inform[ing] low-income women about [California's free reproductive healthcare] services 'without burdening a speaker with unwanted speech'" through "a public-information campaign" or "even post[ing] the information on public property near crisis pregnancy centers." *NIFLA*, 138 S. Ct. at 2376 (quoting *Riley*, 487 U.S. at 800). Further, the Court rejected California's argument that its advertising campaign was unsuccessful because many eligible low-income women remained unenrolled in the State program. *Id.* ("Here, for example, individuals might not have enrolled in California's services because they do not want them, or because California spent insufficient resources on the advertising campaign."). This failed advertising attempt was insufficient to justify compelling speech through the notice requirement because "'a tepid response' does not prove an advertising campaign is not a sufficient alternative." *Id.* (quoting *Riley*, 487 U.S. at 795). The Court concluded that a state is prohibited under the First Amendment from "sacrific[ing] speech for efficiency," and thus "California cannot co-opt the licensed facilities to deliver its message for it." *Id.*

physician or the State.[229] States can remedy this confusion by communicating directly with the patients—for example, through state-issued pamphlets and state-run media campaigns similar to what was at issue in *Casey*. Therefore, pre-abortion disclosures that fail *Zauderer* as illegitimate informed consent regulations are unlikely to survive heightened scrutiny when challenged under the First Amendment.

The critical point of divergence in a First Amendment analysis from the undue burden framework is in affirming the primacy of the listener's speech value in applying heightened scrutiny and assessing whether the compelling state interest in the potential life of a fetus is narrowly tailored to achieve it. In *Casey*'s due process analysis, the Court held that compelled disclosures with the purpose and effect of dissuading abortion permissibly promoted the state interest in preserving potential life and did not constitute an undue burden on women because they remained free to make the ultimate decision.[230] However, these same disclosure requirements, absent any clear benefit to the patient in the First Amendment context, are examples of unconstitutional government compelled ideological speech that would be unlikely to survive heightened scrutiny in the First Amendment context. As a result, under the framework proposed by this Note, courts could be faced with striking down a disclosure requirement that is a permissible burden on a woman's access to abortion but an impermissible restraint on physician speech. What *Lakey* completely confused and *Rounds* merely muddled is that a pre-abortion disclosure that relies on contested science

[229] Importantly, the statute at issue in *Casey* did not require physicians to personally convey the content of the State's anti-abortion message, but rather required the provider to "inform the woman of the availability of printed materials published by the State" containing information meant to persuade a woman to choose childbirth over abortion. Planned Parenthood of Se Pa. v. Casey, 505 U.S. 833, 881 (1992) (plurality opinion). Unlike in *Casey*, many modern compelled disclosure laws, including those in *Rounds*, *Lakey*, and *Stuart*, compel physicians to advance the State's message discouraging abortion in their own voice. In addition to the physician's speech rights, the compelled disclosures also raise significant First Amendment concerns about women misattributing the State's message as that of her trusted physician. *See* Hill, *supra* note 66, at 443 ("Because the state is deploying the provider to further its own message, the woman may assume that the false or misleading information is coming from her physician and accord the state-mandated information more weight than she should."); Keighley, *supra* note 55, at 2374 ("A patient trusts that her physician's words to her convey expert knowledge tailored to serve the patients' best interests, and that these words are not the product of the state's moral agenda."). Regardless of misattribution, laws that compel physicians to serve as the messenger of the State's message are especially troubling because as a trusted or authoritative figure, the physician's voice "add[s] a patina of trustworthiness and expertise" to the message, making it more persuasive. Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 979 (2009).

[230] *Casey*, 505 U.S. at 878 ("To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion.").

to controversially portray abortions as medically dangerous can potentially (and likely will) pass the Court's undue burden standard, while nonetheless fail an appropriate and independent First Amendment review.

CONCLUSION

While initially feared by progressive activists to usher in further restrictions on the regulatory state in favor of both unfettered commercial interests and anti-abortion political agenda, *NIFLA* may prove to be a pyrrhic victory for the right. Instead it might serve as a catalyst in rolling back government restrictions on abortion access, not through claims of undue burden on the woman but rooted in the First Amendment rights of physicians.

NIFLA illustrates that even when the compelled speech is in the State's voice; serves a consumer purpose; and is factual, relevant, and informative, it can be disallowed on the basis of a First Amendment challenge. The Court's speech protective analysis can be used by the reproductive justice movement as a blueprint for bringing First Amendment claims challenging pre-abortion disclosure laws. The decision is integral in advocating for courts to bifurcate analyses of First Amendment claims of infringing on physician speech and Fourteenth Amendment claims of undue burden on abortion access. *NIFLA* further informs how courts should treat the speech-specific claims by linking commercial speech doctrine with informed consent, both as examples of professional speech. *NIFLA*'s narrow conception of what constitutes unprotected professional speech centered around the regulatory value to the listener (either through professional conduct or commercial speech) and placed further restrictions on how compelled speech can be narrowly tailored to advance a state interest. Just as *NIFLA* held a statute that served a legitimate consumer purpose, and was factual, relevant, and informative could not survive intermediate scrutiny, this Note offers a framework for arguing that suspect pre-abortion disclosure regulations should be subject to that same level of scrutiny. As a result, courts would need to treat First Amendment challenges independently from due process challenges and be forced to reconcile *NIFLA*'s free speech precedent with the substance of the abortion-protective challenge.