Washington Law Review

Volume 95 | Number 4

12-1-2020

Sonograms and Speech: Informed Consent, Professional Speech, and Physicians' First Amendment Rights

Oliana Luke
oliluke@washlrev.org

Follow this and additional works at: https://digitalcommons.law.uw.edu/wlr

Part of the Constitutional Law Commons, and the Health Law and Policy Commons

Recommended Citation

Oliana Luke, Comment, *Sonograms and Speech: Informed Consent, Professional Speech, and Physicians' First Amendment Rights*, 95 Wash. L. Rev. 2027 (2020).
Available at: https://digitalcommons.law.uw.edu/wlr/vol95/iss4/9

This Comment is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact lawref@uw.edu.

SONOGRAMS AND SPEECH: INFORMED CONSENT, PROFESSIONAL SPEECH, AND PHYSICIANS' FIRST AMENDMENT RIGHTS

Oliana Luke*

Abstract: Abortion is an extremely divisive topic that has caused waves of litigation. The right to access abortion has traditionally been challenged based on due process, equal protection, and privacy grounds. However, in a more recent string of cases, physicians have been challenging laws that require the physician to narrate an ultrasound before an abortion as an abridgment of their First Amendment rights. These cases require courts to balance the government's ability to reasonably regulate a physician through professional licensing with the physician's First Amendment protections against government-compelled speech. This Comment argues that, to balance these ideals and survive First Amendment scrutiny, mandatory ultrasound laws must include exceptions for therapeutic privilege and patient waiver. These exceptions, grounded in the established medical practice of informed consent, apply when certain information would be more harmful than beneficial to a patient. Statutes that do not include these exceptions accordingly do not comport with First Amendment protections against compelled speech.

INTRODUCTION

As of August 2020, ten states mandate that a pregnant person seeking an abortion receive an ultrasound before the abortion procedure.[1] During this ultrasound, the pregnant person receiving the abortion typically lies half-naked on the examination table while the doctor narrates the sonogram.[2] The doctor is mandated to describe the different body parts of the fetus, the likely age of the fetus, and play audio of the fetal heart tone.[3]

---

* J.D. Candidate, University of Washington School of Law, Class of 2021. I would like to thank Professor Robert Gomulkiewicz for his insight, feedback, and support throughout the drafting process. I would also like to thank Ian Walsh, Monica Romero, and Quynh La for their relentless work on this piece; additionally, many thanks to the entire editorial staff of *Washington Law Review* for their constant dedication to this journal. Finally, eternal gratitude to my literal and chosen family for getting me to where I am—I truly could not have done it without all of you.

1. *Requirements for Ultrasound*, GUTTMACHER INST. (Aug. 1, 2020), http://www.guttmacher.org/state-policy/explore/requirements-ultrasound [https://perma.cc/F34F-UYHA].

2. *See* Stuart v. Camnitz, 774 F.3d 238, 255 (4th Cir. 2014).

3. *See* Anna Silman, *What It's Like to Endure a Forced Ultrasound Before Your Abortion*, THE CUT (Dec. 13, 2019), http://www.thecut.com/2019/12/forced-ultrasound-abortion-what-its-like.html [https://perma.cc/S4TM-M934]; Jessica Glenza, *Abortion: Justices Permit Kentucky Law that Requires Doctors to Show Pregnant Women Ultrasounds*, THE GUARDIAN (Dec. 9, 2019), http://www.theguardian.com/us-news/2019/dec/09/supreme-court-kentucky-abortion-law-doctors-ultrasound [https://perma.cc/6GFP-8XVN].

This mandate usually remains in place even if the patient has received multiple ultrasounds that same day, is getting an abortion as the result of a rape, or is receiving an abortion for a wanted pregnancy but one with a fetal anomaly.[4] These laws typically permit the patient to close their eyes and shut their ears during the ultrasound and narration.[5] Regardless of how the patient reacts, the physician must continue under the threat of financial penalty or loss of license[6]—even if the patient is demanding that they stop.[7]

Abortion is a heavily litigated area—mandatory ultrasound laws are no exception.[8] The right to receive an abortion is protected under the Due Process Clause of the Fourteenth Amendment.[9] Most abortion regulations are currently litigated based on the Due Process Clause and the corresponding "undue burden" standard, which was established in the seminal case *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[10] However, a unique claim has arisen out of ultrasound informed consent laws—one that is based on the infringement of the First Amendment rights of the physician performing the abortion rather than on the infringement of a patient's Fourteenth Amendment rights.[11]

---

4. *See* Glenza, *supra* note 3; *Stuart*, 774 F.3d at 255.

5. *See* EMW Women's Surgical Ctr., P.S.C. v. Beshear, 920 F.3d 421, 424 (6th Cir. 2019), *cert. denied sub nom.* EMW Women's Surgical Ctr., P.S.C. v. Meier, __ U.S. __, 140 S. Ct. 655 (2019); *Stuart*, 774 F.3d at 242; Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 573 (5th Cir. 2012).

6. *See* Danielle C. Le Jeune, *An "Exception"-Ally Difficult Situation: Do the Exceptions, or Lack Thereof, to the "Speech-and-Display Requirements" for Abortion Invalidate Their Use as Informed Consent?*, 30 GA. ST. U. L. REV. 521, 542 (2014) ("Unless a patient meets one of the few exceptions provided to these requirements, the physician must comply with the procedure or face a large fine, mandatory disciplinary action, potential criminal penalties, or denial of licensure."); Deborah Yetter, *Federal Appeals Court Upholds Kentucky 'Ultrasound' Abortion Law*, COURIER J. (Apr. 4, 2019), https://www.courier-journal.com/story/news/politics/ky-legislature/2019/04/04/federal-appeals-court-upholds-kentucky-ultrasound-abortion-law/3368859002/ [https://perma.cc/K3S6-S2NA] ("The law permits a woman to look away from the image and cover her ears to avoid hearing the physician's description or the fetal heartbeat. But physicians who fail to attempt to show and describe the fetus to the patient could face fines of up to $250,000 and action against their medical license.").

7. *See Stuart*, 774 F.3d at 255 (noting how the law is "[f]orcing this experience on a patient over her objections").

8. *See, e.g.*, *id.* at 242 (challenging a North Carolina statute mandating "display[ing] and describ[ing] the image during the ultrasound"); *EMW*, 920 F.3d at 423–24 (challenging Kentucky's Ultrasound Informed Consent Act); *Lakey*, 667 F.3d at 570, 572–73 (challenging a Texas statute that required physicians "to perform and display a sonogram of the fetus" among other requirements to gain "informed consent to an abortion").

9. Roe v. Wade, 410 U.S. 113, 164 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992).

10. 505 U.S. 833 (1992).

11. *E.g.*, *Stuart*, 774 F.3d at 244; *EMW*, 920 F.3d at 423; *Lakey*, 667 F.3d at 572; Planned

The First Amendment provides strong protections from governmental interference of speech.[12] However, a state has the authority to reasonably regulate a physician's speech through the power of licensing.[13] This curtailment of physician speech is justified to ensure that physicians are knowledgeable and providing quality care.[14] Although licensing allows states to implement reasonable regulation, physicians do not forfeit all of their constitutional rights while on the job—including their First Amendment rights.[15]

Requiring a physician to obtain informed consent is one example of how a state regulates physician speech. Informed consent is the "opportunity to evaluate knowledgeably the options available and the risks attendant upon each [option]."[16] Legislators typically justify stringent abortion regulation by claiming that they are protecting women by ensuring informed consent to an abortion.[17] However, recent abortion laws, such as the mandatory ultrasound laws described above, raise an important question: where does a state's ability to mandate informed

---

Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 727 (8th Cir. 2008). In each of these cases, the courts considered whether requiring a physician to perform an ultrasound, display a sonogram, and describe the fetus violated the physician's First Amendment protected right against compelled speech.

12. *See infra* Part I (discussing how the U.S. has stronger free speech protections than many other countries and the assumption is that speech is protected unless it falls into a particular exception); *Stuart*, 774 F.3d at 245 ("[W]e are mindful of 'the First Amendment's command that government regulation of speech must be measured in minimums, not maximums.'" (citing Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 790 (1988)).

13. Dent v. West Virginia, 129 U.S. 114, 122–23 (1889); Nat'l Inst. of Fam. & Life Advocs. (NIFLA) v. Becerra, __ U.S. __, 138 S. Ct. 2361, 2382 (2018); *Casey*, 505 U.S. at 884.

14. *See Dent*, 129 U.S. at 122–23; *Casey*, 505 U.S. at 884.

15. *See Casey*, 505 U.S. at 884; *NIFLA*, 138 S. Ct. 2361 at 2374–75.

16. Canterbury v. Spence, 464 F.2d 772, 780 (D.C. Cir. 1972).

17. *See* Yetter, *supra* note 6. Kentucky Governor Matt Bevin stated

> We applaud the decision by the Sixth Circuit, which affirms the commonsense notion that patients should be well equipped with relevant information before making important medical decisions. I am grateful to be governor of a state that values every human life, and we are committed to continue our fight on behalf of the most vulnerable among us.

Id. And he discussed that "[a]t a previous hearing on the case, lawyer M. Stephen Pitt, Bevin's general counsel, said the law was meant to protect women who might regret abortions or may not fully understand the procedure." *Id.*; *see also Judge: N.C. Abortion Ultrasound Law Illegal*, USA TODAY (Jan. 18, 2014), https://www.usatoday.com/story/news/nation/2014/01/18/ultrasound-law-north-carolina/4630599/ [https://perma.cc/H6ST-LSS7] ("North Carolina legislators had argued that offering the ultrasound image to a woman seeking an abortion along with other information would promote childbirth. The law also would protect patients from potential coercion to have an abortion and emotional distress associated with the procedure, advocates said."); Terry Baynes, *Court Allows Texas Law on Ultrasound Before Abortion*, REUTERS (Jan. 10, 2012), https://www.reuters.com/article/us-abortion-texas/court-allows-texas-law-on-ultrasound-before-abortion-idUSTRE8091XF20120110 (Texas Governor Rick Perry, praised the ruling as a victory: "This important sonogram legislation ensures that every Texas woman seeking an abortion has all the facts about the life she is carrying.").

consent end and the violation of a physician's free speech rights begin?

Alongside First Amendment principles are established medical practices that guide how much and what kind of information doctors should give patients to best inform their consent.[18] There are two significant exceptions in this longstanding practice that dictate when a physician is *not* to provide information to a patient: the therapeutic privilege exception and patient waiver exception.[19] The therapeutic privilege exception permits a physician to decline to share certain information that is part of an informed consent requirement when doing so would cause the patient serious psychological or physical harm.[20] It is used sparingly, but is of great importance because it allows the physician to assess the unique circumstance of a given patient and determine when certain information would be particularly harmful.[21] Additionally, the patient waiver exception allows the patient to determine how much information they personally need to make an informed decision.[22] This exception permits the patient to refuse to hear some information that would otherwise be required because they know enough to make a fully informed decision.[23] Emphasis on patient autonomy is a central tenant of informed consent.[24]

This Comment demonstrates that regulations requiring ultrasounds before an abortion must include the therapeutic privilege and patient waiver exceptions to survive First Amendment scrutiny. Part I describes general principles of the First Amendment free speech protection and examines the doctrine of "professional speech." Part II details how informed consent in the abortion context clashes with physicians' First Amendment compelled speech protections. Part III argues that the longstanding informed consent exceptions for therapeutic privilege and patient waiver are necessary to protect physicians' free speech rights under the First Amendment.

---

18. *See Canterbury*, 464 F.2d at 780–81; Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL'Y 223, 235–36 (2009).

19. *Canterbury*, 464 F.2d at 788–89; Le Jeune, *supra* note 6, at 534–35.

20. Stuart v. Camnitz, 774 F.3d 238, 254 (4th Cir. 2014); AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS COMM. ON ETHICS, INFORMED CONSENT 7 (2009) [hereinafter ACOG], https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Ethics/Informed-Consent [https://perma.cc/3FM8-Q3DK]; *Canterbury*, 464 F.2d at 789.

21. *See Canterbury*, 464 F.2d at 789.

22. Douglas Andrew Grimm, *Informed Consent for All! No Exceptions*, 37 N.M. L. REV. 39, 77, 82 (2007) (arguing that no exceptions to informed consent should be permitted in the *research* context, but that exceptions "for informed consent to treatment should stand").

23. *See id.* at 77; ACOG, *supra* note 20, at 7; Manian, *supra* note 18, at 239 (discussing the right to refuse treatment).

24. *See* Manian, *supra* note 18, at 235.

I. FIRST AMENDMENT PRINCIPLES AND THE DEVELOPING DOCTRINE OF PROFESSIONAL SPEECH

The First Amendment prohibits federal and state government from abridging the freedom of speech.[25] The United States has one of the oldest and strongest constitutional protections of free speech in the world.[26] While the road to current free speech protections has been rocky at times,[27] Americans often hold free speech as one of this nation's deepest and most treasured constitutional protections.[28] However, the bounds of this protection are not always clear.[29] The Supreme Court has attempted to define exactly what type of "speech" is protected, and when it is appropriate for the government to impede this freedom. Supreme Court precedent dictates that different tiers of scrutiny apply to certain types of speech. Yet, courts have struggled to balance professional regulation with core free speech values.[30]

A. *First Amendment Principles and the Different Standards Applied*

The First Amendment's most obvious directive is that the government cannot restrict a person or entity from speaking; however, the First Amendment also prevents the government from compelling speech.[31] The

---

25. U.S. CONST. amend. I; Gitlow v. New York, 268 U.S. 652, 666 (1925) (holding that the First Amendment applies to the states through the Fourteenth Amendment).

26. ALAN BROWNSTEIN & LESLIE GIELOW JACOBS, GLOBAL ISSUES IN FREEDOM OF SPEECH AND RELIGION 2–11 (2009).

27. *See* NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, FIRST AMENDMENT LAW 2–5 (7th ed. 2019).

28. *See* Scott Raecker, Kristi Knous, Connie Ryan & Andrea Woodard, *As Iowa Caucuses Arrive, We Can All Demonstrate Civility*, DES MOINES REG. (Feb. 1, 2020), https://www.desmoines register.com/story/opinion/columnists/iowa-view/2020/02/01/elections-2020-tense-moments-civility-respect-character/2858492001/ [https://perma.cc/B2BH-5NQC]; Jeffrey M. McCall, *Don't Attend (or Donate to) a College that Restricts Free Expression*, THE HILL (Jan. 29, 2020), https://thehill.com/opinion/education/480442-dont-attend-or-donate-to-a-college-that-restricts-free-expression [https://perma.cc/3KLF-L89U]; Tony Semerad, *Free Expression—Not 'Censorship'—Will Best Protect Democracy, Facebook CEO Mark Zuckerberg Tells Utah Audience*, SALT LAKE TRIB. (Feb. 1, 2020), https://www.sltrib.com/news/2020/02/01/free-expression-not.

29. The treatment of professional speech is a great example of this lack of clarity. *See, e.g.*, EMW Women's Surgical Ctr., P.S.C. v. Beshear, 920 F.3d 421, 432–35 (6th Cir.), *cert. denied sub nom.* EMW Women's Surgical Ctr., P.S.C. v. Meier, __ U.S. __, 140 S. Ct. 655 (2019) (discussing how the Fifth and Eighth Circuits interpret the First Amendment's free speech protection applied to physicians).

30. *See* Nat'l Inst. of Fam. & Life Advocs. (NIFLA) v. Becerra, __ U.S. __, 138 S. Ct. 2361, 2375 (2018).

31. U.S. CONST. amend. I; *see also* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that local authorities compelling a flag salute in schools violates the First Amendment's protection of free speech).

Court has long recognized that the First Amendment "guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say."[32] The government cannot force a person or entity to be a mouthpiece for the message of the state—regardless of whether the message is a fact or opinion.[33]

Over time, First Amendment jurisprudence has incorporated formal standards of review as a mechanism to evaluate free speech cases—borrowing this doctrinal tool from the Fourteenth Amendment equal protection arena.[34] "Strict scrutiny" is the highest standard of review and requires that the government prove that the law is "narrowly tailored" to serve a "compelling governmental interest."[35] On the other side of strict scrutiny is "rational basis review," which upholds legislation so long as it is "rationally related to a legitimate state interest."[36] While rational basis review plays a limited role in free speech cases, the role of strict scrutiny was solidified in First Amendment jurisprudence in the 1980s, with the Court employing this standard of review to all regulations that categorically restrict or compel a certain type of speech.[37] However, First Amendment jurisprudence can be muddled because of centuries old precedent and the newer use of tiers of review—often resulting in scholars and courts trying post-hoc to label established precedent with these conventional forms of scrutiny.

While the application of strict scrutiny is usually fatal for a law,[38] the Supreme Court has gradually designated new categories of speech that do not require such high scrutiny.[39] There are many categories of speech that the Court has decided should not receive heightened scrutiny because "[it] has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth

32. Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 797 (1988) (emphasis in original) (quoting U.S. CONST. amend. I).

33. *See id.* at 797–98 ("These cases cannot be distinguished simply because they involved compelled statements of opinion while here we deal with compelled statements of 'fact': either form of compulsion burdens protected speech.").

34. *See* Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 785–87 (2007).

35. Reed v. Town of Gilbert, 576 U.S. 155, 171 (2015).

36. *See* City of New Orleans v. Duke, 427 U.S. 297, 303 (1976); Bhagwat, *supra* note 34, at 786.

37. Bhagwat, *supra* note 34, at 784, 787; Carey v. Brown, 447 U.S. 455, 461–62 (1980).

38. Matthew D. Bunker, Clay Calvert & William C. Nevin, *Strict in Theory, but Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM. L. & POL'Y 349, 351 (2011).

39. *See id.* at 357 (arguing that there are four categories where courts can avoid the application of strict scrutiny: "classifying a regulation as content neutral rather than content based; characterizing speech as either low value or devoid of any protection; treating the speaker as a second-class citizen; and deeming the regulation to be one of general applicability such that any restriction on speech is merely incidental").

that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[40] Examples of types of speech that do not receive any First Amendment protection are obscenity, incitement, fighting words, and child pornography.[41] While some scholars have later gone back and applied a rational basis typography to these categories of speech, they are generally known to simply receive no protection under the First Amendment.[42]

The inflexibility of either strict scrutiny or no scrutiny at all became readily apparent.[43] The Court began trying to strike a balance by creating unique hyper-specific tests that each apply to certain types of speech—never creating a generally-applicable intermediate standard.[44] Intermediate scrutiny, in its traditional equal protection context, requires an "important governmental" objective that must be "substantially related" to the achievement of that objective.[45] As more middle-ground exceptions have emerged, lower courts and scholars began to argue that these standards are effectively different variations of traditional intermediate scrutiny.[46] Despite the speech-specific tests varying in precise language and terminology, they all seek the same thing: that a

40. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

41. Bhagwat, *supra* note 34, at 787–88 n.22 (first citing New York v. Ferber, 458 U.S. 747, 747 (1982) (holding that child pornography does not receive First Amendment protection because of states' interests in protecting children); then citing Bradenburg v. Ohio, 395 U.S. 444, 447 (1969) (discussing the principle that the constitutional guarantee of free speech only allows a state to regulate where an activity is likely to incite or produce imminent lawless action); then citing Roth v. United States, 354 U.S. 476, 485 (1957) (holding that obscenity is not within the area of constitutionally protected speech); and then citing Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (upholding a statute that prohibited the use of fighting words in public places)).

42. *See* Bunker et al., *supra* note 38, at 361.

43. *See* Bhagwat, *supra* note 34, at 787–800 (explaining the history on the creation of intermediate scrutiny in First Amendment law). For example, in *Ward v. Rock Against Racism*, the Court created a four-part balancing test for "time, place, manner" restrictions to accommodate the government's interest in regulating public spaces. 491 U.S. 781 (1989). Similarly, in *United States v. O'Brien*, the Court created a four-part intermediate-like test to grapple with situations where conduct acts as symbolic speech. 391 U.S. 367 (1968).

44. *See* Bhagwat, *supra* note 34, at 787–00. Examples of these certain type of speech are: time, place, and manner restrictions; symbolic conduct; regulations of mass media; commercial speech; charitable solicitation; political contributions; sexually oriented businesses; and speech of government employees. *Id.* at 809–16.

45. Craig v. Boren, 429 U.S. 190, 197 (1976).

46. *See* Bhagwat, *supra* note 34, at 785; Suzanne A. Kim, Suzette Richards & Rachel L. Jensen, *Equal Protection*, 1 GEO. J. GENDER & L. 213, 219–20 (2000); Clay Calvert & Minch Minchin, *Can the Undue-Burden Standard Add Clarity and Rigor to Intermediate Scrutiny in First Amendment Jurisprudence? A Proposal Cutting Across Constitutional Domains for Time, Place & Manner Regulations*, 69 OKLA. L. REV. 623, 624–28 (2017); Wynter K. Miller & Benjamin E. Berkman, *The Future of Physicians' First Amendment Freedom: Professional Speech in an Era of Radically Expanded Prenatal Genetic Testing*, 76 WASH. & LEE L. REV. 577, 610–11 (2019).

regulation is related to the government interest espoused.[47]

The substantially related prong of intermediate scrutiny essentially requires that the means used "fit" the governmental end.[48] There is no formal "substantial relationship" test for intermediate scrutiny, but courts often use the strict scrutiny framework as a loose guide.[49] In a strict scrutiny analysis there are three prongs to narrow tailoring: (1) whether the regulation is overinclusive, or restricts more speech than necessary to achieve its goal; (2) whether the regulation is underinclusive, or does not restrict speech that would be equally harmful to the government's interest; (3) and whether the "least restrictive means" has been chosen to achieve the stated interest.[50] These prongs are used, but less stringently applied, in an intermediate scrutiny analysis.[51]

As an example of the type of "fit" sought by intermediate scrutiny, the test for a law or regulation that poses a restriction on the time, place, or manner of speech[52] requires in part that it is not "substantially broader than necessary to achieve the government's interest."[53] In contrast, for symbolic conduct,[54] the test examines "if the incidental restriction on

---

47. *See* Bhagwat, *supra* note 34, at 801 ("Instead, the Supreme Court has come to emphasize the fact that despite somewhat differing formulations, many of the Court's new 'tests' share some basic, common characteristics: under these tests, laws will be upheld so long as they serve some sort of a significant/substantial/important governmental interest and are reasonably well tailored to that purpose (i.e., not unreasonably overbroad).").

48. *See* Kim et al., *supra* note 46, at 232–33.

49. *Id.*; *see* Bhagwat, *supra* note 34, at 787–800 (describing how the Court typically modified strict scrutiny to create a specific intermediate-like test for different categories of speech).

50. Bunker et al., *supra* note 38, at 372–73.

51. Bhagwat, *supra* note 34, at 789 (noting that the "narrowly tailored" aspect of the intermediate scrutiny test does not require the chosen regulatory means to be the "least restrictive means" to achieving its goals); Calvert & Minchin, *supra* note 46, at 629 ("[S]trict scrutiny demands that the statute restricts no more speech than is absolutely necessary to serve the interest, while the fit need not be quite so precise under intermediate scrutiny."); Miller & Berkman, *supra* note 46, at 611 (stating that the "track record of outcomes is mixed" under intermediate scrutiny (quoting Kathleen M. Sullivan, *Post-Liberal Judging: The Role of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 297 (1992))).

52. *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("Our cases make clear, however, that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984))).

53. Bhagwat, *supra* note 34, at 789 (quoting *Ward*, 491 U.S. at 800).

54. *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 376–77 (1968) (upholding the conviction of an individual who publicly burned his draft card in protest of the Vietnam War after the Court noted that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms"). For symbolic conduct, the Court uses a type

alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[55] Further, for commercial speech,[56] one prong of the test requires that the governmental interest cannot "be served as well by a more limited restriction on commercial speech."[57] While each of these tests for these different categories of speech have their own language and nuance, they all require some kind of fit between the government interest and the means used.

Justice Scalia remarked that intermediate scrutiny has become "some kind of default standard"[58] for speech that is "not readily categorizable."[59] It has been highly criticized as being overly malleable, uncertain, and rife for judicial activism.[60] Especially in the free speech context, the variation of language in each intermediate scrutiny test and the lack of one identifiable standard is in part to blame for the ambiguity in this area of law.[61]

---

of intermediate scrutiny that looks to whether the government has an "important or substantial" interest, whether the regulation is unrelated to the suppression of free expression, and whether the incidental restriction on expression is no greater than is essential to further that interest. *Id.* at 377.

55. *Id.* at 377.

56. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980). The Court created a four-part test for commercial speech:

> 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.

Id.; *see also* Bd. of Trs. v. Fox, 492 U.S. 469, 480 (1989) (holding that governmental restrictions on commercial speech need not be "necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective"); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (explaining commercial speech is generally considered speech that does no more than propose a commercial transaction or relate *solely* to the speaker's and audience's economic interests). The commercial speech doctrine was created to accommodate the government's interest in protecting consumers. *See Va. State Bd. of Pharmacy*, 425 U.S. at 783. Commercial speech is thought to be more durable and hardier than other types of speech because of the speaker's economic interest. *See id.* at 771 n.24. Therefore, commercial speech receives a type of intermediate scrutiny to accommodate this interest in protecting consumers while also protecting commercial actors' free speech rights. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 561–66.

57. Bhagwat, *supra* note 34, at 794 (quoting *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564).

58. Madsen v. Women's Health Ctr, Inc., 512 U.S. 753, 792 (1994) (Scalia, J., concurring in part and dissenting in part).

59. *See* Miller & Berkman, *supra* note 46, at 613.

60. Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 301 (1998).

61. *See* Bhagwat, *supra* note 34, at 787–801 (detailing the different intermediate-like standards of scrutiny that have emerged and how there is a lack of consensus on what intermediate scrutiny in First Amendment law entails or when it is applied).

B. Professional Speech as an Emerging Doctrine

Some lower courts and scholars have argued that "professional speech" should be recognized as a new category of speech that receives a type of specifically designed intermediate scrutiny.[62] A "professional" is generally defined as an "individual[] who provide[s] personalized services to clients and who [is] subject to 'a generally applicable licensing and regulatory regime.'"[63] In 1889, the Supreme Court upheld a state's ability to require professional licensing in *Dent v. West Virginia*.[64] The Supreme Court justified the licensing of medical professionals based on the states' interest in securing the general welfare "against the consequences of ignorance and incapacity, as well as of deception and fraud."[65] So long as the qualifications were "appropriate to the calling or profession, and attainable by reasonable study or application, no objection to their validity can be raised because of their stringency or difficulty."[66]

The states' licensing regulatory power that was born in *Dent* acknowledged the government's ability to restrict professionals' rights for the greater good of society.[67] Professional licensing laws typically determine who may enter the profession, who may remain in that profession, and what constitutes appropriate practice.[68] Typical examples of licensed professionals are doctors, attorneys, and accountants; but hundreds of professionals are licensed by the state, from real estate brokers to barbers.[69] While the licensing regulation might just require a person to pass a test to enter the profession, the state can go so far as to dictate the exact words a professional must disclose to a client.[70]

---

62. *See* Stuart v. Camnitz, 774 F.3d 238, 249 (4th Cir. 2014) ("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."); Carl H. Coleman, *Regulating Physician Speech*, 97 N.C. L. REV. 843, 843 (2019) (proposing "that courts should apply intermediate scrutiny to all laws interfering with any aspect of physician-patient communications").

63. Nat'l Inst. of Fam. & Life Advocs. (NIFLA) v. Becerra, __ U.S. __, 138 S. Ct. 2361, 2371 (2018) (quoting Moore-King v. Cnty. of Chesterfield, 708 F.3d 560, 569 (4th Cir. 2013)).

64. 129 U.S. 114 (1889).

65. *Id.* at 122.

66. *Id.*

67. *Id.* at 123.

68. *See* Erika Schutzman, *We Need Professional Help: Advocating for a Consistent Standard of Review When Regulations of Professional Speech Implicate the First Amendment*, 56 B.C. L. REV. 2019, 2032–33 (2019).

69. *Id.*

70. *See id.* at 2034; *see, e.g.*, EMW Women's Surgical Ctr., P.S.C. v. Beshear, 920 F.3d 421, 424 (6th Cir.), *cert. denied sub nom.* EMW Women's Surgical Ctr., P.S.C. v. Meier, __ U.S. __, 140 S. Ct.

However, a professional does not entirely relinquish their First Amendment rights upon obtaining a license.[71] This creates tension between a state's well-recognized ability to regulate physician speech under reasonable licensing regulations and the broad free speech principles that prevent a state from compelling or restricting a person's speech. In an attempt to balance these differing principles, lower courts have created the category called "professional speech" that, similar to commercial speech, receives an intermediate-like scrutiny.

The theory of professional speech is rooted in Justice Robert Jackson's 1945 concurrence in *Thomas v. Collins*.[72] Jackson agreed with the majority that the government could not require a speaker to get a license before giving a public speech, but he opined that "a rough distinction always exists" between the permissible licensing of a vocation and the impermissible regulation of speech.[73] In 1985, Justice Byron White wrote a concurrence in *Lowe v. Securities Exchange Commission*,[74] a case decided on statutory grounds, that distinguished public speech from speech targeted at a private individual.[75] Justice White found no problem with "'generally applicable licensing provisions limiting the class of persons who may practice [a] profession,' even where the practice of that profession consists entirely of speaking."[76]

Lower courts have used the concurrences of these seminal cases to define the boundaries and doctrine of professional speech.[77] For example, in *Pickup v. Brown*,[78] the Ninth Circuit found that talk therapy was a form of professional conduct, not speech, and therefore, it was not entitled to

655 (2019) (discussing a law that requires a doctor to explain ultrasound images to patients prior to giving abortions); Stuart v. Camnitz, 774 F.3d 238, 242 (4th Cir. 2014) (describing a law that requires physicians to describe ultrasound images to patients seeking abortions); Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 573 (5th Cir. 2012) (holding that narrated ultrasounds are an appropriate use of government licensing powers).

71. Nat'l Inst. of Fam. & Life Advocs. (NIFLA) v. Becerra, __ U.S. __, 138 S. Ct. 2361, 2371–72 (2018) ("Speech is not unprotected merely because it is uttered by 'professionals.'").

72. 323 U.S. 516, 544–48 (1945) (Jackson, J., concurring).

73. Robert McNamara & Paul Sherman, NIFLA v. Becerra*: A Seismic Decision Protecting Occupational Speech*, 2018 CATO SUP. CT. REV. 197, 206 (2018) (quoting *Thomas*, 323 U.S. at 544 (Jackson, J., concurring)).

74. 472 U.S. 181, 211 (1985) (White, J., concurring).

75. *See id.* at 187–89 (majority opinion).

76. *See* McNamara & Sherman, *supra* note 73, at 207 (quoting *Lowe*, 472 U.S. at 232 (White, J., concurring)).

77. *See id.* at 208–09 (explaining how lower courts have used and expanded Justice White's concurrence in *Lowe*); Coleman, *supra* note 62, at 846 (discussing how some lower courts suggest that physicians' communications with their patients are entitled no First Amendment protection (citing *Lowe*, 472 U.S. at 233 (White, J., concurring))).

78. 728 F.3d 1042 (9th Cir. 2013).

First Amendment protection.[79] Thus, California's ban on conversion therapy[80] was upheld as a reasonable regulation of a profession.[81] In contrast, the Eleventh Circuit reviewed a Florida law that prohibited a physician from asking about a patient's gun ownership when doing so was "not relevant" to their medical care.[82] The Eleventh Circuit did not determine whether strict scrutiny applied because the statute failed even the more lenient intermediate scrutiny.[83]

Thus, lower courts have struggled with defining and discerning professional speech—particularly in the context of the growing legal challenges to restrictive abortion regulations.[84] Abortion regulations pose a unique challenge because government officials often use the concept of informed consent to justify the compulsion of physician speech.[85] The Supreme Court had not directly grappled with the doctrine of "professional speech"[86] until 2018, in *National Institute of Family & Life Advocates (NIFLA) v. Becerra*.[87] In *NIFLA*, the Court refused to create a new category of "professional speech" that receives lower scrutiny; however, the Court mentioned that "professional conduct"—referencing regulations of informed consent—does receive a lower form of scrutiny.[88]

---

79. *Id.* at 1048.

80. *See id.* at 1048–49. The Ninth Circuit defined conversion therapy as:

> a variety of methods, including both aversive and non-aversive treatments, that share the goal of changing an individual's sexual orientation from homosexual to heterosexual. In the past, aversive treatments included inducing nausea, vomiting, or paralysis; providing electric shocks; or having an individual snap an elastic band around the wrist when aroused by same-sex erotic images or thoughts. Even more drastic methods, such as castration, have been used. Today, some non-aversive treatments use assertiveness and affection training with physical and social reinforcement to increase other-sex sexual behaviors.

Id.

81. *See id.* at 1055; McNamara & Sherman, *supra* note 73, at 204.

82. Wollschlaeger v. Governor of Fla., 848 F.3d 1293, 1302 (11th Cir. 2017) (quoting FLA. STAT. § 790.338(1) (2011)).

83. *See id.* at 1311–13 ("We now turn to FOPA's record-keeping, inquiry, and anti-harassment provisions. Because these provisions fail to satisfy heightened scrutiny under *Sorrell*, they obviously would not withstand strict scrutiny. We therefore need not decide whether strict scrutiny should apply.").

84. *See infra* Part II.

85. *See supra* note 17 and accompanying text.

86. *See* Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1258 (2016) (stating that as of 2016, whether a professional speech doctrine existed was "subject to debate"); Nat'l Inst. of Fam. & Life Advocs. (NIFLA) v. Becerra, __ U.S. __, 138 S. Ct. 2361, 2373 (2018) (discussing how the Supreme Court has alluded to professional speech in previous cases like *Casey*); *cf.* Conant v. McCaffrey, 172 F.R.D. 681, 694 (N.D. Cal. 1997) ("Although the Supreme Court has never held that the physician-patient relationship, as such, receives special First Amendment protection, its case law assumes, without so deciding, that the relationship is a protected one.").

87. __ U.S. __, 138 S. Ct. 2361 (2018).

88. *See id.* at 2372.

II. THE PROFESSIONAL SPEECH DILEMMA: INFORMED CONSENT AND ANTI-ABORTION LEGISLATION

Informed consent has been an integral part of medical practice for decades.[89] As the understanding of informed consent has evolved, physicians and medical practitioners have shifted towards a patient-centric view of informed consent[90]: "the test for determining whether a particular peril must be divulged is its materiality to the patient's decision."[91] As government officials invoke informed consent as a justification for restrictive abortion regulations,[92] courts are left to struggle to balance this established medical practice with a physician's legal protections. Lower courts have historically struck this balance by creating a type of intermediate scrutiny that applies to all professional speech.[93] However, in the recent *NIFLA* case, the Supreme Court foreclosed the opportunity to create a new category of speech altogether.[94] But, in an ambiguous aside, the Court simultaneously noted that some form of lesser scrutiny still applies to informed consent provisions.[95]

A. *Acquiring Informed Consent*

It is standard medical practice for a physician to inform a patient of the basic risks and alternatives to any procedure so that the patient can consent to the procedure knowing the fundamental facts.[96] However, the politicization of abortion has called into question what it takes to properly acquire informed consent.[97] Many abortion regulations are passed under the justification that they are necessary to properly inform consent—even though many of these regulations go far beyond what constitutes informed

---

89. *See* Samuel D. Hodge, Jr. & Maria Zambrano Steinhaus, *The Ever-Changing Landscape of Informed Consent and Whether the Obligation to Explain a Procedure to the Patient May Be Delegated*, 71 ARK. L. REV. 727, 730–31 (2019).

90. *See id.* at 731.

91. Canterbury v. Spence, 464 F.2d 772, 786–87 (D.C. Cir. 1972).

92. *See supra* note 17 and accompanying text.

93. *See infra* section II.B.1.

94. *See* Nat'l Inst. of Fam. & Life Advocs. (NIFLA) v. Becerra, __ U.S. __, 138 S. Ct. 2361, 2375 (2018).

95. *See id.* at 2372.

96. *See Informed Consent: Code of Medical Ethics Opinion 2.1.1*, AM. MED. ASS'N (Nov. 14, 2016) [hereinafter *Informed Consent*], https://www.ama-assn.org/delivering-care/ethics/informed-consent [https://perma.cc/BQ3E-JHQT]; ACOG, *supra* note 20, at 3.

97. For more on the politicization of abortion, see Jill Lepore, *How Abortion and Birth Control Became Politicized*, NAT'L PUB. RADIO (Nov. 9, 2011), https://www.npr.org/2011/11/09/142097521/how-birth-control-and-abortion-became-politicized [https://perma.cc/TL9Z-NREB].

consent in every other medical context.[98] These regulations have spurred litigation to attempt to define the boundaries of what a patient must know, or does not need to know, to give fully informed consent.[99]

1. Overview of Informed Consent Principles

One of the earliest appearances of informed consent as a legal concept was in 1914, when Justice Cardozo opined that "[e]very human being of adult years and sound mind has a right to determine what shall be done with [their] own body."[100] This concept, which was incorporated over time into common law,[101] recognizes patient autonomy and the ability of a patient to make a decision for themselves.[102] Generally, such legislation requires the physician to tell the patient of the dangers, advantages, and alternatives to a specific treatment and obtain authorization before proceeding.[103]

Under common law, informed consent entails the disclosure of all material risks.[104] "Material" is defined as information that a reasonable person would likely find significant in deciding whether or not to forego the proposed therapy.[105] Reasonableness is typically determined from the perspective of the patient.[106]

The American Medical Association (AMA) details in three parts how a physician should obtain informed consent: (1) "[a]ssess the patient's ability to understand relevant medical information and the implications of treatment alternatives and to make an independent, voluntary decision"; (2) "[p]resent relevant information accurately and sensitively, in keeping with the patient's preferences for receiving medical information"; and

---

98. *See supra* note 17 and accompanying text; Grimm, *supra* note 22, at 43–44 (describing the primary elements that most medical ethicists view as necessary for proper informed consent).

99. *See infra* section II.B.1.

100. Hodge & Steinhaus, *supra* note 89, at 729 (quoting Schloendorff v. Soc'y of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914), *abrogated by* Bing v. Thunig, 142 N.E.2d 3 (N.Y. 1957)).

101. *See* Grimm, *supra* note 22, at 40; Natanson v. Kline, 350 P.2d 1093, 1101–02 (Kan. 1960) (discussing a physician's fiduciary duty to get their patients informed consent in a malpractice negligence action); Mohr v. Williams, 104 N.W. 12, 13 (Minn. 1905) (discussing the implications of informed consent in a civil assault and battery action), *overruled in part by* Genzel v. Halvorson, 80 N.W.2d 854 (Minn. 1957).

102. *See* Manian, *supra* note 18, at 226; Grimm, *supra* note 22, at 59; Canterbury v. Spence, 464 F.2d 772, 784 (D.C. Cir. 1972).

103. *See* Hodge & Steinhaus, *supra* note 89, at 732–33. Note that although there are different and heightened standards of informed consent for research studies, this Comment focuses on treatment-based informed consent. Grimm, *supra* note 22, at 42–43.

104. *Canterbury*, 464 F.2d at 786–87.

105. *Id.* at 787 (quoting Jon R. Waltz & Thomas W. Sheuneman, *Informed Consent to Therapy*, 64 NW. U. L. REV. 628, 640 (1970)).

106. *Id.* at 787; Coleman, *supra* note 62, at 890.

(3) "[d]ocument the informed consent conversation and the patient's (or surrogate's) decision in the medical record in some manner."[107] The American College of Obstetricians and Gynecologists (ACOG) recognizes that the adequacy of information will depend on the "common practice of the profession," what a reasonable patient would want, and what that unique patient's subjective needs are.[108]

There are certain situations when a physician cannot obtain informed consent or it is not feasible to obtain informed consent, resulting in carveouts of this otherwise steadfast requirement.[109] The most common exceptions are when: (1) informed consent is assumed during the diagnostic phase of therapy,[110] (2) there is an emergency situation and the patient is incapacitated,[111] (3) the physician claims a therapeutic privilege, or (4) a patient voluntarily waives informed consent.[112] This Comment focuses on the latter two of these exceptions.

The therapeutic privilege exception typically applies when the information would be detrimental to the patient's mental well-being.[113] This exception was acknowledged in the seminal informed consent case *Canterbury v. Spence*,[114] where the U.S. Court of Appeals for the D.C. Circuit noted that the critical inquiry is "whether the physician responded to a sound medical judgment that communication of the risk information would present a threat to the patient's well-being."[115] The AMA also presents guidelines on when to withhold information from a patient, which includes instructions to "[a]ssess[] the amount of information the patient is capable of receiving at a given time, and tailor disclosure to meet the patient's needs and expectations in keeping with the individual's preferences."[116]

---

107. *See Informed Consent*, *supra* note 96.

108. *See* ACOG, *supra* note 20, at 5.

109. *See* Grimm, *supra* note 22, at 65.

110. *See id.* at 65–66. The diagnostic privilege exception assumes consent for routine physical exams that are minimally invasive, like drawing blood or taking a temperature. *Id.* This exception is outside the scope of this Comment.

111. *See id.* at 65. The emergency exception is used when the patient is unconscious or incapable of consenting and "harm from a failure to treat is imminent and outweighs any harm threatened by the proposed treatment." *Id.* at 70 (quoting *Canterbury*, 464 F.2d at 788). This exception is outside the scope of this Comment.

112. *See id.* at 76.

113. *See id.*; *Canterbury*, 464 F.2d at 789 ("It is recognized that patients occasionally become so ill or emotionally distraught on disclosure as to foreclose a rational decision, or complicate or hinder the treatment, or perhaps even pose psychological damage to the patient.").

114. 464 F.2d 772 (D.C. Cir. 1972).

115. *Id.* at 789.

116. *Withholding Information from Patients: Code of Medical Ethics Opinion 2.1.3*, AM. MED.

The patient waiver exception entails a patient's right to refuse to receive information regarding their care, waive their right to make decisions about their care, or waive receiving care at all.[117] This exception is grounded in the notion of patient autonomy—the idea that the patient can make the best decision for themself, even without all the information.[118] The AMA stipulates that a physician must "[h]onor a patient's request not to receive certain medical information."[119]

These few exceptions carve out the otherwise firm doctrine that informed consent is required before any treatment. Informed consent and the exceptions therein have been incorporated into common law, state law, and private medical association governing rules.[120]

2. Informed Consent in the Abortion Context

Informed consent operates differently in the realm of abortion than in any other medical context.[121] States have grown bold in passing restrictive abortion laws and many government officials claim that the goal of these measures is to better inform the consent of the patient.[122] Such laws include mandatory waiting periods, gestational time limits, counseling before an abortion, and ultrasounds before an abortion.[123] Proponents of restrictive abortion laws argue that these provisions are necessary to protect the potential life of a fetus against a rushed and uninformed patient decision.[124] However, critics counter that these laws are just thinly veiled attempts at restricting abortion.[125] Some critics also claim that there is a

---

ASS'N, https://www.ama-assn.org/delivering-care/ethics/withholding-information-patients [https://perma.cc/6U2X-PDGM].

117. Grimm, *supra* note 22, at 77; ACOG, *supra* note 20, at 7; Manian, *supra* note 18, at 239 (discussing the right to refuse treatment).

118. Grimm, *supra* note 22, at 77–78.

119. *Withholding Information from Patients*, *supra* note 116.

120. *See id.*; *Canterbury*, 464 F.2d at 772; Hodge, *supra* note 89, at 732 (noting state informed consent laws); ACOG, *supra* note 20.

121. *See* Manian, *supra* note 18, at 224.

122. *See supra* note 17 and accompanying text; Whitney D. Pile, *The Right to Remain Silent: A First Amendment Analysis of Abortion Informed Consent Laws*, 73 MO. L. REV. 243, 243–44 (2008).

123. *An Overview of Abortion Laws*, GUTTMACHER INST. (Feb. 1, 2020), https://www.guttmacher.org/state-policy/explore/overview-abortion-laws [https://perma.cc/4FPN-VW6T]; *see supra* note 6 and accompanying text.

124. Pile, *supra* note 122, at 243–44.

125. *See* Debbie Elliot & Laurel Wamsley, *Alabama Governor Signs Abortion Ban into Law*, NAT'L PUB. RADIO (May 14, 2019), https://www.npr.org/2019/05/14/723312937/alabama-lawmakers-passes-abortion-ban [https://perma.cc/XE6E-7DMU] ("The amendment has divided Republicans. Lt. Gov. Will Ainsworth, who presides over the Senate, posted on Twitter that his position is simple—'Abortion is murder.'"); Will Doran, *NC Abortion Law Is Unconstitutional,*

paternalistic justification at work—namely, that women are ill-equipped to make this medical and moral judgment on their own.[126] These laws put abortion providers in the tricky position of providing a service that their patients want, while also comporting with all state-imposed informed consent laws—with the risk of prosecution if they fail to comply.[127]

The concept of informed consent is grounded in the understanding that a reasonable patient is also a subjective patient who comes from their own experience.[128] A patient might want certain information based on their own personal experience and the unique context of that procedure.[129] In particular, abortions have heavy religious and political implications that add to the emotional weight of the decision in ways that are unlike many other medical procedures.[130] Patients receive abortions for a whole host of reasons: they became pregnant from rape, they are too young or financially unstable to have a child, they just do not want a child at that time, the fetus is non-viable, or carrying the pregnancy will be medically dangerous.[131] A physician must determine what type of information is necessary or relevant for the patient to make a properly informed decision,

---

Federal Court Rules, NEWS & OBSERVER (Mar. 26, 2019), www.newsobserver.com/news/politics-government/article 228421354.html#storylink=cpy ("Rev. Mark Creech, a Baptist preacher who leads the NC Christian Action League, said that regardless of the judge's ruling, 'history will one day condemn those who defend what all people will someday recognize to have been the wanton killing of innocent children.'"); Kate Smith, *Louisiana Has Passed Nearly 100 Anti-Abortion Restrictions Since Roe v. Wade*, CBS NEWS (Feb. 11, 2020), https://www.cbsnews.com/news/louisiana-nearly-100-anti-abortion-restrictions-roe-v-wade-exclusive/ [https://perma.cc/BN35-S5T5] ("'The history of Louisiana's abortion restrictions are in fact a history of attempts to ban abortion, it's not about giving care to patients,' Nash said. 'What we're trying to say is that the legislature's intent has been to regulate abortion out of existence. That's been the pattern.'").

126. Pile, *supra* note 122, at 243–44.

127. Jen Gunter, *Medical School Doesn't Teach the 'Woman's Life Is in Danger' Curriculum*, N.Y. TIMES (May 20, 2019), https://www.nytimes.com/2019/05/20/opinion/abortion-laws.html [https://perma.cc/A4XP-QVS9].

128. Canterbury v. Spence, 464 F.2d 772, 786–87 (D.C. Cir. 1972); ACOG, *supra* note 20, at 5.

129. ACOG, *supra* note 20, at 5; *see Informed Consent*, *supra* note 96.

130. Carmen Fishwick, *Why We Need to Talk About Abortion: Eight Women Share Their Experiences*, THE GUARDIAN (Oct. 9, 2015), https://www.theguardian.com/world/2015/oct/09/why-we-need-to-talk-about-abortion-eight-women-share-their-experiences [https://perma.cc/4NVY-PWPQ] (discussing the stigma around having an abortion: "The fact that even progressive, outspoken, pro-choice feminists feel the pressure to keep our abortions under wraps – to speak about them only in corners, in murmurs, in private with our closest confidantes – means that opponents of abortion get to define it however suits them best").

131. Lawrence B. Finer, Lori F. Frohwirth, Lindsay A. Dauphinee, Susheela Singh & Ann M. Moore, *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSPS. ON SEXUAL & REPROD. HEALTH 110 (2005); Christina Zdanowicz, *Women Have Abortions for Many Reasons Aside from Rape and Incest. Here Are Some of Them*, CNN (May 22, 2019), https://www.cnn.com/2019/05/21/health/women-reasons-abortion-trnd/index.html [https://perma.cc/VPS2-9U93].

keeping in mind the subjective situation of each individual patient.[132]

The landmark case on informed consent in abortion procedures is *Planned Parenthood of Southeastern Pennsylvania v. Casey*, where the plaintiffs challenged a Pennsylvania statute that was passed under the guise of informed consent.[133] *Casey* upheld the holding in *Roe v. Wade*[134] that a pregnant person has a fundamental right under the Due Process Clause of the Fourteenth Amendment to receive an abortion.[135] While *Casey* upheld this right to an abortion, it also affirmed the right of legislatures to pass laws regulating abortion procedures—so long as the regulation does not amount to an "undue burden" to receiving an abortion.[136] Ultimately, *Casey* upheld most of the challenged Pennsylvania informed consent law as not unduly burdensome under the Due Process Clause of the Fourteenth Amendment.[137]

The Pennsylvania informed consent statute challenged in *Casey* required, in part, that the doctor orally inform the patient, at least twenty-four hours before the procedure, about the nature of the abortion procedure, the risks and alternatives that a "reasonable patient" would consider material when deciding whether to have the abortion, the risks of carrying the child to term, and the "probable gestational age" of the fetus at the time the abortion would be performed.[138] The statute also required informing the patient of the availability of a state printed pamphlet.[139]

Importantly, the Pennsylvania statute included an exception: the physician need not provide all of this information "if he or she can demonstrate, by a preponderance of the evidence, that he or she reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the

---

132. ACOG, *supra* note 20, at 5; *see Informed Consent*, *supra* note 96.

133. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 833 (1992).

134. Roe v. Wade, 410 U.S. 113 (1973).

135. *Casey*, 505 U.S. at 846.

136. *Id.* at 874. The Court in *Casey* actually expanded the right of legislatures to pass restrictive informed consent laws, overturning prior precedent that had found certain informed consent laws unconstitutional under *Roe*. *See* Manian, *supra* note 18, at 244–49.

137. *Casey*, 505 U.S. at 893–95 (upholding all of Pennsylvania's informed consent law except a provision that required spousal consent before receiving an abortion).

138. 18 PA. CONS. STAT. § 3205(a)(1) (2020); *Casey*, 505 U.S. at 844. Additionally, the statute requires the physician to provide information on financial assistance that may be available from the state and the father. 18 PA. CONS. STAT. § 3205(a)(2)–(3).

139. 18 PA. CONS. STAT. § 3205(a)(2). The statute also required that the physician must inform the patient that the state has printed materials that describe the unborn child and that the physician must give the patient a copy if the patient requests. *Id.* § 3205(a)(2)–(3).

patient."[140] The Court in *Casey* noted that, *because of this exception,* "the statute does not prevent the physician from exercising his or her medical judgment."[141]

While the Court mostly grappled with the Fourteenth Amendment's Due Process Clause, it added a short response to the petitioner's First Amendment claim. The Court simultaneously acknowledged both a physician's free speech rights as well as state's ability to require reasonable licensing regulations:

> 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 child-birth, 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, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (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, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977). We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.[142]

This one paragraph is all that the *Casey* Court said about the First Amendment claim.[143] The Court upheld the particular statute at issue on First Amendment grounds and said no more.

B. The NIFLA *Complication: When Informed Consent Meets Professional Speech*

Lower courts have historically applied the professional speech doctrine to abortion informed consent cases and used a variety of intermediate scrutiny tests. However, in 2018 the Supreme Court decided *NIFLA v. Becerra*, where the Court refused to acknowledge "professional speech" as a category of speech afforded less than strict scrutiny.[144] However, the Court acknowledged an exception for "professional conduct," with the implied inclusion of informed consent regulations.[145] Lower courts have been left to discern what standard applies to this "professional conduct."

---

140. *Casey*, 505 U.S. at 883–84; 18 PA. CONS. STAT. § 3205(c).

141. *Casey*, 505 U.S. at 884.

142. *Id.*

143. *Id.*

144. Nat'l Inst. of Fam. & Life Advocs. (NIFLA) v. Becerra, __ U.S. __, 138 S. Ct. 2361, 2375(2018).

145. *Id.* at 2372.

1. *Before* NIFLA*, Courts Struggled to Discern a Standard for Abortion Ultrasound Regulations*

Abortion regulation has been an area of particular conflict as legislators pass new and innovative restrictions on access to abortion—placing heavy burdens on physicians to provide a safe service while also complying with nuanced regulations.

In 2008 in *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*,[146] the Eighth Circuit Court of Appeals upheld a South Dakota informed consent law that required a doctor to acquire a signed statement from the patient.[147] The required statement needed to include information such as the increase in risk of depression and suicide associated with abortion[148] and notice that the patient will be terminating "the life of a whole, separate, unique, living human being."[149] The *Rounds* Court found that an abortion informed consent statute can stand under the First Amendment so long as it is not "untruthful, misleading or not relevant to the patient's decision to have an abortion."[150] The court pointed to *Casey* for this truthful, non-misleading, and relevant standard.[151] Ultimately, the *Rounds* Court found that the required signing of the statement was part of the state's power to reasonably regulate speech and it did not impede on the physician's First Amendment rights.[152]

The Fifth Circuit Court of Appeals in 2012 upheld a Texas informed consent law against a First Amendment challenge in *Texas Medical Providers Performing Abortion Services v. Lakey*.[153] The statute, in part, required the physician who was to conduct the abortion to perform and display a sonogram of the fetus, to play the sound of the "heart auscultation" of the fetus, and to explain the results of the procedures.[154] The patient can choose to not listen to the "heartbeat" by plugging their ears, but they are required to listen to the explanation of the sonogram

146. 530 F.3d 724 (8th Cir. 2008).

147. *Id.* at 727, 738.

148. *Id.* Abortion is not a statistically significant predictor of subsequent anxiety, mood, impulse-control, and eating disorders or suicidal ideation. Julia R. Steinberg, Charles E. McCulloch & Nancy E. Adler, *Abortion and Mental Health: Findings from The National Comorbidity Survey-Replication*, 123 OBSTETRICS & GYNECOLOGY 263, 263 (2014).

149. *Rounds*, 530 F.3d at 726.

150. *Id.* at 735.

151. *Id.* at 734–35.

152. *Id.* at 738.

153. 667 F.3d 570 (5th Cir. 2012).

154. *Id.* at 573.

except under three narrow exceptions.[155] Despite the more intrusive nature of this informed consent provision, the court upheld it under a similar truthful, non-misleading, and relevant standard as *Rounds*.[156] The Fifth Circuit found that the informed consent provisions did not require strict scrutiny and that this provision was not substantially different than the informed consent provision at issue in *Casey*.[157]

In contrast, in 2014, the Fourth Circuit Court of Appeals in *Stuart v. Camnitz*[158] took up a case involving a North Carolina ultrasound statute similar to the one in *Lakey*. The case also involved a similar compelled-speech infringement claim.[159] This statute required the physician to perform an ultrasound prior to an abortion, display the sonogram, describe the fetus in detail, and offer to play the audio of the fetal heart tone.[160] Though the patient may avert their eyes, the ultrasound must be performed, except in the case of a medical emergency.[161] The court said of professional speech rights that "the stringency of review [for professional speech] thus slides 'along a continuum' from 'public dialogue' on one end to 'regulation of professional *conduct'* on the other."[162] The *Stuart* Court found that the ultrasound requirement fell in the middle of this continuum because it required physicians to both "say" and "do."[163] Notably, the court emphasized that the truthful and non-misleading test applied by the Eighth and Fifth Circuits did not come from *Casey*'s First Amendment analysis.[164] The *Stuart* Court noted that, in light of *Casey*'s scope, "The 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."[165] The court therefore applied a "heightened intermediate scrutiny standard used in certain commercial speech cases," which requires that the "statute directly advances a substantial governmental interest and that the measure is drawn to achieve that

---

155. A pregnant woman may choose not to "receive the verbal explanation of the results of the sonogram images" only if the pregnancy was a result of sexual assault or incest, the woman is a minor who has received a judicial bypass, or the fetus has an "irreversible medical condition or abnormality." TEX. HEALTH & SAFETY CODE ANN. § 171.0122(d) (West 2020).

156. *Lakey*, 667 F.3d at 576–78.

157. *Id.* at 578.

158. 774 F.3d 238 (4th Cir. 2014).

159. *Id.* at 242.

160. *Id.* at 243.

161. *Id.*

162. *Id.* at 248 (emphasis in original).

163. *Id.*

164. *Id.* at 248–49.

165. *Id.*

interest"—a test that North Carolina ultimately failed.[166]

2. *The Supreme Court Speaks in* NIFLA

The Supreme Court directly addressed professional speech in 2018 in *NIFLA v. Becerra*. At issue in *NIFLA* was the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act),[167] which was aimed at regulating Crisis Pregnancy Centers.[168] These centers are mostly "pro-life (largely Christian belief-based) organizations that offer a limited range of free pregnancy options, counseling, and other services to individuals that visit a center."[169] The California law required licensed pregnancy-related clinics to disseminate a notice to any customers stating the availability of publicly funded-family planning services, including contraception and abortion.[170] The law also required unlicensed pregnancy-related clinics to disseminate a notice stating that they were an unlicensed clinic.[171] Several Crisis Pregnancy Centers challenged both parts of the FACT Act as an abridgment of their First Amendment rights against government compelled speech.[172]

Although the Ninth Circuit Court of Appeals had applied a broad professional speech doctrine that provided for an intermediate-like scrutiny akin to commercial speech, the Supreme Court refused to follow suit.[173] The Court noted it has been "reluctant to mark off new categories of speech for diminished constitutional protection" absent persuasive evidence of a long, albeit unrecognized, tradition of diminished protection.[174] However, the Court made clear in its decision that it was not entirely closing the door on creating a category of professional speech; rather, the evidence in this particular case was not compelling enough to do so.[175]

---

166. *Id.* at 248, 250.

167. CAL. HEALTH & SAFETY CODE ANN. §§ 123470–123473 (West 2018).

168. Nat'l Inst. of Fam. & Life Advocs. (NIFLA) v. Becerra, __ U.S. __, 138 S. Ct. 2361, 2368 (2018).

169. *Id.* (internal quotation marks omitted) (quoting CASEY WATTERS, MEG KEANEY & NATALIE EVANS, U.C. HASTINGS COLL. OF THE L., PUB. L. RSCH. INST., PREGNANCY RESOURCE CENTERS: ENSURING ACCESS AND ACCURACY OF INFORMATION 4 (2011)).

170. *Id.* at 2369–70.

171. *Id.* at 2370.

172. *Id.*

173. *Id.* at 2371–72.

174. *Id.* at 2372.

175. *Id.* at 2375 ("In sum, neither California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles. We do not foreclose the possibility that some such reason exists. We need not do so because the licensed notice cannot survive even intermediate scrutiny.").

Despite the Court's lack of recognition of a broad professional speech category,[176] it listed two related categories with long histories of receiving lower scrutiny under the First Amendment: professionals' commercial speech and the regulation of professional conduct.[177] The first exception is for laws that require professionals to disclose "factual, noncontroversial information in their 'commercial speech.'"[178] The *NIFLA* Court went on to determine that this exception did not apply in the case because the California requirement was about advertising state-sponsored services, not the clinics' own commercial services.[179]

The second exception that the Court acknowledged was that a state may "regulate professional conduct, even though that conduct incidentally involves speech."[180] The Court did not define what constitutes "professional conduct," but, notably, found that the California law did not fall under this exception because it "is not an informed-consent requirement or any other regulation of professional conduct."[181] The Court also cited to *Casey*, and the informed consent regulation at issue there, as a reference of a case that used the professional conduct exception properly.[182] Together, this implies that informed consent laws fall under the "professional conduct" exception, and therefore may receive less than strict judicial scrutiny—however, what level of scrutiny is entirely uncertain.[183]

Although the Court did not go into detail about the boundaries of these two exceptions, it did spend a significant amount of time emphasizing the importance of free speech and the unfettered right of physicians to speak as they please.[184] The Court cited historical examples of governments

176. *Id.* at 2372.

177. *Id.* at 2372–73.

178. *Id.* at 2372. This exception is rooted in cases like *Zauderer v. Office of Disciplinary Counsel*, where the Court upheld a law requiring attorneys who advertised their services on a contingency fee basis to disclose that clients might have to pay some fees. The Court in *Zauderer* found that when a professional's speech was "purely factual and uncontroversial information about the terms under which . . . services will be available," then such speech should be upheld unless it is "unjustified or unduly burdensome." Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 651 (1985). The *NIFLA* Court acknowledged that the *Zauderer* exception to professional speech in a commercial context was an exception to the strict scrutiny that is typically applied in cases involving regulated speech. *NIFLA*, 138 S. Ct. at 2372.

179. *NIFLA*, 138 S. Ct. at 2372.

180. *Id.*

181. *Id.* at 2373.

182. *Id.* at 2372 (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992)).

183. *Id.*

184. *See* EMW Women's Surgical Ctr., P.S.C. v. Beshear, 920 F.3d 421, 452–53 (6th Cir. 2019) (Donald, J., dissenting), *cert. denied sub nom.* EMW Women's Surgical Ctr., P.S.C. v. Meier, __ U.S. __, 140 S. Ct. 655 (2019).

manipulating patient-doctor communication in the interest of suppressing minorities.[185] This firm language, along with the refusal to create a new category of professional speech that receives lower scrutiny, highlights the Court's conviction to protect the free speech rights of all.

The Court went on to apply typical First Amendment strict scrutiny to the California law and ultimately found it to be an unconstitutional restraint of speech.[186] The Court stated that, regardless of whether the State's purported interest was substantial or not, the law failed because it was not narrowly tailored to that interest.[187]

3. *After* NIFLA*, Courts Still Are Struggling to Determine What Standard to Apply to Abortion Informed Consent Regulations*

The *NIFLA* decision left significant room for lower courts to interpret what abortion informed consent statutes could require and what standard of scrutiny should apply to these statutes. The Sixth Circuit Court of Appeals was the first to attempt to grapple with *NIFLA*'s new interpretation on professional speech in the abortion context, when it took up *EMW Women's Surgical Ctr., P.S.C. v. Beshear*.[188] The case involved an ultrasound informed consent statute, similar to the one at issue in *Lakey*.[189] Despite the new ruling in *NIFLA*, the *EMW* court ultimately decided the case based on a similar test as the Fifth and Eighth Circuits—the law must be "truthful, non-misleading, and relevant."[190] The court notably went out of its way to mention that while the statute does not explicitly provide for an exception based on physician discretion, it also does not "penalize a doctor if she or he exercises discretion to advise a patient that she need not listen to or view the disclosures."[191] The *EMW* Court found that the relevant statute was similar in kind to the statute at issue in *Casey*, and therefore, survived.[192]

However, echoing the Fourth Circuit in *Stuart*, the *EMW* dissent pointed to the fact that the "truthful, non-misleading, and relevant" test comes from precedent interpreting the Due Process Clause of the

185. *NIFLA*, 138 S. Ct. at 2374.

186. *Id.* at 2375–78.

187. *Id.*

188. 920 F.3d 421, 431 (6th Cir. 2019), *cert. denied sub nom.* EMW Women's Surgical Ctr., P.S.C. v. Meier, __ U.S. __, 140 S. Ct. 655 (2019).

189. *Id.* at 424–25.

190. *Id.* at 429.

191. *Id.* at 424.

192. *Id.* at 429–32.

Fourteenth Amendment, not the First Amendment.[193] *Casey* only had one cursory paragraph on the First Amendment issue that merely upheld the Pennsylvania statute at issue.[194] The dissent called into question whether the statute was truly similar to the *Casey* statute, especially when the statute at issue did not permit a physician to exercise discretion in the way that the *Casey* statute did.[195] Additionally, the dissent echoed the *NIFLA* Court's articulation that speech is a highly protected value in our society.[196] The dissent urged the court to uphold the steadfast free speech rights that the Supreme Court so vehemently prescribes to by protecting physician's right to not speak.[197]

EMW demonstrates that *NIFLA*, despite directly grappling with the professional speech doctrine, has far from solved this problem. Instead, there is still ongoing debate about what form of scrutiny applies to mandatory ultrasound laws and when a state has gone too far in mandating "informed consent" and has instead trampled on firmly held First Amendment rights.

III. FIRST AMENDMENT PRINCIPLES PREVENT THE GOVERNMENT FROM HAVING ABSOLUTE CONTROL OF PHYSICIAN SPEECH—EVEN WHEN REGULATING INFORMED CONSENT

Mandatory ultrasound laws that do not provide for the therapeutic privilege and patient waiver exceptions likely compel speech in violation of the First Amendment, regardless of the form of intermediate scrutiny that is applied to professional conduct. Without these exceptions, mandatory ultrasound laws substantially infringe on longstanding principles of informed consent by removing physician discretion and instead compelling speech without regard for individual circumstances. Absent the therapeutic privilege and patient waiver exceptions, mandatory ultrasound laws are not substantially related to an important state interest, nor are they restricted to compelling only relevant information. Accordingly, mandatory ultrasound laws lacking these exceptions likely violate the First Amendment.

NIFLA was a sweeping and firmly grounded opinion that emphasized the importance of the freedom of speech and the right of even physicians

193. *Id.* at 448 (Donald, J., dissenting).

194. *Id.* at 449; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992).

195. *EMW*, 920 F.3d at 452 (Donald, J., dissenting).

196. *Id.*

197. *Id.* at 453.

to speak as they please.[198] The majority highlighted that "this Court's precedents have long protected the First Amendment rights of professionals."[199] To emphasize this point, the Court specifically cited to historical examples of governments manipulating patient-doctor communication in the interest of suppressing minorities.[200] The Court recalled the effort to increase the Romanian birth rate that resulted in a prohibition on giving patient's information about birth control and condoms.[201] The Court also commented on how "Chinese physicians were dispatched to the countryside to convince peasants to use contraception."[202] In fact, "[o]f the 5,945 words in the majority and concurring opinions [of the *NIFLA* decision], approximately 2,485 (41.8%) of them were dedicated to explicating the dangers of abridging speech."[203] This shows that the Court and this country have deeply held free speech convictions that extend to physicians because of the fear of the despotic alternatives.

The *Casey* Court also underscored the importance of physician discretion when it upheld the Pennsylvania statute's informed consent provisions. The *Casey* Court highlighted the importance of the explicit exception in the statute that "does not prevent the physician from exercising his or her medical judgment."[204] The Supreme Court has a clearly established reverence for the professional judgment of physicians.

In addition to the deference that the Court has for physician discretion, medical practice and informed consent principles highly emphasize the importance of permitting room to account for each patient's particular circumstance.[205] Because each patient walks into a doctor's office with their own history and knowledge, a physician must naturally account for the nuances of each particular situation. For example, a physician may understand that with the patient's age and health there are certain risks that are far lower than others and therefore those risks are not worth relaying to an already worried patient.[206] Or a physician might know that a patient who has no higher education and does not work in the medical

---

198. *Id.* at 452–53.

199. Nat'l Inst. of Fam. & Life Advocs. (NIFLA) v. Becerra, __ U.S. __, 138 S. Ct. 2361, 2374 (2018).

200. *Id.*

201. *Id.*

202. *Id.*

203. *EMW*, 920 F.3d at 452 (Donald, J., dissenting).

204. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 883–84 (1992).

205. ACOG, *supra* note 20, at 5; *Informed Consent*, *supra* note 96.

206. Grimm, *supra* note 22, at 44; Stuart v. Camnitz, 774 F.3d 238, 251–52 (4th Cir. 2014) (citing ACOG, *supra* note 20, at 3, 5).

field will need a more simplified explanation than if that physician is treating a patient with medical knowledge.[207]

Along with a physician's duty to understand the whole context of a patient's circumstances, informed consent principles emphasize a patient's ability to determine care for themself. A patient may reasonably waive receiving information that is part of a "typical" informed consent discussion.[208] For example, if the patient is seeking an abortion as result of a rape, they may reasonably wish to forego a medically unnecessary ultrasound to avoid the trauma that might ensue.[209] Or if the patient is getting an abortion because a wanted pregnancy resulted in a non-viable fetus, given the context and the emotional weight of the decision, an ultrasound would not help the patient in making an informed decision.[210]

The importance of physician discretion and accounting for subjective patient experiences is foundational in First Amendment precedent and established medical practice. While the precise language of the intermediate scrutiny test for informed consent provisions is not known, in any form there must be a reasonable "fit" between the interest espoused and the means used.[211] Under the two most common standards that lower courts use for a regulation of informed consent, the regulation must be "substantially related" or "relevant"—blanket compulsions of speech have been historically struck down.[212] Mandatory ultrasound laws without the therapeutic privilege and patient waiver exceptions would fail either form of scrutiny because they do not have an adequate fit with the stated government interest.

By creating a broad statute with no ability for discretion by the patient or physician, state governments create a widely overinclusive regulation that mandates speech that is entirely irrelevant to the government's interests. For example, if a patient receives an ultrasound earlier the same day as an abortion there is no room for the patient or physician to waive receiving another ultrasound—despite the lack of new information it would bring. This compelled speech does nothing to further the state's interest of properly informing consent. Another example is if the patient is having an abortion because the child has a birth defect that will cause the child to die in birth. The inability to discretionarily waive the

---

207. *Id.* at 44 ("Caregivers can find themselves on a slippery slope-having to retreat backwards in the sophistication of the information presented while looking for a common ground of information that the patient can understand.").

208. ACOG, *supra* note 20, at 7; *Informed Consent*, *supra* note 96.

209. *Stuart*, 774 F.3d at 254.

210. *Id.*

211. *Supra* section I.A.

212. *Supra* section I.A.

ultrasound—forcing the physician to speak—does nothing to inform the patient or protect a fetus that is already nonviable. These statutes sweep broadly to include circumstances that do nothing but traumatize a patient and force a physician to literally speak when they otherwise would not. Including these exceptions allows the physician to tailor the speech to the particular situation and discretionarily waive the mandated ultrasound when it would be entirely irrelevant to the state's proffered interest. These exceptions are easy avenues to ensure that the compelled speech has a basic fit to the interests of the state.

Strict scrutiny typically requires the "least restrictive means" to be used.[213] While intermediate scrutiny does not require this exacting burden, intermediate scrutiny still requires the legislature to consider alternative means of regulation that do not compel speech.[214] The therapeutic privilege and patient waiver exceptions are readily available tools used frequently in medical practice. They may easily be included in statutory schemes and have huge implications for tailoring the informed consent to the specific situation of each patient. Having the built-in discretion to omit certain information that is entirely irrelevant to a patient's decision-making only helps to further define the statute to the specific desires of the legislature. The court in *EMW* conceded that individualized information is more relevant.[215] Having these safety valves of discretion retains the subjective patient experience to receive information that actually is relevant instead of having a blanket government-mandated disclosure that cannot be tailored to individual circumstances.

States are using mandatory ultrasound laws to compel physicians to literally speak when they otherwise would not—going beyond expressive conduct to implicate speech itself.[216] However, the Court has repeatedly emphasized its distaste for the blanket compulsion of speech. In *NIFLA*, the exception for professional conduct was specifically written with the caveat that the conduct may only "incidentally burden speech."[217] This language emphasizes that courts and lawmakers should not take an absolutist approach to informed consent law. Informed consent in all contexts must give due weight to a physician's ability to properly

213. Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).

214. *Id.*

215. EMW Women's Surgical Ctr., P.S.C. v. Beshear, 920 F.3d 421, 431 (6th Cir. 2019), *cert. denied sub nom.* EMW Women's Surgical Ctr., P.S.C. v. Meier, __ U.S. __, 140 S. Ct. 655 (2019).

216. Stuart v. Camnitz, 774 F.3d 238, 255 (4th Cir. 2014) ("The coercive effects of the speech are magnified when the physician is compelled to deliver the state's preferred message in his or her own voice. This Requirement treads far more heavily on the physicians' free speech rights than the state pamphlet provisions at issue in *Casey*.").

217. Nat'l Inst. of Fam. & Life Advocs. (NIFLA) v. Becerra, __ U.S. __, 138 S. Ct. 2361, 2373 (2018).

determine the amount and type of information that is required for a patient's full knowledge. While the state can impose its own view of how much or what type of information must be stated in a certain context, this regulation cannot be absolute. Nothing is "incidental" about mandating a physician, on threat of losing their license and possible legal penalties, to require the physician in every case to speak.[218]

CONCLUSION

Abortion is a heavily litigated subject and states have grown increasingly bold in passing some of the most restrictive abortion laws in history.[219] In particular, litigants have been attacking mandatory ultrasound laws by claiming that they unconstitutionally compel protected speech of the physician.[220] These cases attempt to balance the long upheld right of the state to regulate a physician through licensing[221] and the physician's First Amendment rights.[222] The Supreme Court's decision in *NIFLA* implied that abortion informed consent statutes receive some kind of intermediate scrutiny—but the Court failed to articulate exactly what that scrutiny entails.[223] Underlying this conflict is established principles of informed consent and free speech protections.[224] While the limits of informed consent may be uncertain, the Supreme Court has been firm in its conviction to protect speech from blanket government compulsion.[225] In order to survive any form of intermediate scrutiny, these ultrasound regulations must include exceptions for therapeutic privilege and patient waiver. These exceptions are necessary for the regulation to be substantially related to the state's interest in providing the proper informed consent of a patient. They balance the goals of mandating informed consent and safeguarding a physician's First Amendment rights—all while looking out for the patient's best interests.

---

218. *Id.*

219. Manian, *supra* note 18, at 239; *see* sources cited *supra* note 17; sources cited *supra* note 8.

220. *EMW*, 920 F.3d at 425.

221. Dent v. West Virginia, 129 U.S. 114, 122 (1889).

222. *NIFLA*, 138 S. Ct. at 2374–76.

223. *See id.* at 2373.

224. ACOG, *supra* note 20, at 2–4; *Informed Consent*, *supra* note 96; U.S. CONST. amend. I.

225. *EMW*, 920 F.3d at 452 (Donald, J., dissenting).