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THE RIGHT TO REMAIN SILENT:
FIRST AMENDMENT RIGHTS OF PHYSICIANS IN STATES WITH
NARRATED ULTRASOUND LAWS

Sabrina Jemail

I. INTRODUCTION

Is it truly possible to teach an old dog new tricks? More specifically, what if the old dog is the federal judiciary and the new trick is a different constitutional provision with which to contest state abortion laws? For decades, federal courts across the country have grappled with questions surrounding state abortion regulations, deciphering the constitutionality of the state's involvement in such deeply personal, private decisions.¹ The traditional arguments come from the Fourteenth Amendment Due Process Clause's rights for patients.² But recently enacted state abortion laws target the doctors performing these medical procedures rather than the patients seeking them.³ These laws require that doctors must perform a narrated ultrasound on the pregnant woman before performing an abortion.⁴ Specifically, Kentucky, North Carolina, and Texas all require the patient to hear an explanation of the ultrasound, even if she decides to avert her eyes of the sonogram images.⁵ They each also characterize the description of the fetus as a "medical description" that includes the size of the embryo, presence of cardiac activity, and location and existence of limbs and internal organs.⁶ As a result, the nature of the legal arguments challenging these laws has shifted. Lately, doctors are challenging the constitutionality of these state laws in federal court as violations of the First Amendment's free speech protections because the laws impose verbal requirements on the doctors.⁷ While the Fifth and Sixth Circuits have upheld such laws as merely informed consent laws regulating a

1. *See, e.g., Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)

2. *See, e.g., Roe*, 410 U.S. 113; *Casey*, 505 U.S. 833; U.S. CONST. amend. XIV.

3. *See, e.g.,* Ultrasound Informed Consent Act, KY. REV. STAT. ANN. § 311.727 (West 2017); N.C. GEN. STAT. § 90-21.85 (West 2011); Act Relating to Informed Consent to an Abortion, TEX. HEALTH & SAFETY CODE ANN. § 177.0122 (West 2011).

4. *See, e.g.,* KY. REV. STAT. ANN. § 311.727; N.C. GEN. STAT. § 90-21.85; TEX. HEALTH & SAFETY CODE ANN. § 177.0122.

5. *See, e.g.,* KY. REV. STAT. ANN. § 311.727; N.C. GEN. STAT. § 90-21.85; TEX. HEALTH & SAFETY CODE ANN. § 177.0122.

6. *See, e.g.,* KY. REV. STAT. ANN. § 311.727; N.C. GEN. STAT. § 90-21.85; TEX. HEALTH & SAFETY CODE ANN. § 177.0122.

7. *See, e.g., Nat'l Ins. Fam. & Life Adv. v. Becerra*, 138 S. Ct. 2361 (2018); *EMW Women's Surgical Ctr. P.S.C. v. Beshear*, 920 F.3d 421 (6th Cir. 2018); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012); *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014).

medical procedure, the Fourth Circuit has taken the opposite position and struck down such laws in violation of the doctors' constitutionally-protected free speech.⁸

Part II of this Note provides an overview of the judicial history surrounding abortion regulations, including the Supreme Court's opinion upholding informed consent laws that require risk and health disclosures before abortion procedures. Part II also discusses the split between the Fifth and Sixth Circuits and the Fourth Circuit. Part III of this Note examines the propriety of analogizing mandatory narrated ultrasound laws to informed consent laws and determines which circuit opinion is a proper interpretation of First Amendment free speech protections. Finally, Part IV argues in favor of the Fourth Circuit's line of reasoning and discusses the implications of this legal direction.

II. BACKGROUND

Beginning in 1973 with the Supreme Court's landmark decision in *Roe v. Wade*, the Court has entrenched itself in the heated battle between pro-choice and pro-life activists. Several subsequent decisions have since come down, but the litigation and ensuing policy implications have not become any less complex or controversial.⁹ First, this Part outlines the complicated history of abortion litigation in the United States. Second, it provides an overview of free speech litigation. Finally, this Part delves into the crossover of these two bodies of law by detailing the recent appellate decisions concerning the First Amendment rights of physicians who perform abortions. Although the two bodies are seemingly unrelated, this Part will show how abortion rights and free speech rights bleed into one another, as the Fourth, Fifth, and Sixth Circuits have demonstrated.

A. Abortion and Due Process: A Controversial History

For years, the fight over a woman's right to an abortion has divided this nation, sparking debate in legislatures, courtrooms, and newspapers.¹⁰ In one of its most famous cases, *Roe v. Wade*, the Supreme Court struck down Texas laws criminalizing abortion, determining that the right to an abortion was fundamental; as such, under strict scrutiny analysis, the

8. See, e.g., *Becerra*, 138 S. Ct. 2361; *EMW Women's Surgical Ctr. P.S.C.*, 920 F.3d 421; *Tex. Med. Providers Performing Abortion Servs.*, 667 F.3d 570; *Stuart*, 774 F.3d 238.

9. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Becerra*, 138 S. Ct. 2361; David Masci & Ira C. Lupu, *A History of Key Abortion Rulings of the U.S. Supreme Court*, PEW RES. CENTER: RELIGION & PUB. LIFE (Jan. 16, 2013), <http://www.pewforum.org/2013/01/16/a-history-of-key-abortion-rulings-of-the-us-supreme-court/>.

10. See, e.g., N.E.H. Hull & Peter Charles Hoffer, *Roe v. Wade: The Abortion Rights Controversy in American History*, 46 AM. J. LEGAL HIST. 104 (2004).

Court upheld a woman's right to the procedure.¹¹ Writing for the majority, Justice Blackmun clarified that the Due Process Clause of the Fourteenth Amendment contains an implicit "right to privacy."¹² This classification signifies that, in order to enact a law that affects this right, the state must have a "compelling state interest" that is "narrowly drawn" to serve that interest.¹³ However, he noted that a pregnant woman is not "isolated" in this right, indicating that the rights of the fetus are intertwined with hers. Therefore, states also have an interest in the fetus and pregnancy.¹⁴ Furthermore, as the pregnancy progresses, the state interest grows in substantiality until it finally reaches the status of a "compelling" interest at the end of the woman's first trimester.¹⁵ At this point, the state may impose regulations on abortion that relate to protection of maternal health.¹⁶ Even further, at the end of the second trimester—the point of fetal viability—the state's interest is so compelling that it outweighs the mother's.¹⁷ At this time, the state can regulate and even proscribe abortion, unless doing so harms or threatens the life of the mother.¹⁸

In subsequent cases, this reasoning became known as "the trimester framework."¹⁹ While the Supreme Court maintained the same general principle of striking down abortion laws under the right to privacy implicit in the Fourteenth Amendment's Due Process Clause, the controversy surrounding *Roe* led the Court to revisit the issue in *Planned Parenthood of Southeastern Pa. v. Casey*.²⁰ In *Casey*, the Court reaffirmed the essential holding in *Roe*, recognizing a woman's right to an abortion, as well as the legitimacy of the state's interest at and after the point of fetal viability to create restrictions on abortion procedures.²¹ The Court, however, struck down the use of the "trimester framework" and instead opted for a focus on viability as the measure for when the state's interests outweighed those of the mother.²² Further, the Court noted that the rigid framework was a controversial portion of the opinion, one which subsequently led to courts striking down laws that did not prevent a woman from making the ultimate choice.²³ Instead, the Court adopted the

11. *Roe v. Wade*, 410 U.S. 113, 164 (1973).

12. *Id.* at 152, 163.

13. *Id.* at 155.

14. *Id.* at 159.

15. *Id.* at 162-63.

16. *Id.*

17. *Id.* at 164-65.

18. *Id.*

19. *See Planned Parenthood v. Casey*, 505 U.S. 833, 858 (1992).

20. *Id.*

21. *Id.* at 846.

22. *Id.* at 870.

23. *Id.* at 875.

“undue burden” standard, wherein a law only interferes with a woman’s right to an abortion before the point of viability when “it has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of an unviable fetus.”²⁴ While this new standard marked a new method for analyzing the constitutionality of abortion regulations, it still relied on the Fourteenth Amendment’s Due Process Clause and focused solely on the rights of the mother.

From the clear-cut, albeit over-simplified “trimester framework” in *Roe*, to the murky and nuanced “undue burden” standard of *Casey*, the Court has worked through a series of complex and controversial challenges to abortion regulations. One common thread through all of them has been the use of the Fourteenth Amendment as the foundation of the constitutional challenges, and for good reason. When defending a person’s access to a medical procedure that many deem to be a fundamental right, an obvious route is to object to the denial of this right “without due process of law.”²⁵

B. Informed Consent Laws: When Free Speech Ends and the Medical Profession Begins

Subsequent laws and judicial challenges would call into play an entirely different provision of the Constitution: The First Amendment. The First Amendment of the United States Constitution provides, in part, that “Congress shall make no law . . . abridging the freedom of speech.”²⁶ The Supreme Court has elaborated on this sentence substantially through history, defining the varying levels of protection afforded to the different types of speech.²⁷ For speech of the highest protection, a law must survive a strict scrutiny analysis, where the regulation must be “narrowly tailored” to serve a “compelling governmental interest.”²⁸ An example of such a law is one that is “content-based.” Such content-based speech regulations are “presumptively invalid” unless they can overcome the strict scrutiny standard.²⁹ In *R.A.V. v. City of St. Paul*, the Supreme Court struck down a St. Paul, Minnesota law that prohibited “fighting words that insult or provoke violence on the basis of race, color, creed, religion, or gender.”³⁰ Writing for the majority, Justice Scalia even went so far as to claim that

24. *Id.* at 876.

25. U.S. CONST. amend. XIV, § 1.

26. U.S. CONST. amend. I.

27. Alexander Tsesis, *The Categorical Free Speech Doctrine and Contextualization*, 65 EMORY L.J. 495, 496 (2015).

28. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992).

29. *Id.* at 382.

30. *Id.* at 391 (internal quotations omitted).

this regulation created not only content discrimination, but viewpoint discrimination as well, since it only prohibited fighting words against a minority protected class, and not those slung against the majority.³¹ While the city indeed has a duty to protect all its citizens, he wrote, “the point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content.”³² Thus, a content-based regulation on speech, even if well-meaning, cannot stand in the face of the First Amendment.

However, the Court has also determined that some forms of speech have less protection than others. For instance, the Constitution “accords a lesser protection to commercial speech,”³³ or speech “related solely to the economic interests of the speaker and its audience.”³⁴ In *Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y.*, the Court struck down a law prohibiting advertisement of electrical utilities.³⁵ The state had enacted the law to promote energy conservation.³⁶ The Court implemented a four-part test used to determine whether commercial speech regulations violate the First Amendment: (1) the law must concern lawful activity and not be misleading; (2) the asserted governmental interest must be substantial; (3) the regulation must directly advance the governmental interest asserted; and (4) the regulation must not be more extensive than necessary.³⁷ Under this test, the Court struck down the advertising ban on the fourth prong, stating that because the regulation reached all promotional advertising, “regardless of the impact of the touted service on overall energy use,” it was more extensive than necessary to serve the governmental interest of energy conservation.³⁸ Therefore, the government can still violate the First Amendment with regards to lesser-protected speech, even when the law in question serves a substantial governmental interest.

Finally, there are certain circumstances where the state can regulate specific speech, such as with informed consent laws. In *Casey*, the Court noted that the First Amendment right *not* to speak while in the course of the practice of medicine, is “subject to reasonable licensing and regulation by the State,” where physicians are “required to give truthful, nonmisleading information” relevant to the medical procedure.³⁹ Laws

31. *Id.*

32. *Id.* at 392.

33. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561 (1980).

34. *Id.* at 563.

35. *Id.* at 559, 571.

36. *Id.* at 559.

37. *Id.* at 566

38. *Id.* at 569-70.

39. *Planned Parenthood v. Casey*, 505 U.S. 833, 882 (1992) (plurality opinion).

requiring informed consent for the medical risks of an abortion procedure remain constitutional “even when those consequences [of the abortion procedure] have no direct relation” to the health of the mother, but only to the fetus.⁴⁰ The Court continued to discuss informed consent laws by exemplifying their use in other procedures, such as a kidney transplant, where the physician must notify the patient of risks and benefits of the procedure.⁴¹

More recently, the Eighth Circuit in *Planned Parenthood of Minnesota, North Dakota, and South Dakota v. Rounds* upheld informed consent laws relating to abortion procedures in light of the First Amendment and physicians’ freedom to not speak.⁴² The court referenced the plurality opinion from *Casey* in determining that compelling a physician’s speech in the context of providing truthful, relevant medical information is not a violation of the First Amendment.⁴³ In *Rounds*, the law in question required a physician to inform a woman considering abortion, in part:

[t]hat the abortion will terminate the life of a whole, separate, unique, living human being; That the pregnant woman has an existing relationship with that unborn human being and that the relationship enjoys protection under the United States Constitution and under the laws of South Dakota; That by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship will be terminated.⁴⁴

Despite Planned Parenthood’s arguments that the required speech included nonmedical and subjective information, the court found that the information required was “truthful, non-misleading, and relevant to the patient’s decision to have an abortion.”⁴⁵

These compelled-speech laws not only apply to abortion providers, but also to pregnancy crisis centers. Recently, the Supreme Court weighed in on laws relating to crisis pregnancy centers, specifically ruling on a California law requiring such centers inform patients of contraception and abortion options, as well as their licensing status.⁴⁶ In *NIFLA v. Becerra*, Justice Thomas, writing for the majority, held that the California law violated the First Amendment rights of the crisis pregnancy centers beholden to these laws.⁴⁷ Denying the state’s argument that such laws were no different from informed consent laws, the Court noted that the

40. *Id.*

41. *Id.* at 883.

42. *See* *Planned Parenthood v. Rounds*, 530 F.3d 716 (8th Cir. 2008).

43. *Id.* at 733-34.

44. *Id.* at 719.

45. *Id.* at 738-39.

46. *See* *Nat’l Ins. Fam. & Life Adv. v. Becerra*, 138 S. Ct. 2361 (2018).

47. *Id.* at 2378.

information requirements had nothing to do with a medical procedure or its associated risks.⁴⁸ The Court differentiated the California law to those upheld in *Casey*, noting that the latter were clearly informed consent laws and only required the doctor to notify the patient of materials available; whereas the California notices did not “facilitate informed consent at all” and could in no way be analogous to informed consent laws.⁴⁹ Therefore, the plurality opinion in *Casey* that supported compelled speech regulations in the context of informed consent laws was not analogous to the California lawsuit involving nonmedical notices.⁵⁰

In fact, the Court extended the discussion of the California laws by describing the dangers of regulating professional medical speech beyond what is necessary to provide a patient with informed consent. Justice Thomas emphasized that “regulating the content of professionals’ speech ‘pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.’”⁵¹ In fact, the Court claimed that it has not found a valid reason to treat “professional speech as a unique category that is exempt from ordinary First Amendment principles.”⁵² So even when applying an intermediate scrutiny test, the Court determined that, while the law may serve the state’s substantial interest in providing family-planning information to low-income women, the requirement that the law imposes on crisis centers is not “sufficiently drawn to achieve [that interest].”⁵³

Regardless of what the Supreme Court has ruled concerning compelled information laws, the Court has not ruled on how such professional speech regulations apply specifically to narrated ultrasound laws, where a physician must perform an ultrasound and describe in detail the fetus to a patient contemplating abortion.⁵⁴ While an ultrasound is not medically necessary for an abortion, the laws nevertheless require the physician to perform one, even if the woman objects.⁵⁵ The Ultrasound Informed Consent Act in Kentucky, the Women’s Right to Know Act in North Carolina, and the Act Relating to Informed Consent to an Abortion in Texas are the ultrasound laws that physicians in those respective states

48. *Id.* at 2376; These notices specifically related to clinics that promoted pregnancy and childbirth and discouraged women from seeking abortions. The law required that those clinics with licenses must disclose that women did have an option to seek an abortion elsewhere, while those without licenses must disclose that they were, in fact, unlicensed.

49. *Id.* at 2373.

50. *Id.*

51. *Id.* at 2374 (quoting *Turner Broadcasting Sys. v. F.C.C.*, 512 U.S. 622, 641 (1994)).

52. *Id.*

53. *Id.*

54. *Forced Ultrasound Laws*, NARAL PRO-CHOICE AM., <https://www.prochoiceamerica.org/issue/forced-ultrasound-laws/> (last visited Sept. 18, 2020).

55. *Id.*

challenged on First Amendment grounds.⁵⁶ Currently, thirteen states have narrated ultrasound laws, but only Kentucky, North Carolina, and Texas have had constitutional challenges to acts at the appellate level.⁵⁷

The Supreme Court has a long history of ruling on First Amendment challenges and has developed separate standards of review for analyzing laws that implicate speech, either by prohibition or compulsion.⁵⁸ Even within the context of the abortion debate, the Court has held that certain compelled speech regulations are constitutional when they require disclosures of “truthful, non-misleading and relevant” information.⁵⁹ This reasoning guided the Eighth Circuit in upholding a law that required disclosure for abortion providers, since the information required was, as the opinion stated, “truthful, non-misleading, and relevant to the patient’s decision to have an abortion.”⁶⁰ Most recently, however, the Court has shown that not all required disclosures fall into the First Amendment-exempted category of “informed consent.”⁶¹ Rather, when the law in question fails to facilitate informed consent, as did the law in *NIFLA*, such a regulation is a content-based compelled speech regulation which courts must strike down as unconstitutional.⁶²

C. Just Another Informed Consent Law: The Fifth and Sixth Circuits’ Stance

The Fifth Circuit has for years addressed the constitutionality of narrated ultrasound laws, creating persuasive authority for other circuits.⁶³ In *Texas Medical Providers Performing Abortion Services v. Lakey*, the Fifth Circuit upheld the Texas Act Relating to Informed Consent to an Abortion and determined that the law, in its compelling of physician speech, did not violate the physician’s First Amendment rights.⁶⁴ In coming to this conclusion, the court applied the principles of *Casey*’s plurality, noting that the ultrasound description was the “epitome of

56. KY. REV. STAT. ANN. § 311.727(d), (e) (West 2017); N.C. GEN. STAT. § 90-21.85(a)(2)-(4) (West 2011); H.B. 15 (a)(4)(C), 82nd Leg. Reg. Sess. (Tex. 2011).

57. *Forced Ultrasound Laws*, *supra* note 55; *see also*, EMW Women’s Surgical Ctr. P.S.C. v. Beshear, 920 F.3d 421 (6th Cir. 2018); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570 (5th Cir. 2012); *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014); *supra* note 7.

58. *See, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 561 (1980); *Turner Broadcasting Sys. v. F.C.C.*, 512 U.S. 622, 641 (1994).

59. *Planned Parenthood v. Casey*, 505 U.S. 833, 882 (1992) (plurality opinion).

60. *Planned Parenthood v. Rounds*, 530 F.3d 724, 738 (8th Cir. 2008).

61. *Nat’l Ins. Fam. & Life Adv. v. Becerra*, 138 S. Ct. 2361, 2373 (2018).

62. *Id.*

63. *EMW Women’s Surgical Ctr. P.S.C. v. Beshear*, 920 F.3d 421, 430 (6th Cir. 2018).

64. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 580 (5th Cir. 2012).

truthful, non-misleading information.”⁶⁵ While perhaps more graphic and scientifically current than the informed consent verbiage upheld in *Casey*, the court nonetheless found the two disclosures to be analogous.⁶⁶ Furthermore, the Supreme Court made clear in *Casey* that information about fetal development is “relevant” to the woman’s decision, making disclosures about the fetus necessary in order to receive informed consent from the patient seeking an abortion.⁶⁷

In this way, the Fifth Circuit analogized the Texas ultrasound law to any traditional informed consent law required before a physician may perform a medical procedure. Because this law is necessary in the regulation of the medical profession, it does not violate the doctor’s First Amendment rights to not speak.⁶⁸ Furthermore, the court found that to make a First Amendment argument against these informed consent laws ignores the “balance *Casey* struck between women’s rights and the states’ prerogatives.”⁶⁹ In making this comment, the court essentially dismissed the First Amendment challenge altogether with no level of scrutiny. Rather, the Fifth Circuit found that because the law was so similar to the one upheld in *Casey*, a First Amendment challenge would “belabor the obvious and conceded point” from *Casey*, which “rejected any such clash of [First Amendment] rights in the context of informed consent.”⁷⁰

The Sixth Circuit also found *Casey* to be instructive in its decision upholding Kentucky’s mandatory narrated ultrasound law in *EMW Women’s Surgical Center P.S.C. v. Beshear*.⁷¹ Quoting *Casey*’s plurality opinion, the court emphasized that laws requiring physicians provide “truthful, non-misleading information” is necessary to informed consent.⁷² Further, the Sixth Circuit wrote this opinion in light of the recent Supreme Court decision in *NIFLA v. Becerra*, which it also found to be instructive as to the First Amendment implications of informed consent laws.⁷³ Specifically, the court noted that both *Casey* and *NIFLA* recognized that “heightened scrutiny does not apply to incidental regulation of professional speech that is part of the practice of medicine,” and that such regulation “includes mandated informed-consent requirements.”⁷⁴ Thus, the Sixth Circuit established that under a First

65. *Id.* at 578.

66. *Id.*

67. *Id.* (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 871 (1992)).

68. *Id.* at 577.

69. *Id.*

70. *Id.*

71. *EMW Women’s Surgical Ctr. P.S.C. v. Beshear*, 920 F.3d 421, 427 (6th Cir. 2018).

72. *Id.* (quoting *Casey*, 505 U.S. at 882).

73. *Id.* at 429 (citing *Casey*, 505 U.S. at 882-84; *Nat’l Ins. Fam. & Life Adv. v. Becerra*, 138 S. Ct. 2361, 2373 (2018)).

74. *Id.*

Amendment challenge, the court will not apply heightened scrutiny to an informed consent law, even one relating to abortion, as long as it satisfies three requirements: (1) it relates to a medical procedure; (2) it is truthful and not misleading information; and (3) it is relevant to the patient's decision whether to have the procedure.⁷⁵ In applying this test to the law in question, the court found that the Kentucky law met all three requirements; it was therefore analogous to the informed consent laws previously upheld in *Casey* and did not require a heightened scrutiny analysis as to the free speech implications of the physician.⁷⁶

Interestingly, in an opinion piece for *The Washington Post*, law professor Ronald Krotoszynski Jr. pointed out the glaring hypocrisy in the Court's decision not to review the Sixth Circuit's *EMW v. Beshear* case despite granting certiorari to the analogous, although ideologically flipped, case in *NIFLA*.⁷⁷ In the piece, Krotoszynski described how Justice Thomas emphasized that the California law imposed a "government-scripted, speaker-based disclosure requirement" in violation of the speaker's First Amendment rights.⁷⁸ The article then stated that such an imposition is "precisely" what Kentucky's narrated ultrasound abortion law does; the only difference is that the California law furthered the state's pro-choice preference, while the Kentucky law furthered its own pro-life stance.⁷⁹ Furthermore, the author explained the negative implications of the Court's refusal to grant certiorari to the Sixth Circuit's case, namely that allowing the Sixth Circuit's decision to stand opens the door for other states to enact similarly unconstitutional laws under the illusion that these regulations are "informed consent" laws.⁸⁰ For Mr. Krotoszynski, the most troubling part of the Court's decision is that the Court has provided greater leniency in speech for non-medical personnel providing advice under the pretense that they are physicians, while licensed physicians cannot provide their own professional medical advice without the state's interference of its own pro-life message.⁸¹

In a response letter to this opinion piece, the vice president of legal affairs at NIFLA, Anne O'Connor, ignored one of the central tenants of Mr. Krotoszynski's argument by simply stating that the Kentucky narrated ultrasound law is merely an informed consent law—a type of law

75. *Id.* at 428.

76. *Id.* at 429.

77. Ronald J. Krotoszynski Jr., *The Supreme Court Gives Free Speech to Fake Doctors, But Not Real Ones*, WASH. POST (Dec. 11, 2019, 6:11 PM), http://www.washingtonpost.com/opinions/the-supreme-court-gives-free-speech-to-fake-doctors-but-not-real-ones/2019/12/11/2c4f4bc8-1c27-11ea-8d58-5ac3600967a1_story.html.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

which the Court has upheld for years.⁸² As such, it is inherently different from the compelled speech regulation at issue in *NIFLA*.⁸³ But had Ms. O'Connor or the Sixth Circuit in its decision in *EMW v. Beshear* looked deeper into the law and the Court's opinion in *NIFLA*, they could see that while an informed consent law is indeed a constitutional imposition on a physician's speech, such a law only relates to those disclosures that "directly relate to the medical risks and benefits of the procedure," which a medically-unnecessary narrated ultrasound does not.⁸⁴

Together, the Fifth and Sixth Circuits both upheld the Texas and Kentucky narrated ultrasound laws, respectively, as types of informed consent laws, which the Court has upheld before—most notably in *Casey*.⁸⁵ The Fifth Circuit essentially ignored the First Amendment challenge to the law by refusing to assign a level of scrutiny under which to analyze it, instead opting to hold that, as an informed consent law, it simply does not violate the speaker's First Amendment rights.⁸⁶ Meanwhile, the Sixth Circuit applied a three-prong test to determine that this type of informed consent law does not require any heightened scrutiny.⁸⁷

D. The Split Arises: The Fourth Circuit's Stance

In 2014, the Fourth Circuit considered the First Amendment rights of physicians under North Carolina's narrated ultrasound law in *Stuart v. Camnitz*.⁸⁸ The law, known as the Women's Right to Know Act, requires that physicians "describe the fetus in detail," including the presence of limbs and organs, and provides an exception to these requirements only for medical emergencies.⁸⁹ First, the court determined which level of scrutiny was appropriate for its analysis of this First Amendment challenge.⁹⁰ Unlike the Fifth and Sixth Circuits, the Fourth Circuit found that the law was a content-based regulation and thus must satisfy at least an intermediate level of scrutiny to survive.⁹¹ In reaching this conclusion,

82. Anne O'Connor, *Women Deserve a "Window into the Womb" through Mandatory Ultrasound*, WASH. POST (Dec. 20, 2019, 5:28 PM), http://www.washingtonpost.com/opinions/women-deserve-a-window-into-the-womb-through-mandatory-ultrasound/2019/12/20/513d7b22-2275-11ea-b034-de7dc2b5199b_story.html.

83. *Id.*

84. Krotoszynski, *supra* note 78.

85. *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 578 (5th Cir. 2012); *EMW Women's Surgical Ctr. P.S.C. v. Beshear*, 920 F.3d 421, 429 (6th Cir. 2018).

86. *Lakey*, 667 F.3d at 577.

87. *EMW v. Beshear*, 920 F.3d at 428-29.

88. *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014); N.C. GEN. STAT. § 90-21.85 (West 2011).

89. *Stuart*, 774 F.3d at 243.

90. *Id.* at 244-45.

91. *Id.* at 245.

the court emphasized that, first and foremost, the First Amendment protects not only against prohibitions of speech, but also against regulations that require speech.⁹² Further, the law at hand compelling physician speech, like all regulations 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.”⁹³ Moreover, this compelled speech is “ideological,” and while the Fifth Circuit may have been correct in asserting that the required disclosures are factual, the veracity of the statements “does not divorce the speech from its moral or ideological implications.”⁹⁴ Specifically, the court noted that while not every medical description of a fetus may be ideological speech, this specific script “promotes a pro-life message,” emphasizing the moral and political effects of the speech, and thus its content-based nature.⁹⁵

While content-based regulations typically must survive strict scrutiny, the state asserted that the law should receive a rational basis standard of review since it is a law regulating the practice of medicine.⁹⁶ The court stated that physicians do not “abandon their First Amendment rights” when they begin practicing.⁹⁷ Instead, the court pointed to the sliding “continuum” for determining the level of scrutiny for professional regulations, where “public dialogue” is on one end and “professional conduct” is on the other.⁹⁸ This narrated ultrasound law, the court said, falls in the middle of the continuum, as it requires physicians to both act and speak.⁹⁹ Furthermore, because the practice of medicine is a fairly self-regulated profession, the state’s interest in regulating it has less potency than it does for other, less-regulated professions.¹⁰⁰ This, combined with the fact that the speech is content-based, led the court to determine that it must apply intermediate scrutiny to the law.¹⁰¹

The Fourth Circuit then went on to compare its decision here with the reasoning of the Fifth Circuit’s decision in *Lakey*.¹⁰² The court stated that the *Lakey* court reached too far in its comparison to and reliance on *Casey*.¹⁰³ The Fourth Circuit instead maintained that the single paragraph

92. *Id.*

93. *Id.* at 246 (citing *Riley v. Nat’l Fed’n of Blind*, 487 U.S. 781, 795 (1988)).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 247.

98. *Id.* at 248 (quoting *Pickup v. Brown*, 740 F.3d 1208, 1227, 1229 (9th Cir. 2013)).

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 248-49.

103. *Id.*

in the *Casey* opinion does not provide the appropriate level of scrutiny for abortion regulations controlling physicians' speech.¹⁰⁴ Further, according to the Fourth Circuit, the plurality opinion in *Casey* did not assert that all medical speech regulations should receive rational basis review.¹⁰⁵ Therefore, according to the Fourth Circuit, the Fifth Circuit's reliance on *Casey* to determine the level of scrutiny required for the narrated ultrasound laws was inappropriate.¹⁰⁶

The Fourth Circuit proceeded to analyze the law under the appropriate intermediate scrutiny level, stating that the state's interest is "important," and so the means for achieving it must be drawn to that interest and "proportional to the burden placed on the physician's speech."¹⁰⁷ The Supreme Court has long held that states do have an important interest in both the health of the mother and in the promotion of life.¹⁰⁸ The North Carolina law, however, did not further the state's interest in the mother's health; in fact, the court explicitly noted that the other informed consent laws which *are* in the interest of the mother's health are *not* at issue in this case, emphasizing that informed consent laws were completely separate from the law in question.¹⁰⁹ These laws, like informed consent laws for all other medical procedures, require the physician to notify the patient of the risks and benefits of the abortion procedure and are important for promoting the rights of patients.¹¹⁰

While the state contended that the narrated ultrasound law was no different than other such consent laws, the court reiterated that these narrated ultrasound laws do not resemble any traditional informed consent laws, which allow a patient to make a well-informed decision about a medical procedure. The Fourth Circuit noted that, in *Casey*, the informed consent law that the Court upheld sounded similar to other informed consent laws, with the added modification that the woman could receive a state-published pamphlet describing the fetus if she wished.¹¹¹ Meanwhile, this North Carolina law compels the physician to give that information to the patient in real time, whether she wants to receive it or not.¹¹² The court characterized this speech as "coercive," underscoring its inherent differences from the law that the Court in *Casey* upheld, which only required the doctor to inform the patient of the available pamphlet.¹¹³

104. *Id.*

105. *Id.* at 249.

106. *Id.*

107. *Id.* at 251.

108. *Id.* at 250-51.

109. *Id.* at 244.

110. *Id.*

111. *Id.* at 253.

112. *Id.*

113. *Id.*

Regarding the state's interest in promoting life, while the state may certainly have a policy preference against abortion, it cannot "commandeer" the physician's relationship with the patient to "compel" the physician to express the state's preference to the patient.¹¹⁴ Such compulsion is no longer the state's encouragement, but a lecture, through the mouthpiece of a doctor.¹¹⁵ Therefore, the state's means in furthering its interests in the patient and fetus are not proportional to the burden that the law imposes on the physician.¹¹⁶ Moreover, the law does not resemble any sort of informed consent law that courts traditionally uphold to promote state interests; even more, it imposed "an extraordinary burden on [the physician's] expressive rights."¹¹⁷ Indeed, this law is an example of a regulation compelling ideological speech. These types of laws "pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion."¹¹⁸

E. Putting It All Together

While the Supreme Court has a long history of adjudicating abortion law cases, the cases have usually revolved around the Fourteenth Amendment rights of women seeking abortions. Only recently have the First Amendment rights of physicians performing these abortions come into play in the federal judiciary. This new take on abortion rights litigation is the result of narrated ultrasound laws. While the Fifth and Sixth Circuits see these as an extension of long-upheld informed consent laws, the Fourth Circuit has distinguished these laws as a way for the state to use doctors as its mouthpiece on a controversial moral issue. Although the Supreme Court has recently ruled on compelled speech laws in relation to pregnancy crisis centers in *NIFLA v. Becerra*, it has not addressed the compelled speech laws for abortion providers. Thus, there is an unresolved circuit split regarding these narrated ultrasound laws.

III. DISCUSSION

The aforementioned circuit split presents an interesting dilemma for the legal field, pitting free speech rights against the state's interests in protecting life and providing patients with adequate medical information. This Part address whether such narrated ultrasound laws are indeed

114. *Id.*

115. *Id.*

116. *Id.* at 254.

117. *Id.*

118. *Id.* at 255 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994)).

informed consent laws where the state's interests would outweigh the physician's free speech rights, arguing that these laws go beyond informed consent. Further, this Part demonstrates how the Court's most recent decision in *NIFLA v. Becerra* is instructive for the narrated ultrasound lawsuits as the compelled speech required by the laws at issue in *NIFLA* is analogous to the compelled speech that the narrated ultrasound laws demand. Finally, this Part argues that, because of these factors, the Fourth Circuit's reasoning provides the argument most in line with the First Amendment and should thus be used in the adjudication of subsequent narrated ultrasound lawsuits.

A. Informed Consent or Simply Information?

While the Fourth Circuit clearly separates narrated ultrasound laws from the informed consent laws that already exist in North Carolina, the Fifth and Sixth Circuits took the opposite approach when analyzing their respective narrated ultrasound lawsuits.¹¹⁹ Although these ultrasound laws have titles that include an iteration of "informed consent," they are actually codified in a different section from their states' informed consent laws for abortions.¹²⁰ The portions of the states' code that enforce informed consent for abortions require a description of the risks and benefits of the procedure, just as the laws governing disclosures for other medical procedures do.¹²¹ Therefore, the ultrasounds required by law are not medically equivalent to the informed consent that a patient typically receives prior to an abortion or any other surgery.¹²² The ultrasound laws present distinct legal questions from the legal questions in cases with traditional informed consent laws.¹²³ While these prior informed consent laws can serve as guidance, the distinct difference between traditional informed consent laws and narrated ultrasound laws, evinced by each state's code, indicates that the Fifth and Sixth Circuits' heavy reliance on informed consent lawsuits in their decisions could be distortive. The following Subsection will discuss in detail the implications of narrated ultrasound laws and whether they are similar enough to informed consent so as to be medically relevant and within the scope of constitutional state regulation.

119. *Id.* at 251; *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 578 (5th Cir. 2012); *EMW Women's Surgical Ctr. P.S.C. v. Beshear*, 920 F.3d 421, 428 (6th Cir. 2018).

120. *See* KY. REV. STAT. ANN. § 311.727 (West 2017); N.C. GEN. STAT. § 90-21.85 (West 2011); TEX. HEALTH & SAFETY CODE ANN. § 171.0122 (West 2019).

121. *Stuart*, 774 F.3d 238; *Lakey*, 667 F.3d at 578; *EMW v. Beshear*, 920 F.3d at 428; *see also* KY. REV. STAT. ANN. § 311.725; N.C. GEN. STAT. § 90-21.82; TEX. HEALTH & SAFETY CODE ANN. § 177.012.

122. *See supra* note 122.

123. *See, e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833, 882 (1992); *Planned Parenthood v. Rounds*, 530 F.3d 716, 719-20 (8th Cir. 2008).

B. NIFLA: Relevant, Analogous, Controlling

While *Casey* provided much guidance to the Fifth and Sixth Circuits in their respective narrated ultrasound lawsuits, the more recent 2018 Supreme Court decision of *NIFLA v. Becerra* regarding state abortion laws is more relevant to the type of compelled speech regulation in question.¹²⁴ Justice Thomas, writing for the majority, emphasized that the notice at issue was not an “informed consent” law and therefore that the plurality opinion in *Casey* was not relevant to the discussion of this present regulation.¹²⁵ The Sixth Circuit in *EMW v. Beshear* interpreted this point, however, to mean that the California law was unlike both the informed consent law in *Casey* as well as the Kentucky narrated ultrasound law.¹²⁶ Instead, the Sixth Circuit reiterated that the Pennsylvania law in *Casey* and the Kentucky law presented the same legal question and rendered the *NIFLA* opinion irrelevant to the discussion.¹²⁷

This characterization, while convenient for the Sixth Circuit’s ultimate decision, is not accurate. As stated earlier in this Note, Kentucky already has informed consent laws relating to abortion procedures located in a separate section of its code.¹²⁸ The Ultrasound Informed Consent Act, and the regulations from these other narrated ultrasound lawsuits, do not relate to risks and benefits of an abortion or other information that is relevant to the medical procedure itself; rather, they only discuss details of the fetus.¹²⁹ In fact, an ultrasound before an abortion, while helpful for dating the pregnancy, is not medically necessary for the procedure itself.¹³⁰ The *NIFLA* opinion noted that the notice requirements of the California disclosure law provided “no information about the risks or benefits” of any pregnancy-related procedure.¹³¹ These narrated ultrasound laws “[impose] a government-scripted, speaker-based disclosure requirement” that is severed completely from the states’ “informational interest.”¹³² Considering the lack of medical necessity for the ultrasounds and the similarity between the ultrasound laws and the California notice law, these narrated ultrasound laws are not informed consent laws, as the Fifth and Sixth Circuits contend, but rather are more akin to the law in *NIFLA*.

124. Nat’l Ins. Fam. & Life Adv. v. Becerra, 138 S. Ct. 2361 (2018).

125. *Id.* at 2373.

126. *EMW v. Beshear*, 920 F.3d at 429.

127. *Id.*

128. KY. REV. STAT. ANN. § 311.725 (West 2017).

129. *See*, KY. REV. STAT. ANN. § 311.727(d), (e) (West 2017); N.C. GEN. STAT. § 90-21.85(a)(2)-(4) (West 2011); H.B. 15 (a)(4)(C), 82nd Leg. Reg. Sess. (Tex. 2011).

130. Jen Russo, M.D., *Mandated Ultrasound Prior to Abortion*, 16 VIRTUAL MENTOR: AM. MED. ASS’N J. ETHICS 240, 241 (2014).

131. Nat’l Ins. Fam. & Life Adv., 138 S. Ct. 2361, 2373 (2018).

132. *Id.* at 2377.

Therefore, *NIFLA* should be instructive in these and future narrated ultrasound lawsuits.

Specifically, courts should heed Justice Thomas' poignant remarks regarding professional speech and its lack of special categorization in terms of First Amendment protections.¹³³ The Court was clear in *NIFLA* that it has never recognized such a category of speech, and that just because speech is uttered by "professionals" does not make it unprotected nor immune to a strict scrutiny review as a content-based regulation.¹³⁴ Once again the Court emphasized that compelled speech requirements are by nature content-based restrictions, and are subject to strict scrutiny.¹³⁵ The majority noted that even when applying intermediate scrutiny to the laws, since the law was somewhat commercial in nature, the laws fell significantly short of achieving the state's informational goals because the notices were wholly unrelated to "the risks and benefits."¹³⁶ Similarly, if the states in the narrated ultrasound lawsuits have a goal to provide pregnant patients with informed consent of the risks and benefits of a procedure, then requiring physicians to describe an ultrasound of the fetus is entirely unrelated to the procedure. This government-written script does not facilitate informed consent in any way. As such, it is not a narrowly-drawn method to achieve the states' apparent interest in providing information about the procedure.

While the *NIFLA* Court took a fairly conservative position, striking down a law that would have encouraged abortions, the reasoning actually runs both ways. In reference to the narrated ultrasound lawsuits, the majority made clear that it did not call into question "health and safety warnings . . . or purely factual and uncontroversial disclosures"; but as long as the regulated, compelled speech does not relate to the specific medical procedure at hand, the speech requirement "chill[s]" the physician's First Amendment rights.¹³⁷ It is clear that a regulation requiring a doctor to both perform and narrate medically unnecessary ultrasounds before performing an abortion is not only unrelated to a health or safety warning, but is also quite the opposite of "uncontroversial."¹³⁸ Therefore, unlike the Fifth and Sixth Circuits held, these narrated ultrasound laws are not informed consent. Rather, they are burdensome requirements imposed on physicians that alter their speech and, thus, violate their constitutional rights.

A required disclosure does not automatically become an informed

133. *See infra* Part-II B

134. *Becerra*, 138 S. Ct. at 2371-72.

135. *Id.* at 2371.

136. *Id.* at 2375.

137. *Id.* at 2376, 2378.

138. *See id.*

consent disclosure just because it must precede the medical procedure at hand. Rather, the disclosure is only informed consent if the patient must hear it to gain a full understanding of the procedure's risks. Notably, a state's preference or moral stance on the procedure is not related to the risks and benefits of the procedure, even if it is one as controversial as abortion. Certainly, the Court did not intend to create such a hypocritical disparity between two similar compelled speech regulations. Therefore, it can be assumed that the Court did not feel the need to restate what it had already made clear in *NIFLA*: medical providers cannot be subject to compelled speech regulations that are unrelated to "the risks and benefits" of the procedure and, thus, disconnected from the informational interests that guide the state's informed consent laws.¹³⁹ Such compelled speech laws, whether in favor of a pro-choice or pro-life stance, fail even intermediate scrutiny.

D. Narrated Ultrasound Laws: When the Physician Becomes the State's Mouthpiece

Putting aside the state's interest in the health of the mother and only considering its significant interest in protecting human life, the method for achieving this interest through narrated ultrasound laws is still much too broad. In *Casey*, the Court upheld a law that required the physicians to merely tell a patient about a state pamphlet that promoted a pro-life message. In the narrated ultrasound laws, however, the physicians must actually *speak* the state's pro-life message themselves. As the Fourth Circuit noted, this requirement not only goes beyond informed consent, but actually compels "ideological speech," forcing the physician to express the state's view on this controversial matter, as the state's "mouthpiece."¹⁴⁰

Meanwhile, the Fifth and Sixth Circuits' contention that the narrated ultrasound only provides "truthful, non-misleading information" like other informed consent laws and like the pamphlet law in *Casey* is a gross simplification.¹⁴¹ First, these Circuits' categorizations, like that of the vice president of NIFLA, ignore the obvious disconnection that a narrated ultrasound has from any sort of medically relevant informed consent disclosure. Beyond this plain distinction between the two laws, this simplification patently ignores the deeply controversial moral implications of the state's pro-life message inherent in the script and the

139. *Id.* at 2375.

140. *Stuart v. Camnitz*, 774 F.3d 238, 253-54 (4th Cir. 2014).

141. *See EMW Women's Surgical Ctr. P.S.C. v. Beshear*, 920 F.3d 421, 427 (6th Cir. 2018); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 577 (5th Cir. 2012); *See also Planned Parenthood v. Casey*, 505 U.S. 833, 882 (1992).

visual and audio requirements of the law. While a state is free to have a stance on abortion, it is not free to violate the expressive rights of a private citizen to promote that message. The state may provide materials that express its message, whether it be pro-life or pro-choice, as was the case in *NIFLA*, but it cannot compel and alter the speech of an individual who otherwise would not express such a sentiment. This rings especially true when the speaker is a medical professional and the speech is wholly unrelated to the medical procedure at hand. Therefore, as the Court did in *NIFLA*, courts should construe narrated ultrasound laws, and all other laws which compel physicians to disclose unrelated, state-sponsored information, as content-based regulations that must pass a heightened scrutiny to survive.

IV. CONCLUSION

Although the Fourth Circuit decided its narrated ultrasound lawsuit before the *NIFLA* decision was issued, its *Stuart* decision was correct in striking down the narrated ultrasound law because it violated physicians' First Amendment rights. In light of the *NIFLA* decision, courts across the country now have an obligation to apply heightened scrutiny to compelled speech regulations in the context of abortion procedures. Courts must look to the interests the state alleges and determine whether the law is narrowly drawn to achieve that interest. In narrated ultrasound lawsuits, where the laws are unrelated to any health or safety warnings and instead force the doctor to promote a highly controversial ideological message, the laws will not survive heightened scrutiny. There is no question that such speech and act requirements violate the First Amendment rights of the doctors who must adhere to them. Furthermore, allowing these laws to stand not only infringes the doctors' free speech, but also endangers patients by burdening their access to a medical procedure and bombarding them with unnecessary information. Upholding these compelled speech laws now paves the way for future legislation compelling physician speech wholly unrelated to the medical procedure at hand. Permitting more of these compelled speech laws could overwhelm patients at a time when they are already subjected to massive amounts of information—most of which is medically unnecessary. Moreover, such lenient restrictions on the disclosures would certainly condone, if not encourage, that the patient could receive misleading or even false information. In the interest of protecting doctors' First Amendment rights and patients' health and informed consent rights, courts should strike down such narrated ultrasound laws that stretch far beyond medically necessary into ideologically forceful and burdensome.