# MANDATORY NARRATED ULTRASOUNDS: A FIRST AMENDMENT PERSPECTIVE ON ABORTION REGULATIONS

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*Ever since the U.S. Supreme Court recognized the right to terminate a pregnancy in* Roe v. Wade*, many state legislatures have passed myriad regulations intended to complicate the process of obtaining an abortion. These regulations include "informed consent" provisions, such as the mandatory narrated ultrasound, which impose strict disclosure requirements on physicians who seek to perform abortions. Since these regulations compel physicians to speak when they otherwise might not, these laws implicate the First Amendment's Free Speech Clause. As a result, physicians looking to perform abortions have an alternative avenue, apart from the Fourteenth Amendment's Due Process Clause, for challenging the constitutionality of the mandatory narrated ultrasound and other "informed consent" regulations.*

*Due to a lack of clarity from the Supreme Court, circuit courts and scholars are currently divided over the constitutionality of mandatory narrated ultrasound laws under the First Amendment. This Note discusses the lower courts' varying approaches to analyzing mandatory narrated ultrasound laws and demonstrates how the Supreme Court's recent jurisprudence complicates the First Amendment analysis. Ultimately, this Note suggests a more streamlined test that lower courts can use when analyzing mandatory narrated ultrasound laws and concludes that these laws violate physicians' First Amendment rights to free speech.*



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## INTRODUCTION

Jen Ferris was nineteen years old when she found out that she was pregnant.[1] As the daughter of a woman who became a mother at twenty-one and the granddaughter of a woman who became a mother at fifteen, Jen knew that she did not want to have the same experience.[2] So she went to a medical clinic to begin the difficult process of terminating her pregnancy.[3]

When Jen arrived at the clinic, she learned that the doctors would have to perform an ultrasound, during which the doctors would play the heartbeat of the unborn child and describe the fetus in detail.[4] The doctors could not perform the abortion unless Jen agreed to the ultrasound.[5] Knowing that this decision was the right one for her, Jen entered an examination room alone and laid on her back as the doctors played the sound of the heartbeat and detailed the fetus.[6]

The ultrasound did not change Jen's mind about terminating her pregnancy,[7] but it left her with a feeling of shame that has not yet gone away,

1. *See* Anna Silman, *What It's Like to Endure a Forced Ultrasound Before Your Abortion*, THE CUT (Dec. 13, 2019), https://www.thecut.com/2019/12/forced-ultrasound-abortion-what-its-like.html [https://perma.cc/84KH-SB3Q].

2. *See id.* According to a 2004 survey, 25 percent of women who have an abortion indicate, as the reason for having the procedure, that they are "not ready for a(nother) child/[t]iming is wrong." Luu Ireland, *Who Are the 1 in 4 American Women Who Choose Abortion?*, UMASS CHAN MED. SCH. (May 30, 2019) (alteration in original), https://www.umassmed.edu/news/news-archives/2019/05/who-are-the-1-in-4-american-women-who-choose-abortion/ [https://perma.cc/GUC6-SHHS].

3. *See* Silman, *supra* note 1.

4. *See id.*

5. *See id.*

6. *See id.*

7. *See id.* Studies show that most women seeking abortions are sure of their decision and do not change their minds as a result of state-mandated narrated ultrasounds. *See, e.g.*,

even years later.[8] As the doctors described the fetus, Jen could sense that they "wanted [her] to feel a certain way."[9] Only after becoming pregnant with her first son and sitting in the ultrasound room once again did Jen realize that she "was part of this kind of convoluted political theater" when the state inserted itself into her examination room so many years ago.[10]

Beginning in 1973 with the landmark case of *Roe v. Wade*,[11] the Supreme Court has consistently upheld a woman's constitutional right to terminate her pregnancy before viability[12] under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.[13] However, state legislatures have attacked this right for decades.[14] Since *Roe*, state legislatures have collectively passed over 1190 restrictive abortion laws.[15] Today, states have numerous regulations in place that limit access to abortion in some way, including (1) licensing requirements,[16] (2) gestational limits,[17] (3) state-mandated counseling,[18] (4) mandatory waiting periods,[19] and (5) mandatory narrated ultrasounds.[20]

Many of these regulations impose informed consent requirements on abortions.[21] The doctrine of informed consent requires physicians to make sufficient disclosures to their patients so that they may make informed

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USHMA D. UPADHYAY ET AL., EVALUATING THE IMPACT OF A MANDATORY PRE-ABORTION ULTRASOUND VIEWING LAW: A MIXED METHODS STUDY, PLOS ONE, at 1–2 (2017), https://journals.plos.org/plosone/article/file?id=10.1371/journal.pone.0178871&type=printable [https://perma.cc/R3TH-X8BE].

8. *See* Silman, *supra* note 1. Jen suffered from "retroactive shame" during her pregnancy with her first son, agonizing over whether she "wasted" her healthy pregnancy should this pregnancy go wrong. *Id.*

9. *Id.*

10. *Id.*

11. 410 U.S. 113 (1973).

12. Viability is the point at which the fetus is able to live outside the mother's womb. *See id.* at 160.

13. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) ("[T]he essential holding of *Roe v. Wade* should be retained and once again reaffirmed."); *see also Roe*, 410 U.S. at 153 ("This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

14. *See generally* T.J. Raphael & Amber Hall, *In the 45 Years Since* Roe v. Wade*, States Have Passed 1,193 Abortion Restrictions*, THE WORLD (Jan. 22, 2018, 4:30 PM), https://www.pri.org/stories/2018-01-22/45-years-roe-v-wade-states-have-passed-1193-abortion-restrictions [https://perma.cc/42SD-KP68].

15. *See id.*

16. Thirty-six states require that abortions be performed by a licensed physician. *An Overview of Abortion Laws*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/overview-abortion-laws [https://perma.cc/Q2DE-Z8PS] (Jan. 1, 2022).

17. Forty-three states prohibit abortions after a certain point, with the exception of an emergency to protect the mother's health. *See id.*

18. Eighteen states mandate that a woman receive counseling prior to obtaining an abortion. *See id.* The counseling, which may differ among states, provides information concerning the ability of the fetus to feel pain and the purported link between abortion and breast cancer, among other things. *See id.*

19. Twenty-five states require a woman to wait usually around twenty-four hours between the time of counseling and the abortion procedure itself. *See id.*

20. For a detailed discussion of mandatory narrated ultrasounds, see *infra* Part II.

21. *See* Nadia N. Sawicki, *The Abortion Informed Consent Debate: More Light, Less Heat*, 21 CORNELL J.L. & PUB. POL'Y 1, 3 (2011).

decisions about their medical care.[22] Numerous states have passed bills that impose unique informed consent requirements on abortions.[23] Kentucky, for example, requires that a physician perform an ultrasound on any woman seeking an abortion, during which the physician must provide a medical description of the fetus and play the sound of the heartbeat[24] ("mandatory narrated ultrasound").

Following *Roe*, parties have typically challenged these antiabortion restrictions as violations of the Fourteenth Amendment to the U.S. Constitution.[25] However, parties looking to challenge abortion informed consent provisions have another avenue for potential recourse: the First Amendment.[26] While states like Kentucky characterize mandatory narrated ultrasound regulations, among other provisions, as "informed consent," legislators have almost certainly intended for these regulations to complicate the process of obtaining an abortion, rather than to provide critical information to a woman seeking to terminate her pregnancy.[27] However, since these "informed consent" provisions compel a physician to speak when they otherwise might not, parties have challenged these regulations as violations of the First Amendment's Free Speech Clause.[28]

Although the Supreme Court has addressed the constitutionality of various other abortion "informed consent" provisions,[29] it has not directly addressed the mandatory narrated ultrasound.[30] As a result, litigants challenging mandatory narrated ultrasounds on First Amendment grounds have had mixed results.[31] In *Texas Medical Providers Performing Abortion Services v. Lakey*[32] and *EMW Women's Surgical Center, P.S.C. v. Beshear*,[33] the Fifth and Sixth Circuits, respectively, both upheld mandatory narrated ultrasound provisions as constitutional regulations of medical practice under the First

22. *See id.* at 19 ("A physician seeking his patient's consent to a medical intervention is morally and legally obligated to explain to his patient the information she needs to know to make an informed decision about how to proceed.").

23. *See id.* at 3.

24. *See* KY. REV. STAT. ANN. § 311.727 (West 2022). Under the statute, a woman seeking an abortion cannot give informed consent unless the physician performs the narrated ultrasound. *See id.*

25. *See, e.g.*, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2301 (2016) (wherein abortion providers challenged state-imposed admitting privileges and surgical center requirements under the Fourteenth Amendment).

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

27. *See* Sawicki, *supra* note 21, at 3–4; *see also* Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 378 (2008) ("Although couched in the protective terms of informed consent, these statutes are unabashedly meant to transform the embryo or fetus from an abstraction to a baby in the eyes of the potentially aborting mother.").

28. *See infra* Part II.

29. *See infra* Part I.D.

30. The Supreme Court denied certiorari in *EMW Women's Surgical Center, P.S.C. v. Meier*, a Sixth Circuit case addressing the constitutionality of mandatory narrated ultrasound provisions. *See* 140 S. Ct. 655 (2019) (mem.).

31. *See infra* Part II.

32. 667 F.3d 570 (5th Cir. 2012).

33. 920 F.3d 421 (6th Cir. 2019).

Amendment.[34] However, the Fourth Circuit in *Stuart v. Camnitz*[35] invalidated a mandatory narrated ultrasound provision as unconstitutional under the First Amendment.[36]

This Note addresses the divide in the lower courts over the constitutionality of mandatory narrated ultrasound provisions. Part I outlines the evolution of the Supreme Court's abortion jurisprudence. Specifically, Part I explains the First and Fourteenth Amendment frameworks for analyzing compelled speech provisions in the abortion context. Part II presents the debate among the lower courts and scholars surrounding the constitutionality of mandatory narrated ultrasound provisions. Part III argues that, applying the Supreme Court's recent decision in *National Institute of Family and Life Advocates v. Becerra*[37] (*NIFLA*), the mandatory narrated ultrasound is an unconstitutional regulation of the physician's speech under the First Amendment. Further, Part III proposes that, in order to reconcile its competing characterizations of "informed consent," the Supreme Court should revise its compelled speech holding in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[38] to invalidate the aspects of "informed consent" provisions that go beyond describing the medical procedure and its risks. Lastly, Part III contends that, even in light of the compelled speech holding in *Casey*, mandatory narrated ultrasounds are distinguishable from the provisions upheld in *Casey* and are thus unconstitutional.

## I. ABORTION REGULATION AND COMPELLED SPEECH

The First Amendment is a critical avenue through which litigants can challenge compelled speech provisions intended to complicate the process of obtaining an abortion, such as the mandatory narrated ultrasound. To understand the relationship between the First Amendment and mandatory narrated ultrasound provisions, it is important to consider the Supreme Court's declaration of the constitutional right to terminate a pregnancy and state legislatures' subsequent responses to the Supreme Court's abortion cases. Part I.A traces the constitutional development of the fundamental right to terminate a pregnancy. Part I.B discusses states' responses to *Roe v. Wade* and the evolution of compelled speech provisions in the abortion context. Part I.C explains the First Amendment framework for analyzing compelled speech generally, while Part I.D outlines the Supreme Court's various responses to compelled speech provisions, specifically in the abortion context.

34. *See id.* at 432; *Lakey*, 667 F.3d at 580. For a more detailed discussion of *Lakey* and *EMW Women's Surgical Center*, see *infra* Parts II.A–B.

35. 774 F.3d 238 (4th Cir. 2014).

36. *See id.* at 250. For a more detailed discussion of *Stuart*, see *infra* Part II.A.

37. 138 S. Ct. 2361 (2018).

38. 505 U.S. 833 (1992).

### *A. Fourteenth Amendment Due Process and a Woman's Right to Choose*

The Fourteenth Amendment provides, in part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."[39] Since its ratification after the Civil War, the Fourteenth Amendment's Due Process Clause has come to encompass two distinct doctrines: procedural due process and substantive due process.[40] Procedural due process, on the one hand, guarantees certain procedural protections before the state can deprive individuals of their life, liberty, or property.[41] Substantive due process, on the other hand, protects certain unenumerated[42] rights from state encroachment, regardless of the procedures employed.[43]

Substantive due process empowers the Supreme Court to carve out fundamental rights rooted in the constitutional principles of due process.[44] While developing the doctrine, the Supreme Court offered a number of different formulas for identifying fundamental rights protected under the Due Process Clause.[45] However, under modern substantive due process, the Court applies only a single test when deciding to recognize a new fundamental right: whether the right is "implicit in the concept of ordered liberty" as evidenced by our traditions.[46] Under this approach, the Court recognizes fundamental rights that have a long history in the United States and beyond.[47]

When a party challenges a state regulation under the Due Process Clause of the Fourteenth Amendment, the Supreme Court must first determine whether the claimed right is one that warrants constitutional protection under the test described above.[48] If the Court decides that the proposed right is, in fact, a fundamental right under the Due Process Clause, the Court must then determine whether the regulation at issue unconstitutionally encroaches upon

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39. U.S. CONST. amend. XIV.

40. *See* Aaron J. Shuler, *From Immutable to Existential: Protecting Who We Are and Who We Want to Be with the "Equalerty" of the Substantive Due Process Clause*, 12 J.L. SOC. CHALLENGES 220, 222–23 (2010).

41. *See id.* at 223.

42. Unenumerated rights are those rights protected under the Fourteenth Amendment that are not specifically listed in the text of the Constitution, either in the Bill of Rights or in subsequent amendments. *See id.* at 224; *see also* Thomas B. McAffee, *Inalienable Rights, Legal Enforceability, and American Constitutions: The Fourteenth Amendment and the Concept of Unenumerated Rights*, 36 WAKE FOREST L. REV. 747, 787 (2001) (defining "unenumerated rights" as "those not 'specified and declared by We the People'") (quoting Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1291 (1992))).

43. *See* Shuler, *supra* note 40, at 224.

44. *See id.* at 224, 226.

45. *See* Hon. Jon O. Newman, *The Births, Deaths, and Reincarnations of Substantive Due Process*, 41 U. HAW. L. REV. 1, 12–24 (2018) (tracing the history of the Supreme Court's substantive due process jurisprudence).

46. Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

47. *See* Ronald Turner, *On Substantive Due Process and Discretionary Traditionalism*, 66 SMU L. REV. 841, 858–81 (2013) (outlining the use of tradition in a variety of Supreme Court substantive due process cases).

48. *See Glucksberg*, 521 U.S. at 720–21; *see also* Turner, *supra* note 47, at 858–81.

that right.[49] To do so, the Court employs the highest standard of review, known as "strict scrutiny," upholding the regulation only if it is narrowly tailored to serve a compelling state interest.[50]

It is against this backdrop that the Supreme Court considered the right to terminate a pregnancy for the first time. In its 1973 landmark case of *Roe v. Wade*, the Court addressed a challenge to provisions of the Texas Penal Code that criminalized the procurement of an abortion, except with respect to "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother."[51] Under the first step of the Due Process analysis, the Court considered whether the right to terminate a pregnancy is a fundamental right.[52] Tracing the history of abortions from Ancient Greece through the modern day, the Court determined that there was a tradition of abortion before viability in the United States and around the world until the latter half of the nineteenth century, when states first began proscribing abortion at all times other than to save the mother's life.[53] Assured that this centuries-old tradition satisfied the substantive due process test, the Court held that the Fourteenth Amendment's Due Process Clause protects a fundamental right to privacy, which includes a woman's right to terminate a pregnancy.[54]

After determining that there is a fundamental right to terminate a pregnancy under the Due Process Clause, the Court considered whether the Texas abortion ban infringed on that right.[55] Applying strict scrutiny, the Court set forth a trimester framework to measure the constitutionality of state abortion statutes.[56] Under this framework, the state could not regulate abortion in the first trimester, as the Court found that the state's interests in (1) preserving maternal health and (2) protecting potential life were not compelling at this stage of pregnancy.[57] Beginning with the second trimester, the state could regulate abortion so long as "the regulation reasonably relate[d] to the preservation and protection of maternal health."[58] Only after the start of the third trimester could the state regulate and completely proscribe abortion in order to protect the potential life of the unborn child.[59]

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49. *See* Roe v. Wade, 410 U.S. 113, 155 (1973).

50. *See id.*

51. *Id.* at 118.

52. *See id.* at 129 ("The principal thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy.").

53. *See id.* at 129–47.

54. *See id.* at 153 ("This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

55. *See id.* at 164–65.

56. *See id.*

57. *See id.* at 163–64. The Court noted that, until the end of the first trimester, abortion mortality rates are actually lower than childbirth mortality rates. *Id.* at 163.

58. *Id.*

59. *See id.* at 163–64. The state's interest in protecting potential life is compelling during the third trimester because, at that time, the fetus has reached viability and has the capacity to survive outside the mother's body. *See id.* at 163.

The trimester framework remained the constitutional test for abortion regulations under the Fourteenth Amendment until 1992, when the Supreme Court took another look at the fundamental right to terminate a pregnancy.[60] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[61] the Court reaffirmed *Roe*'s "essential holding" that there is a fundamental right to terminate a pregnancy prior to viability.[62] However, the plurality departed from *Roe*'s trimester framework, reasoning that the framework was too "rigid" and not essential to *Roe*'s core holding.[63] In its place, the plurality advanced a new constitutional standard to measure abortion regulations: the undue burden standard.[64] Under the undue burden standard, a state regulation that has the "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" is invalid under the Fourteenth Amendment.[65] Although less protective than the strict scrutiny review underlying *Roe*,[66] the undue burden standard still protects the right to terminate a pregnancy from substantial state interference.

The Court then applied the undue burden test to various provisions of Pennsylvania's Abortion Control Act[67] and upheld a series of "informed consent" regulations.[68] The Court first held that the requirement that a physician inform a woman of the nature of the procedure, the health risks of the abortion, and the probable gestational age of the unborn child did not pose an undue burden on a woman seeking an abortion.[69] In fact, the Court noted that these disclosures are consistent with the disclosures required in other medical procedures.[70] Next, the Court held that the state may require doctors to "inform a woman seeking an abortion of the availability of materials relating to the consequences to the fetus, even when those consequences have no direct relation to her health."[71] Lastly, the Court upheld the requirement that a physician inform a woman of the availability of information relating to

60. *See generally* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

61. The Court addressed both First and Fourteenth Amendment challenges to various provisions of the Pennsylvania Abortion Control Act of 1982, as amended in 1988 and 1989. *See id.* at 844–45. The provisions at issue included an informed consent provision that required the doctor performing the abortion procedure to inform the woman of (1) the nature of the procedure; (2) the risks of the procedure; (3) the "probable gestational age of the unborn child"; and (4) the availability of printed materials describing the fetus, potential child support, and agencies that provide alternatives to abortion. *See* 18 PA. STAT. AND CONS. STAT. § 3205 (2022). For a detailed discussion of the Court's First Amendment analysis in *Casey*, see *infra* Part I.D.

62. *See Casey*, 505 U.S. at 845–46.

63. *See id.* at 873.

64. *See id.* at 876.

65. *Id.* at 877.

66. *See* Roe v. Wade, 410 U.S. 113, 163–64 (1973).

67. 18 PA. STAT. AND CONS. STAT. § 3201 (2022).

68. *See Casey*, 505 U.S. at 881–83.

69. *See id.* at 881–82.

70. *See id.* at 881 ("[A]s with any medical procedure, the State may require a woman to give her written informed consent to an abortion. In this respect, the statute is unexceptional." (citation omitted)).

71. *Id.* at 882.

assistance for women who carry to full term.[72] The Court noted that informing women of the availability of these materials is a "reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion."[73]

The Court's decisions in *Roe* and *Casey* remain incredibly controversial.[74] Many states continue to challenge the undue burden test and the underpinnings of the constitutional right to terminate a pregnancy.[75]

### *B. States' Responses to* Roe v. Wade

Prior to *Roe*, the vast majority of states outlawed abortion in nearly all circumstances.[76] However, when the Supreme Court's decision in *Roe* rendered those blanket bans unconstitutional, state legislatures that wished to limit access to abortion had to construct new regulations that would achieve the same effect without running afoul of *Roe* and its progeny, including the Court's controlling precedent in *Casey*.[77] It was in this context that current-day compelled speech provisions, including the mandatory narrated ultrasound, arose.[78] This section provides an overview of state abortion regulations both before and after *Roe*, highlighting the methods by which a number of states responded to the Supreme Court's recognition of the fundamental right to terminate a pregnancy.

Prior to the nineteenth century, abortion was neither criminalized nor regulated in the United States.[79] However, the second half of the nineteenth century marked the "first right-to-life movement," which heralded a number of criminal bans on abortions.[80] By 1900, almost every state in the country had outlawed "all abortions except those necessary to save a woman's life."[81]

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72. *See id.* at 883.

73. *Id.*

74. *See* Raphael & Hall, *supra* note 14.

75. On December 1, 2021, the Supreme Court heard oral arguments in *Dobbs v. Jackson Women's Health Organization*. *See* Oral Argument, Dobbs v. Jackson Women's Health Org., No. 19-1392 (Dec. 1, 2021), https://www.oyez.org/cases/2021/19-1392 [https://perma.cc/ZE8F-DXZ5] (choose "Oral Argument—December 1, 2021," from left panel); *see also* Dobbs v. Jackson Women's Health Org., 945 F.3d 265 (5th Cir. 2019), *cert. granted*, 141 S. Ct. 2619 (2021) (No. 19-1392) (mem.). Although it is unclear whether and how the Supreme Court will modify *Roe* and *Casey*, the decision could have a significant impact on the right to terminate a pregnancy. *See* Amy Howe, *Majority of Court Appears Poised to Roll Back Abortion Rights*, SCOTUSBLOG (Dec. 1, 2021, 1:04 PM), https://www.scotusblog.com/2021/12/majority-of-court-appears-poised-to-uphold-mississippis-ban-on-most-abortions-after-15-weeks/ [https://perma.cc/WWQ4-FP9X].

76. *See* Sarah Kliff, *CHARTS: How* Roe v. Wade *Changed Abortion Rights*, WASH. POST (Jan. 22, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/01/22/charts-how-roe-v-wade-changed-abortion-rights/ [https://perma.cc/U4M6-924S]. In those states, abortions necessary to protect the life or health of the mother remained legal. *See id.*

77. *See* Caitlin E. Borgmann, Roe v. Wade*'s 40th Anniversary: A Moment of Truth for the Anti-Abortion-Rights Movement?*, 24 STAN. L. & POL'Y REV. 245, 245–46 (2013).

78. *See id.* at 246.

79. *See id.* at 249.

80. *See id.* The movement was led by physicians who hoped to reserve for themselves the power to decide whether to perform abortions in individual cases. *See id.*

81. *Id.*

This remained true through the mid-1960s, at which time forty-four states outlawed abortion in nearly all circumstances that did not threaten the life of the mother.[82] Although states began liberalizing their abortion regulations in the late 1960s and early 1970s, pre-*Roe* abortion regulations remained stringent.[83]

In 1973, *Roe* immediately invalidated every state criminal ban on abortion.[84] However, rather than settling the controversy surrounding abortion, the decision only created new incentives for pro-life activists to usher in a "second right-to-life movement."[85] Initially, the movement sought to reinstate criminal bans and overturn *Roe* altogether.[86] Many states enacted abortion regulations that blatantly defied *Roe*'s trimester framework, while others attempted to push *Roe*'s boundaries by enacting requirements intended to make abortions burdensome and difficult to access.[87] Prior to *Casey*, these attempts to undermine *Roe* proved largely unsuccessful when challenged in court as violative of the Due Process Clause.[88]

However, *Casey* provided states with a new roster of constitutionally permissible abortion regulations when it lowered the level of constitutional scrutiny for abortion laws from strict scrutiny to an undue burden standard and upheld a number of so-called "informed consent" requirements.[89] In response, states began to pass not only provisions identical to those upheld in *Casey* but also new "informed consent" regulations that the Court might uphold under the new undue burden standard, including the mandatory narrated ultrasound.[90] Thus, the Court's decision in *Casey* facilitated the replacement, in large part, of outright attacks on *Roe*'s central holding with "incremental" restrictions intended by lawmakers to chip away at the right to terminate a pregnancy from a different angle.[91]

Today, state abortion regulations run the gamut of restrictions.[92] Thirty-six states require an abortion to be performed by a licensed physician, and nineteen states require an abortion to be performed in a hospital after a

82. *See* Kliff, *supra* note 76.

83. *See id.* In the years preceding *Roe*, only four states—Alaska, Hawaii, New York, and Washington—legalized abortion in nearly all cases before viability. *See id.* Another thirteen states allowed abortions in some cases. However, the remaining thirty-three states continued to ban abortion in nearly all circumstances. *See id.*

84. *See* Borgmann, *supra* note 77, at 252.

85. *See id.* at 252–53.

86. *See id.* at 253.

87. *See id.* at 253–54. Examples included requirements that abortions be performed in hospitals and that minors receive parental consent prior to obtaining an abortion. *See id.*

88. *See id.* at 254–55. The Burger Court did, however, uphold parental consent laws, so long as they allowed minors to proceed without their parents' consent if it was in their best interests. *See* Bellotti v. Baird, 428 U.S. 132, 147–48 (1976). The Court also upheld bans on the use of public funds and facilities for indigent women's abortions. *See, e.g.*, Maher v. Roe, 432 U.S. 464, 466–74 (1977).

89. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876–83 (1992).

90. *See* Borgmann, *supra* note 77, at 259.

91. *See id.* at 258–62.

92. *See An Overview of Abortion Laws*, *supra* note 16.

specified point in the pregnancy.[93] Under the umbrella of "informed consent," eighteen states mandate that, prior to an abortion, individuals receive counseling that includes information on either (1) the purported link between abortion and breast cancer, (2) the ability of the fetus to feel pain, or (3) the long-term mental health consequences of terminating a pregnancy.[94] In addition, six states mandate that a physician perform an ultrasound on each woman seeking an abortion, during which they must display and describe the image for the patient.[95]

The recent proliferation of state antiabortion laws, masked as "informed consent" regulations, highlights the fragility of *Roe v. Wade* in contemporary society.[96]

### *C. The First Amendment and Compelled Speech*

Because the "informed consent" provisions upheld in *Casey* and subsequently enacted by various state legislatures compel abortion providers to speak when they otherwise may not, the provisions implicate the First Amendment's protection of free speech.[97] Given the Supreme Court's declaration in *Casey* that at least some of these provisions pass the undue burden standard under the Fourteenth Amendment,[98] the First Amendment provides an important channel through which litigants can challenge "informed consent" provisions that compel physician speech. This section provides an overview of the Supreme Court's First Amendment jurisprudence as it relates to compelled speech.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[99] As the Supreme Court has clarified, freedom of speech "includes both the right to speak freely and the right to refrain from speaking at all."[100] This principle derives from the idea that a constitution that "guards the individual's right to speak his own mind" cannot

93. *See id.*

94. *See id.*

95. *See Requirements for Ultrasound*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/requirements-ultrasound [https://perma.cc/38AL-XUBJ] (Jan. 1, 2022). The six states that have mandatory narrated ultrasound laws are Arkansas, Kentucky, Louisiana, Tennessee, Texas, and Wisconsin. *See id.* Arkansas, Louisiana, Texas, and Wisconsin all allow the patient to look away from the image. *See id.* In addition, Louisiana and Texas allow the patient to decline to listen to the description. *See id.*

96. *See* Raphael & Hall, *supra* note 14.

97. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992) ("To be sure, the physician's First Amendment rights not to speak are implicated.").

98. *See id.* at 881–82.

99. U.S. CONST. amend. I.

100. Wooley v. Maynard, 430 U.S. 705, 714 (1977). In *Wooley*, the Court addressed challenges by a Jehovah's Witnesses couple to New Hampshire's requirement that noncommercial vehicles bear license plates embossed with "Live Free or Die." *See id.* at 707. The Court invalidated the requirement as a violation of the First Amendment, stating that "where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Id.* at 717.

at the same time "[leave] it open to public authorities to compel him to utter what is not in his mind."[101]

When the Court confronts a statute that appears to infringe on the First Amendment right to free speech, it must first determine whether the regulated speech is content-based or content-neutral.[102] If the regulation targets the communicative content of the speech itself, then it is content-based and subject to strict scrutiny review.[103] Under strict scrutiny, a law is constitutionally valid only if it is narrowly tailored to serve a compelling state interest.[104] If the regulation limits communication without regard to the message conveyed, then it is content-neutral and the Court applies intermediate scrutiny.[105] Under intermediate scrutiny, a law is constitutionally valid if it furthers an important or substantial government interest through means that are substantially related to that interest.[106]

In *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*,[107] the Court recognized an exception to strict scrutiny review of content-based regulations in the context of commercial speech.[108] *Zauderer* involved a First Amendment challenge to an Ohio rule requiring legal advertisements that mention contingent fee rates to disclose whether clients would be liable for costs even if their claims were unsuccessful.[109] The appellant, an Ohio attorney, argued that the disclosure requirement violated the First Amendment, as it authorized the state to control the content of legal advertisements.[110]

While the Court recognized that "commercial speech," such as the advertisement at issue, warrants some degree of First Amendment protection, it made clear that the protection is less extensive than that afforded to "noncommercial speech."[111] With regard to state-compelled disclosures in the commercial context specifically, the Court noted that "the extension of First Amendment protection to commercial speech is justified principally by

101. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 634 (1943).

102. *See* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2371 (2018) [hereinafter *NIFLA*]. The Court previously stated that "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech" and is thus a content-based regulation of speech. Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 795 (1988).

103. *See NIFLA*, 138 S. Ct. at 2371.

104. *See id.*

105. More commonly known as time, place, and manner regulations, these laws limit communication, regardless of the message conveyed. *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189–201 (1983). Examples of content-neutral regulations include laws that (1) ban billboards in residential communities and (2) laws that ban noisy speeches near hospitals. *See id.* at 189–90.

106. *See id.* at 190. *But see* Martin H. Reddish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 125–27 (1981) (arguing that the Court's application of intermediate scrutiny to neutral regulations provides weak protection for the right to free speech).

107. 471 U.S. 626 (1985).

108. *See id.* at 651.

109. *See id.* at 633.

110. *See id.* at 636.

111. *See id.* at 637.

the value to consumers of the information such speech provides."[112] As such, legal advertisers do not have a constitutionally protected interest in excluding "purely factual and uncontroversial information" from their advertisements.[113] The Court applied rational basis review[114] and found the disclosure requirement to be constitutional because it was rationally related to the state's interest in preventing consumer deception.[115]

This line of cases establishes the general framework through which the Supreme Court analyzes compelled speech provisions under the First Amendment. Since many "informed consent" abortion regulations implicate physician speech, the Supreme Court's approach to abortion regulations draws heavily from its compelled speech jurisprudence.[116]

### *D. The Supreme Court's Approach to Abortion Regulations That Compel Physician Speech*

The Supreme Court has addressed only a handful of times the constitutionality of abortion "informed consent" provisions that compel physician speech. This section outlines the Court's evolving approach to abortion-related compelled speech provisions, with specific emphasis on the few instances in which the Court invoked the First Amendment principles discussed above. These decisions provide a framework for analyzing the mandatory narrated ultrasound, a compelled speech regulation that the Court has not explicitly addressed.

Following its decision in *Roe*, the Supreme Court took up challenges to two different abortion "informed consent" regulations. In *City of Akron v. Akron Center for Reproductive Health, Inc.*,[117] the Court addressed challenges to the City of Akron's abortion ordinance that, among other things, required that a physician inform a woman seeking to terminate her pregnancy of the availability of alternatives to abortion, including adoption and agency assistance after birth.[118] The Court invalidated the provision,

112. *Id.* at 651.

113. *Id.*

114. Under rational basis review, "a law will be upheld if it is rationally related to any legitimate government purpose." Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL'Y 401, 402 (2016) (emphasis omitted).

115. *See id.* The Court has not yet clarified whether rational basis review applies when the compelled disclosure is "purely factual and uncontroversial" but when the state's interest in compelling disclosure is something other than preventing consumer deception. *See* Jennifer M. Keighley, *Can You Handle the Truth?: Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539, 556–63 (2012). Consequently, the circuit courts are split on whether the *Zauderer* standard applies to varying state interests. *See id.* at 558–63 (discussing the circuit split between the First and Second Circuits and the D.C. Circuit over the scope of *Zauderer*'s holding).

116. *See infra* Part I.D.

117. 462 U.S. 416 (1983), *abrogated by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

118. *See id.* at 423–24 n.5.

reasoning that it went far beyond providing information relevant to the procedure.[119]

In *Thornburgh v. American College of Obstetricians and Gynecologists*,[120] the Court again invalidated a state "informed consent" provision regulating abortion.[121] Pennsylvania's Abortion Control Act of 1982 required physicians to present women seeking abortions with certain information, including the availability of (1) prenatal and neonatal care, (2) child support from the father, and (3) printed materials listing alternatives to abortion.[122] Relying on its decision in *Akron*, the Court invalidated Pennsylvania's "informed consent" provision, reasoning that "[m]uch of this would be nonmedical information beyond the physician's area of expertise and, for many patients, would be irrelevant and inappropriate."[123]

However, only six years after *Thornburgh*, the Court changed course. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court again took up challenges to an abortion "informed consent" provision,[124] but this time the Court specifically addressed the argument that the provision violates the physician's First Amendment free speech rights.[125] Rather than follow its reasoning from *Akron* and *Thornburgh*, the Court disposed of the First Amendment argument in one paragraph:

> All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.[126]

In doing so, the Court strayed from years of precedent regarding compelled speech provisions in abortion laws.[127] In its place, the Court provided a

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119. *See id.* at 442–49. The Court proclaimed that "much of the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether." *Id.* at 444.

120. 476 U.S. 747 (1986), *abrogated by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

121. *See id.* at 758–71.

122. *See id.* at 760–61.

123. *Id.* at 763. The Court stated that "[u]nder the guise of informed consent, the Act requires the dissemination of information that is not relevant to such consent, and, thus, it advances no legitimate state interest." *Id.*

124. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844–45 (1992).

125. *See id.* at 884.

126. *Id.* at 884 (citing Wooley v. Maynard, 430 U.S. 705 (1977)).

127. *See id.* at 882. In addition to its First Amendment holding, the Court also addressed the Fourteenth Amendment implications of the undue burden test on the "informed consent" provisions at issue in *Akron* and *Thornburgh*:

> To the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus, those cases go too far,

framework for assessing abortion regulations that compel physician speech: so long as the regulation compels physicians to provide information that informs the consent of a woman seeking an abortion, it does not violate the First Amendment.[128] The provisions upheld in *Casey*—including the requirement that a physician inform a woman of the availability of printed materials detailing alternatives to abortion—provide examples of the types of compelled speech regulations that pass constitutional muster under this new test.[129]

Twenty-six years later, the Court addressed yet another challenge to an abortion compelled speech provision under the First Amendment. In *NIFLA*, the Court took up a challenge to the Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act[130] ("FACT Act").[131] The California State Legislature passed the FACT Act to regulate crisis pregnancy centers, pro-life organizations that offer a limited range of free pregnancy resources and counseling.[132] According to supporters of the FACT Act, the main goal of these crisis pregnancy centers was to discourage women from seeking abortions.[133] To counteract this messaging, California imposed certain disclosure requirements on these centers.[134]

The FACT Act differentiated between licensed and unlicensed centers, mandating unique disclosures for each.[135] The statute required licensed facilities to disseminate on site a government-drafted notice, which states that "California has public programs that provide immediate free or low-cost access to comprehensive family planning services[,] . . . prenatal care, and abortion for eligible women."[136] The clinics were required to either (1) post the notice in the waiting room, (2) print and distribute the notice to all clients, or (3) provide a digital copy of the notice upon entrance to the clinic.[137]

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> are inconsistent with *Roe*'s acknowledgment of an important interest in potential life, and are overruled.

*Id.* It is important to note, however, that *Casey* did not necessarily overrule *Akron* and *Thornburgh* in their entirety. The words "[t]o the extent" suggest that there may be aspects of *Akron*'s and *Thornburgh*'s compelled speech holdings that survive *Casey*. *See* Abner S. Greene, *"Not in My Name" Claims of Constitutional Right*, 98 B.U. L. REV. 1475, 1496 n.108 (2018).

128. *See Casey*, 505 U.S. at 884.

129. *See id.* at 881–82.

130. *See* CAL. HEALTH & SAFETY CODE § 123470 (West 2022).

131. *See NIFLA*, 138 S. Ct. 2361, 2368 (2018).

132. *See id.*

133. *See id.*

134. *See id.* The stated purpose of the FACT Act was to "ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them." *Id.* at 2369 (quoting 2015 Cal. Legis. Serv. ch. 700, § 2 (West)).

135. *See id.* at 2368–70. The "licensed clinic" category covered licensed primary care or specialty clinics, as well as those that qualified as intermittent clinics under California law. *See id.* The "unlicensed clinic" category covered facilities that were not licensed under California law, as well as those that did not have a licensed medical provider on staff. *See id.* Both "licensed" and "unlicensed" facilities had to primarily provide family planning services. *See id.*

136. *Id.* at 2369 (quoting CAL. HEALTH & SAFETY CODE § 123472(a)(1) (West 2018)).

137. *See id.* The FACT Act also required unlicensed centers to provide a notice stating that "[t]his facility is not licensed as a medical facility by the State of California and has no licensed

Addressing the First Amendment challenge to the licensed notice requirement, the Court first concluded that the requirement is a content-based regulation of speech.[138] The Court observed that "[b]y compelling individuals to speak a particular message, such notices 'alte[r] the content of [their] speech.'"[139] Although content-based regulations of speech typically warrant strict scrutiny review, the Court recognized that it has afforded less protection for professional speech in two circumstances: (1) where the regulation requires professionals to disclose purely factual, uncontroversial information in their commercial speech ("the *Zauderer* exception") and (2) where the statute regulates professional conduct, even though it incidentally involves speech ("the *Casey* informed consent exception").[140]

In reviewing the licensed notice requirement, the Court first concluded that the *Zauderer* exception did not apply.[141] Under *Zauderer*, states can require the disclosure of "purely factual and uncontroversial information about the terms under which . . . services will be available."[142] However, the Court observed that the licensed notice requirement does not relate to the services that the clinics provide.[143] Even more, the requirement compels licensed clinics to provide information about abortion, a topic the Court considers far from uncontroversial.[144]

Moving to the *Casey* informed consent exception to strict scrutiny review, the Court also held that this exception does not apply to the licensed notice requirement.[145] While *Casey* upheld regulations that compelled physician speech to inform the consent of a woman seeking an abortion, the Court concluded that the licensed notice requirement is not an informed consent regulation at all.[146] In fact, the required disclosure is not tied to a medical procedure but instead applies to all interactions between a covered clinic and its clients, regardless of whether a medical procedure is sought.[147] Even if a covered clinic did provide medical procedures, the notice "provides no information about the risks or benefits of those procedures."[148] Therefore, the Court determined that the *Casey* informed consent exception to strict scrutiny did not apply.[149]

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medical provider who provides or directly supervises the provision of services." *Id.* at 2370. The Court's discussion of the unlicensed notice requirement is beyond the scope of this Note.

138. *See id.* at 2371.

139. *Id.* (third alteration in original) (quoting Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781, 795 (1988)).

140. *See id.* at 2372.

141. *See id.* at 2372–74.

142. Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 651 (1985).

143. *See NIFLA*, 138 S. Ct. at 2372.

144. *See id.*

145. *See id.* at 2373–74.

146. *See id.* at 2373.

147. *See id.*

148. *Id.* at 2373–74.

149. *See id.* at 2374. The Court concluded that the licensed notice requirement "regulates speech as speech" rather than as part of the practice of medicine, subject to regulation by the State. *Id.* at 2373–74.

Although the Court concluded that the licensed notice requirement was a content-based regulation and that the professional speech exceptions did not apply, it proceeded to apply intermediate scrutiny—not strict scrutiny—to assess the constitutionality of the disclosure requirement.[150] The Court assumed that California's interest in providing low-income women with information about state-sponsored medical services was substantial.[151] Nevertheless, the Court determined that the licensed notice requirement was not sufficiently narrowly drawn to achieve that interest.[152] In so holding, the Court noted that the notice requirement is underinclusive, compelling disclosure at only a portion of clinics that serve low-income women.[153] In addition, California could inform women of its services without compelling speech by, for example, running an advertising campaign.[154] As a result, the Court held that the licensed notice requirement violated the First Amendment.[155]

In dissent, Justice Breyer noted the inconsistencies between the Court's holding in this case and its First Amendment holding in *Casey*.[156] According to Justice Breyer, there is no meaningful difference between the regulation upheld in *Casey* that requires a doctor to tell a woman seeking an abortion about adoption services and the requirement in the FACT Act that a medical counselor tell a woman seeking prenatal care about abortion services.[157] Although the majority attempted to distinguish *Casey* by arguing that it applies only when obtaining informed consent to a specific medical procedure, Justice Breyer contended that the distinction lacks force.[158] While an abortion is certainly a medical procedure that involves particular health risks, so too is carrying a child to term.[159] According to Justice Breyer, "[h]ealth considerations do not favor disclosure of alternatives and risks associated with the [former] but not those associated with the [latter]."[160] As a result, *Casey* ought to apply equally to the licensed notice requirement, rendering it a constitutional regulation of the practice of medicine.[161]

While abortion providers hoped that the Court would provide clarification on *Casey*'s First Amendment holding in *NIFLA*, many questions remained

150. *See id.* at 2375. While the Court did not foreclose the possibility that another reason existed for requiring a lower level of constitutional scrutiny for professional speech, it did not address that issue because it determined that the licensed notice requirement could not survive even intermediate scrutiny. *See id.*
151. *See id.*
152. *See id.*
153. *See id.*
154. *See id.* at 2376.
155. *See id.* at 2378.
156. *See id.* at 2385 (Breyer, J., dissenting).
157. *See id.*
158. *See id.*
159. *See id.* at 2386.
160. *Id.*
161. *See id.* at 2379, 2386.

unanswered following its decision,[162] including whether mandatory narrated ultrasounds are constitutional under the Court's current compelled speech framework.[163]

## II. MANDATORY NARRATED ULTRASOUNDS: UNCONSTITUTIONAL VIOLATION OF PHYSICIANS' FREE SPEECH RIGHTS?

Although the Supreme Court has addressed the constitutionality of a number of abortion "informed consent" provisions,[164] it has not yet considered the constitutionality of mandatory narrated ultrasound provisions under the First Amendment.[165] Consequently, lower courts and scholars have diverged on both how to apply Supreme Court jurisprudence to these unique provisions and whether these provisions are ultimately constitutional.[166] This part outlines the debate that has permeated the lower courts surrounding the constitutionality of mandatory narrated ultrasound provisions. Part II.A discusses the circuit split that developed prior to the Supreme Court's decision in *NIFLA*. Part II.B addresses the potential implications of *NIFLA* on the constitutionality of mandatory narrated ultrasound provisions.

### *A. Pre-*NIFLA*: Lower Courts Diverged on Constitutionality of Mandatory Narrated Ultrasounds*

In the 2012 case *Texas Medical Providers Performing Abortion Services v. Lakey*, the Fifth Circuit took up constitutional challenges by physicians and abortion providers to Texas House Bill 15 ("H.B. 15"), an "informed consent" law.[167] H.B. 15 amended the 2003 Texas Woman's Right to Know Act[168] with the stated intention of strengthening the informed consent of women seeking abortions.[169] The bill requires a physician performing an abortion to perform a sonogram, display and describe the images, and play the sound of the heartbeat of the fetus to any woman seeking an abortion.[170] A woman may decline to hear the heartbeat or view the images, but she may not decline to receive an explanation of the images unless her pregnancy falls

162. *See* Casey Adams, *A Compelling Case: Exploring the Law of Disclosures After* NIFLA, 82 U. PITT. L. REV. 353, 356 (2020) ("However, it is not clear that all disclosure laws must receive strict scrutiny after *NIFLA*.").
163. *See infra* Part II.B.
164. *See supra* Parts I.B., I.D.
165. *See supra* note 30.
166. *See infra* Parts II.A–B.
167. *See* Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 572 (5th Cir. 2012).
168. TEX. HEALTH & SAFETY CODE ANN. § 171.001 (West 2021).
169. *See Lakey*, 667 F.3d at 573.
170. *See id.*

into one of three exceptions.[171] Physicians will lose their licenses for violating any of these requirements.[172]

H.B. 15's challengers argued that the law violates their First Amendment free speech rights by compelling physicians to describe both the ultrasound images and the sound of the heartbeat.[173] They further alleged that the compelled speech "serves no medical purpose, and indeed no other purpose than to discourage the abortion."[174]

Recognizing that these challenges implicate the Supreme Court's First Amendment holding in *Casey*, the Fifth Circuit began its analysis by outlining its interpretation of the *Casey* holding.[175] According to the Fifth Circuit, *Casey* held that "physicians' rights not to speak are, when 'part of the practice of medicine, subject to reasonable licensing and regulation by the State.'"[176] Further, "[t]his applies to information that is 'truthful,' 'nonmisleading,' and 'relevant . . . to the decision' to undergo an abortion."[177] In other words, the Fifth Circuit suggested that informed consent laws are permissible under *Casey* if they require the disclosure of truthful, nonmisleading, and relevant information because such laws are part of the state's reasonable regulation of the practice of medicine.[178]

Applying these principles to H.B. 15, the Fifth Circuit concluded that the law is constitutional under *Casey*'s First Amendment holding.[179] The court noted that the required disclosures under H.B. 15—medical descriptions of the heartbeat and the sonogram images—are the "epitome of truthful, non-misleading information."[180] In that sense, the mandatory disclosures are no different than those upheld in *Casey*: disclosing the probable gestational age of the fetus and providing printed materials showing a fetus's prenatal development.[181] Therefore, the Fifth Circuit held that the mandatory narrated ultrasound provision falls within the State's power to regulate the practice of medicine under *Casey* and therefore does not violate the First Amendment.[182]

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171. *See id.* A pregnant woman may choose not to receive the verbal explanation if (1) the pregnancy is the result of incest, sexual assault, or another violation of criminal law; (2) the woman is a minor and is obtaining an abortion by judicial bypass; or (3) the fetus has an irreversible medical condition. *See id.*; *see also* TEX. HEALTH & SAFETY CODE ANN. § 171.0122(d) (West 2021).

172. *See Lakey*, 667 F.3d at 573.

173. *See id.* at 574.

174. *Id.*

175. *See id.* at 574–75. For a detailed discussion of *Casey*'s First Amendment holding, see *supra* Part I.D.

176. *Lakey*, 667 F.3d at 575 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992)).

177. *Id.* (second alteration in original) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992)).

178. *See id.* at 576.

179. *See id.* at 577.

180. *Id.* at 578.

181. *See id.*

182. *See id.* at 580.

Professors Scott W. Gaylord and Thomas J. Molony endorsed the Fifth Circuit's interpretation of *Casey* and its application to mandatory narrated ultrasound laws.[183] Like the Fifth Circuit in *Lakey*, Professors Gaylor and Molony describe *Casey* as permitting informed consent provisions that require the disclosure of truthful, nonmisleading, and relevant information.[184] In their view, mandatory narrated ultrasound provisions, like the one at issue in *Lakey*, fit neatly into this framework.[185] In fact, they suggest that the mandatory narrated ultrasound provides the epitome of truthful, nonmisleading information about the development and gestational age of the fetus.[186] Further, they opine that the mandatory narrated ultrasound might even be the most direct and nonmisleading way that the government can ensure that a woman seeking an abortion fully understands the consequences of her decision.[187] Ultimately, this interpretation of *Casey* and its application to the mandatory narrated ultrasound fully endorses the analysis set forth by the Fifth Circuit in *Lakey*.

However, two years after *Lakey*, the Fourth Circuit in *Stuart v. Camnitz* came to the opposite conclusion when it considered constitutional challenges to North Carolina's Woman's Right to Know Act[188] (the "Right to Know Act"). The Right to Know Act required a physician to perform an ultrasound, within seventy-two hours of the abortion, on any woman seeking an abortion.[189] The Right to Know Act further obligated the physician to display the ultrasound and describe the fetus in detail, including the presence of any organs and the location and dimensions of the unborn child, and to offer to allow the woman to hear the heartbeat.[190] The woman could, however, look away from the images and refuse to listen to the medical description by covering her ears.[191] The only statutory exception to these disclosure requirements was medical emergencies.[192]

Beginning its analysis of the constitutionality of the mandatory narrated ultrasound provision under the First Amendment, the Fourth Circuit first grappled with the requisite level of scrutiny to apply to the law.[193] To start, the court noted that the requirement is "quintessential compelled speech" that "forces physicians to say things they otherwise would not say."[194] In that sense, the requirement is a content-based regulation of speech that typically

183. *See* Scott W. Gaylord & Thomas J. Molony, Casey *and a Woman's Right to Know: Ultrasounds, Informed Consent, and the First Amendment*, 45 CONN. L. REV. 595, 640–41 (2012).
184. *See id.* at 640.
185. *See id.* at 641.
186. *See id.* at 642.
187. *See id.*
188. N.C. GEN. STAT. ANN. § 90-21.80 (West 2021).
189. *See* Stuart v. Camnitz, 774 F.3d 238, 243 (4th Cir. 2014).
190. *See id.*
191. *See id.*
192. *See id.*
193. *See id.* at 244–45.
194. *Id.* at 246. The court also noted that the compelled statement is ideological in nature because it conveys the State's admitted purpose: to dissuade women from seeking abortions. *See id.* at 245–46.

receives strict scrutiny review under Supreme Court jurisprudence.[195] However, the court also recognized that the requirement is part of the regulation of the practice of medicine, which typically only needs to satisfy rational basis review.[196] Determining that the mandatory narrated ultrasound provision falls between a content-based regulation of speech and a regulation of professional conduct, the Fourth Circuit concluded that intermediate scrutiny is the most appropriate constitutional standard to apply to the provision.[197]

Under intermediate scrutiny, the state bears the burden of proving that the law at issue is drawn to achieve a substantial government interest.[198] First addressing the state's interest in protecting fetal life, the Fourth Circuit conceded that this interest is an important one.[199] The court also presumed that the mandatory narrated ultrasound provision protects fetal life by discouraging women from seeking abortions.[200] Nevertheless, the court found that the provision failed to "directly advance the [government's] interest without impeding too greatly on individual liberty interests."[201] The court reasoned that the provision interferes with a physician's First Amendment rights beyond the extent permitted for reasonable regulation of medical conduct, while also threatening the patient's mental health and jeopardizing the doctor-patient relationship.[202] Therefore, the court held that the provision was unconstitutional.[203]

Although the Fourth Circuit acknowledged that its decision about the applicable standard of review departs from the Fifth Circuit's holding in *Lakey*, the court noted that it was not convinced by *Lakey*'s reasoning.[204] To start, the Fourth Circuit asserted that the Fifth Circuit stretched the single-paragraph First Amendment holding in *Casey* far beyond its reasonable interpretation.[205] Contrary to *Lakey*'s conclusion that *Casey* announced a sweeping standard of rational basis review for all regulations of medical speech involving abortion, the Fourth Circuit contended that the *Casey* plurality merely found no issue with the particular compelled speech provisions challenged in that case.[206] According to the Fourth Circuit, "[t]hat

195. *See id.* at 246; *see also supra* Part I.C (explaining the Supreme Court's compelled speech jurisprudence in *Wooley*).

196. *See Stuart*, 774 F.3d at 246–47. The Fourth Circuit noted that the Supreme Court has long recognized the state's power to prescribe regulations for professions, including medicine. *See id.* at 247. Importantly, the state's authority to regulate the medical profession is not lost when a regulation entails speech. *See id.* In fact, the state can require the disclosure of information necessary to inform the consent of patients receiving a medical procedure. *See id.*

197. *See id.* at 248–49.

198. *See id.* at 250.

199. *See id.* The Supreme Court has repeatedly held that the state has an important interest in preserving and protecting fetal life. *See id.*

200. *See id.*

201. *Id.*

202. *See id.*

203. *See id.*

204. *See id.* at 248.

205. *See id.* 248–49.

206. *See id.* at 249.

particularized finding hardly announces a guiding standard of scrutiny for use in every subsequent compelled speech case involving abortion."[207]

Finally, the Fourth Circuit differentiated the mandatory narrated ultrasound provision in the Right to Know Act from the informed consent provisions upheld by the Supreme Court in *Casey*.[208] First, unlike the *Casey* requirements, the Fourth Circuit concluded that the mandatory narrated ultrasound provision did not inform a woman's consent to an abortion since the provision allows a woman to cover her eyes and ears during the narration.[209] Second, while a physician operating under the Pennsylvania law in *Casey* need only inform the patient of the availability of certain materials, a physician operating under North Carolina's Right to Know Act must "speak and display the very information on a volatile subject that the state would like to convey."[210] According to the Fourth Circuit, the First Amendment threat is greater when a regulation, like the mandatory narrated ultrasound provision, requires the physician to "deliver the state's preferred message in his or her own voice."[211] Lastly, unlike the informed consent provisions in *Casey*, the mandatory narrated ultrasound provision finds the patient in a uniquely vulnerable position—disrobed on her back on an examination table.[212] Thus, the Fourth Circuit concluded that the setting itself conveys a message, not of the risks and benefits of the procedure but of the "full weight of the state's moral condemnation."[213]

Other scholars agree with the Fourth Circuit's conclusion that mandatory narrated ultrasound provisions are not "informed consent" under *Casey* and thus are unconstitutional under the First Amendment.[214] Professor Jessica Silbey takes a critical view of narrated ultrasounds, arguing that they do not fit within traditional notions of informed consent.[215] According to Professor Silbey, informed consent laws typically require the disclosure of "information relevant to the medical procedure, which includes the reason for and the nature of the medical procedure, its likelihood of success, its material risks, any alternatives, and the consequences of doing nothing."[216] Under her characterization of informed consent, the display of laboratory results is rarely part of the information provided to patients.[217] Additionally,

207. *Id.*
208. *See id.* at 252–55.
209. *See id.* at 252.
210. *Id.* at 253.
211. *Id.*
212. *See id.* at 255.
213. *Id.*
214. *See, e.g.*, Jessica Silbey, *Picturing Moral Arguments in a Fraught Legal Arena: Fetuses, Photographic Phantoms and Ultrasounds*, 16 GEO. J. GENDER & L. 593, 607–08 (2015); Ian Vandewalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics*, 19 MICH. J. GENDER & L. 1, 3 (2012).
215. *See* Silbey, *supra* note 214, at 607–08.
216. *Id.* at 607.
217. *See id.* Professor Silbey illustrates her point by analogizing abortions to other medical procedures. *See id.* She notes that "showing patients the contents of their bodies (e.g., an inflamed appendix) or a video of their impending procedure (e.g., to replace a heart valve) would be unnecessary to procure informed consent for a patient choosing to undergo an

Professor Silbey urges that the purpose of mandatory narrated ultrasound laws is not to inform but rather to "speak against abortion through the woman's physician," which is impermissible under the First Amendment.[218]

Ian Vandewalker, senior counsel at the Brennan Center for Justice, takes a similar position on mandatory narrated ultrasound laws.[219] According to Vandewalker, mandatory narrated ultrasound laws are "biased counseling laws" because they are not intended to inform a woman's consent but rather are intended to discourage a woman from going through with an abortion.[220] Vandewalker notes that "every abortion patient understands that the procedure will terminate her pregnancy."[221] As such, a mandatory narrated ultrasound does not offer any new information that could possibly inform the consent of a woman seeking an abortion.[222] Given that there is no evidence that women would make different decisions due to a mandatory narrated ultrasound, these laws cannot be justified under the umbrella of "informed consent."[223]

The stark differences between the Fifth Circuit's decision in *Lakey* and the Fourth Circuit's decision in *Stuart* highlight the robust debate concerning the constitutionality of mandatory narrated ultrasound provisions under the First Amendment that developed pre-*NIFLA*. Given the lack of clarity from the Supreme Court on medical speech involving abortions, lower courts and scholars have both diverged in their application of the *Casey* "informed consent" holding to mandatory narrated ultrasounds.

### *B. Post-*NIFLA*: Clarity or Continuing Controversy?*

As previously discussed, the Supreme Court recently addressed a First Amendment challenge to an abortion "informed consent" provision in *NIFLA*.[224] While the Court presented a framework for analyzing abortion regulations under the First Amendment, it did not specifically address mandatory narrated ultrasound provisions.[225] Therefore, the Court left room for the lower courts to experiment with applying *NIFLA* to mandatory narrated ultrasounds. This section discusses the lower courts' compelled

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appendectomy or open-heart surgery." *Id.* Instead, Professor Silbey argues that these images "might actually be an inadvisable deterrent that causes unhealthy anguish, anxiety, and delay" for patients undergoing medical procedures. *Id.*

218. *Id.* at 608. According to Professor Silbey, mandatory narrated ultrasounds distort the doctor-patient relationship by forcing the physician to persuade the patient to choose the state-endorsed route—to not terminate the pregnancy. *See id.* at 610. In this way, "the state misleads women by cloaking its message in the perceived neutrality of doctor's speech and imaging technology." *Id.*

219. *See* Vandewalker, *supra* note 214, at 3. Although Vandewalker's main argument is that mandatory narrated ultrasounds and other "biased counseling laws" violate standards of medical ethics, he also acknowledges that they violate the First Amendment. *See id.* at 3–4.

220. *See id.* at 3.

221. *Id.* at 47.

222. *See id.*

223. *See id.* at 48.

224. *See supra* Part I.D.

225. *See supra* Part I.D.

speech jurisprudence involving abortions following *NIFLA* and highlights the ongoing controversy surrounding the constitutionality of mandatory narrated ultrasounds.

After the Supreme Court's decision in *NIFLA*, the Sixth Circuit had an opportunity to apply the Court's decision to a mandatory narrated ultrasound provision passed by the Kentucky state legislature.[226] In *EMW Women's Surgical Center, P.S.C. v. Beshear*, the Sixth Circuit considered a First Amendment challenge to Kentucky's House Bill 2 ("H.B. 2").[227] H.B. 2 requires a doctor to perform an ultrasound, during which the doctor must display and describe the images for the patient, on any woman seeking an abortion.[228] However, the patient is free to look away or cover her ears.[229] Additionally, the doctor must play the sound of the heartbeat but may turn off the volume at the patient's request.[230]

Turning to the constitutional challenge, the Sixth Circuit centered its First Amendment analysis on the Supreme Court's primary holding in *NIFLA*. The court noted that *NIFLA* recognized two exceptions to strict scrutiny review of compelled speech: (1) the *Zauderer* exception for commercial disclosures of factual, noncontroversial information and (2) the *Casey* exception for regulations of professional conduct that incidentally involve speech.[231] The court determined that the mandatory narrated ultrasound provision implicated the latter of the two exceptions since it regulates doctors' conduct.[232]

The Sixth Circuit proceeded to define the *Casey* exception in its own terms. According to the Sixth Circuit, *Casey* marked a shift toward "greater respect for States' interests in informing women," as evidenced by the plurality's acknowledgement that, although a physician's First Amendment rights were implicated by the informed consent statute, a physician's First Amendment rights were implicated only as part of the practice of medicine, subject to reasonable regulation by the State.[233] The Sixth Circuit then declared that the Supreme Court adopted this reasoning in *NIFLA* when it explained that regulations of professional conduct are subject to lower constitutional scrutiny—as compared to other regulations compelling speech.[234] Ultimately, the court concluded that the *Casey* exception, as interpreted by the Supreme Court in *NIFLA*, applies to statutes that facilitate informed consent to a medical procedure because they regulate speech only as part of the practice of medicine, which the state can reasonably regulate.[235]

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226. *See* EMW Women's Surgical Ctr., P.S.C. v. Beshear, 920 F.3d 421, 423 (6th Cir. 2019).
227. *See id.* at 424; *see also* KY. REV. STAT. ANN. § 311.727 (West 2022).
228. *See EMW Women's Surgical Center*, 920 F.3d at 424. The description can include pointing out any organs and identifying whether the patient is pregnant with twins. *See id.*
229. *See id.*
230. *See id.*
231. *See id.* at 426.
232. *See id.*
233. *Id.* at 427–28.
234. *See id.* at 428.
235. *See id.*

The Sixth Circuit then held that it would not review an informed consent statute under strict scrutiny, so long as it meets three requirements: "(1) it must relate to a medical procedure; (2) it must be truthful and not misleading; and (3) it must be relevant to the patient's decision whether to undertake the procedure."[236] In other words, if the mandatory narrated ultrasound provision meets those three requirements, then it is sufficiently similar to the informed consent provision in *Casey* and therefore is not subject to strict scrutiny review.[237]

Beginning with the first requirement, the Sixth Circuit held that H.B. 2 clearly relates to the medical procedure of abortion.[238] Moving to the second requirement, the court held that the mandated disclosures are clearly truthful and not misleading.[239] According to the court, there can be no assertion that anatomical images and descriptions are either false or misleading.[240] Lastly, the court determined that the required disclosures are relevant to the patient's decision about whether to undertake the procedure.[241] The information conveyed through the ultrasound gives the patient more knowledge about the unborn fetus.[242] According to the court, the fact that this information might dissuade a woman from going through with the abortion simply means that it is relevant to her decision.[243] With all three factors met, the court concluded that, although the statute compels physicians to disclose certain information, it does not violate physicians' First Amendment rights because the disclosures sufficiently inform patient consent and thus fall within the reasonable regulation of professional conduct.[244]

Although the Sixth Circuit is the only appellate court that has applied *NIFLA* to a mandatory narrated ultrasound provision, some have suggested that the interaction between *NIFLA* and *Casey*, as it relates to abortion "informed consent" laws under the First Amendment, is not so straightforward.[245] Professor Abner S. Greene argues that the holding in *NIFLA* is "in some tension" with the holding in *Casey* that upheld various "informed consent" provisions, drawing from Justice Breyer's *NIFLA* dissent.[246] While *Casey* upheld a provision that required physicians to tell the woman about the availability of printed materials discussing adoption services and child care, *NIFLA* invalidated a law that required medical providers to tell a woman seeking prenatal care about abortion services.[247] To reconcile this inconsistency, Professor Greene suggests that the Court

236. *Id.*
237. *See id.* at 429.
238. *See id.*
239. *See id.* at 429–30.
240. *See id.*
241. *See id.* at 430.
242. *See id.*
243. *See id.*
244. *See id.* at 432.
245. *See* Greene, *supra* note 127, at 1496; *see also NIFLA*, 138 S. Ct. 2361, 2385–86 (2018) (Breyer, J., dissenting).
246. Greene, *supra* note 127, at 1496.
247. *See id.*; *see also NIFLA*, 138 S. Ct. at 2385–86 (Breyer, J., dissenting).

should maintain its licensed notice holding in *NIFLA* but revise its compelled speech holding in *Casey* to invalidate the portions of the law that go beyond providing informed consent to the abortion procedure and move to providing alternatives to receiving an abortion.[248]

Because the Supreme Court's decision in *NIFLA* inadvertently created tension with its First Amendment holding in *Casey*, the constitutionality of mandatory narrated ultrasound provisions, as well as the correct test to apply to these provisions, remains unclear.

## III. MANDATORY NARRATED ULTRASOUNDS: UNCONSTITUTIONAL UNDER THE FIRST AMENDMENT

Since the Supreme Court's landmark decision in *Roe*, state legislatures have passed restrictive abortion laws under the guise of informed consent to attack the constitutional right to terminate a pregnancy.[249] Some of these regulations require physicians to perform mandatory narrated ultrasounds, which have been challenged as violations of the First Amendment.[250] As it stands now, the Supreme Court's abortion informed consent framework, without further clarity, is inadequate to address the First Amendment issues raised by mandatory narrated ultrasound provisions.[251]

Pre-*NIFLA*, circuit courts diverged on how to apply the Supreme Court's First Amendment holding in *Casey* to mandatory narrated ultrasound provisions.[252] Specifically, courts struggled with whether the mandatory narrated ultrasound fell within the *Casey* informed consent exception to strict scrutiny review and was thus constitutional under rational basis review.[253] The Supreme Court's decision in *NIFLA* further complicated the inquiry by issuing a seemingly incompatible holding to its *Casey* First Amendment decision.[254] Therefore, to address the constitutionality of mandatory narrated ultrasounds, further clarification of the Supreme Court's precedents in *NILFA* and *Casey* is warranted.

This part proposes a more streamlined approach that lower courts can use when analyzing First Amendment challenges to mandatory narrated ultrasound provisions, as well as opportunities for the Supreme Court to clarify its current jurisprudence. Part III.A argues that a straightforward application of *NIFLA* to mandatory narrated ultrasound provisions renders those regulations unconstitutional under the First Amendment. Part III.B acknowledges the inconsistencies between *Casey* and *NIFLA* and argues that,

248. *See* Greene, *supra* note 127, at 1496–97.

249. *See supra* Part I.B. (explaining the responses by state legislatures to the Supreme Court's decision in *Roe*).

250. *See supra* Part II (outlining various First Amendment challenges to mandatory narrated ultrasound provisions).

251. *See supra* Part II.

252. *See supra* Part II.A (discussing the circuit split on the question of whether mandatory narrated ultrasound provisions violate the First Amendment).

253. *See supra* Part II.A.

254. *See supra* Part II.B (illustrating the competing interpretations of *NIFLA* and its interaction with *Casey*).

in the interest of clarity, the Supreme Court should revise its compelled speech holding in *Casey* to invalidate the portions of the challenged law that go beyond providing information about the medical risks and benefits of the abortion procedure. Lastly, Part III.C argues that, even without a *Casey* revision, the mandatory narrated ultrasound is distinguishable from the provisions upheld in *Casey* and is thus unconstitutional.

### *A. Applying* NIFLA*: Mandatory Narrated Ultrasounds Are Not Informed Consent*

Although the Supreme Court only broadly addressed abortion informed consent provisions in *NIFLA*,[255] the Court's compelled speech framework is nonetheless instructive in the context of mandatory narrated ultrasounds. This section argues that, under the principles set forth in *NIFLA*, the mandatory narrated ultrasound is unconstitutional and violates physicians' free speech rights.

As previously discussed, *NIFLA* addressed a First Amendment challenge to California's FACT Act, which required pro-life crisis pregnancy centers to post a notice about the availability of family planning services, including abortion.[256] Recognizing that the law compelled physician speech, the Supreme Court turned to which level of scrutiny to apply.[257] Although the Supreme Court noted that it has applied lower scrutiny to medical speech in two contexts—the *Zauderer* exception and the *Casey* exception[258]—the Court determined that neither exception applied to the provision at issue.[259] First, the *Zauderer* exception did not apply because the law compelled clinics to provide information about abortion, a topic that is far from uncontroversial.[260] Second, the *Casey* informed consent exception did not apply because the notice provided no information about the risks or benefits of a medical procedure.[261] Therefore, the Court determined that a higher level of scrutiny must apply.[262] Although the Court did not specify which level of heightened scrutiny to apply, it invalidated the law under intermediate scrutiny.[263]

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255. *See supra* Part I.D.

256. *See* CAL. HEALTH & SAFETY CODE § 123470 (West 2022); *see also NIFLA*, 138 S. Ct. 2361, 2368–70 (2018).

257. *See NIFLA*, 138 S. Ct. at 2371–72.

258. *See id.* at 2372 (outlining cases where the Court applied a lower level of constitutional scrutiny to regulations compelling speech).

259. *See id.* at 2372–74.

260. *See id.* at 2373. As discussed above, the Court in *Zauderer* held that the government could require disclosures of "purely factual and uncontroversial" information, and these mandates did not run afoul of the First Amendment. *See* Zauderer v. Off. of Disciplinary Couns., 471 U.S. 626, 651 (1985); *see also supra* Part I.C (discussing the Court's compelled commercial speech holding in *Zauderer*).

261. *See NIFLA*, 138 S. Ct. at 2373–74; *see also supra* Part I.A (explaining the Supreme Court's decisions in *Roe* and *Casey* and the right to terminate a pregnancy under the Fourteenth Amendment).

262. *See NIFLA*, 138 S. Ct. at 2375.

263. *See id.* at 2375–78.

Applying this framework to mandatory narrated ultrasound provisions, these regulations do not pass constitutional muster under the First Amendment. Just as the *Zauderer* exception did not apply to the licensed notice requirement in *NIFLA*, it also does not apply to the mandatory narrated ultrasound, since both provisions compel abortion-related speech, which is far from uncontroversial.[264] Even the Sixth Circuit, which upheld a mandatory narrated ultrasound provision in *EMW Women's Surgical Center*, recognized that the *Zauderer* exception does not apply to compelled speech in the abortion context.[265]

Similarly, the *Casey* informed consent exception does not apply. Just as the licensed notice requirement did not provide information about the medical risks and benefits of a procedure,[266] neither does the mandatory narrated ultrasound. As previously discussed, the display of images and laboratory results is rarely part of the information provided to patients prior to undergoing an operation.[267] In fact, as Professor Silbey notes, showing patients the contents of their bodies is completely unnecessary to informed consent and is utterly detached from traditional notions of informed consent in the medical field generally.[268] Additionally, the narrated ultrasound provides no new information to a woman seeking an abortion.[269] As Vandewalker correctly points out, every abortion patient already understands that the procedure will terminate her pregnancy.[270] Therefore, the mandatory narrated ultrasound does not provide any information that further informs the consent of the woman.[271] Lastly, as the Fourth Circuit noted in *Stuart*, the mandatory narrated ultrasound does not inform a woman's consent since a woman is frequently allowed to cover her eyes and ears during the narration.[272] By permitting a woman to refuse to listen to the narration, states with mandatory narrated ultrasound laws practically concede that the narrated ultrasound is not necessary to inform the consent of a woman seeking an abortion.

Since neither of the exceptions to strict scrutiny review apply, *NIFLA* instructs courts to apply some form of heightened scrutiny to the mandatory narrated ultrasound.[273] Just as the licensed notice requirement in *NIFLA* did

264. *See Demonstrators Rally Outside Supreme Court During Arguments in Mississippi Abortion Case*, USA TODAY (Dec. 3, 2021, 10:35 PM), https://www.usatoday.com/picture-gallery/news/politics/2021/12/01/demonstrators-rally-supreme-court-hears-mississippi-abortion-case-dobbs-jackson-womens-health/8821414002/ [https://perma.cc/PY9L-YCS2] (picturing both abortion rights activists and antiabortion activists outside the Supreme Court during the *Dobbs v. Jackson Women's Health Organization* oral arguments).

265. *See* EMW Women's Surgical Ctr., P.S.C. v. Beshear, 920 F.3d 421, 426 (6th Cir. 2019); *see also supra* Part II.B (explaining the Sixth Circuit's interpretation of *NIFLA*).

266. *See NIFLA*, 138 S. Ct. at 2373–74.

267. *See* Silbey, *supra* note 214, at 607–08.

268. *See id.* at 607.

269. *See* Vandewalker, *supra* note 214, at 47.

270. *See id.*

271. *See id.*

272. *See* Stuart v. Camnitz, 774 F.3d 238, 252 (4th Cir. 2014).

273. *See NIFLA*, 138 S. Ct. 2361, 2375 (2018).

not survive intermediate scrutiny,[274] neither does the mandatory narrated ultrasound.[275] Following the Fourth Circuit's intermediate scrutiny analysis from *Stuart*, the mandatory narrated ultrasound fails to directly advance a substantial government interest.[276] Although the state's interest in protecting fetal life is substantial, the mandatory narrated ultrasound does not directly advance that interest.[277] As discussed above, the provision interferes with a physician's First Amendment rights beyond the extent permitted for reasonable regulation of medical conduct[278] because the provision does not further the informed consent of a woman seeking an abortion.[279] Therefore, mandatory narrated ultrasound provisions are unconstitutional under *NIFLA*.

### *B. Reconciling* Casey *and* NIFLA *in Light of Mandatory Narrated Ultrasounds*

As previously discussed, there are some inconsistencies between the Supreme Court's decision in *NIFLA* and its First Amendment holding in *Casey*.[280] This tension is due to the fact that *NIFLA* defined "informed consent" narrowly, including only the benefits and risks of a medical procedure,[281] while *Casey* upheld a wider array of "informed consent" provisions.[282] As a result, *NIFLA* invalidated a licensed notice requirement that compelled crisis centers to post notices about the availability of abortion services,[283] while *Casey* upheld an informed consent provision that required a physician to inform any woman seeking an abortion about the availability of materials detailing alternatives to an abortion.[284]

Since *NIFLA*'s narrow definition of "informed consent" is more consistent with traditional notions of informed consent in the medical field, as evidenced by its application to the mandatory narrated ultrasound,[285] the Supreme Court should clarify its abortion informed consent jurisprudence by adopting Professor Greene's suggested revision to *Casey*.[286] As Professor

274. *See id.* at 2375–78.

275. *See Stuart*, 774 F.3d at 250 (outlining the Fourth Circuit's application of intermediate scrutiny to a mandatory narrated ultrasound provision).

276. *See id.*

277. *See id.*

278. *See id.*

279. *See supra* Part II.A.

280. *See NIFLA*, 138 S. Ct. 2361, 2385–86 (2018) (Breyer, J., dissenting) ("If a State can lawfully require a doctor to tell a woman seeking an abortion about adoption services, why should it not be able, as here, to require a medical counselor to tell a woman seeking prenatal care or other reproductive healthcare about childbirth and abortion services?"); *see also* Greene, *supra* note 127, at 1496–97 (highlighting the tension between the Court's decisions in *Casey* and *NIFLA* and proposing that the Court revise its holding in *Casey* to address the inconsistencies).

281. *See NIFLA*, 138 S. Ct. at 2373.

282. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 881–84 (1992).

283. *See NIFLA*, 138 S. Ct. at 2378.

284. *See Casey*, 505 U.S. at 881–84.

285. *See supra* Part III.A (arguing that mandatory narrated ultrasounds fail *NIFLA*'s test for informed consent because the ultrasounds do not fit within traditional notions of informed consent).

286. *See* Greene, *supra* note 127, at 1496–97.

Greene suggests, the Court should maintain its holding in *NIFLA* but revise its First Amendment holding in *Casey* to invalidate the portions of the law that go beyond providing information about the medical risks and benefits of the procedure and instead require the sharing of information about alternatives to an abortion.[287]

In amending its First Amendment holding in *Casey*, the Supreme Court has an opportunity to clarify its definition of "informed consent" and set forth a streamlined test for analyzing abortion compelled speech provisions, mirroring the framework outlined in Part III.A. By clarifying the definition of "informed consent," these proposed revisions can also help to settle the debate among lower courts and scholars about the constitutionality of mandatory narrated ultrasounds.[288]

### *C. Mandatory Narrated Ultrasounds Are Distinguishable from the Provisions Upheld in* Casey

Although the *Casey* revision proposed in Part III.B would provide the most comprehensive solution to the ongoing confusion about the constitutionality of abortion "informed consent" provisions more broadly, this Note's conclusion that mandatory narrated ultrasounds are unconstitutional does not hinge on a revision of *Casey*. Even if the Supreme Court fails to clarify its definition of "informed consent" by revising *Casey*'s First Amendment holding, mandatory narrated ultrasounds are distinguishable from the provisions upheld in *Casey* and are thus unconstitutional regardless of the inconsistencies between *Casey* and *NIFLA*.

While some scholars agree that disclosure of information about alternatives to a medical procedure can be a part of informed consent,[289] it is clear that the mandatory narrated ultrasound does not inform the consent of a woman to an abortion at all.[290] As discussed above, the mandatory narrated ultrasound does not fit within traditional notions of informed consent and does not provide the patient with any new information about the procedure that would inform her consent to an abortion.[291] In this way, the mandatory narrated ultrasound is distinguishable from the provisions upheld by the Supreme Court in *Casey* under the "informed consent" exception to strict scrutiny review.[292]

More fundamentally, the provisions upheld in *Casey* and the mandatory narrated ultrasound provisions differ in *how* they compel the physician to

287. *See id.*

288. *See supra* Part II.

289. *See* Silbey, *supra* note 214, at 607–08; *see also* Sawicki, *supra* note 21, at 19 ("Information relevant to this decision-making process includes the nature of the procedure or intervention, its likelihood of success, its material risks, any alternatives—including their likelihood of success and their risks—and the consequences of doing nothing as an option.").

290. *See supra* Part III.A (arguing that mandatory narrated ultrasounds do not provide any information that informs the consent of a woman seeking an abortion).

291. *See supra* Part III.A.

292. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992).

speak.[293] As the Fourth Circuit noted in *Stuart*, while a physician operating under the Pennsylvania law in *Casey* need only inform the patient about the availability of certain materials, a physician operating under a mandatory narrated ultrasound provision must "speak and display the very information on a volatile subject that the state would like to convey."[294] Importantly, "[t]he 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," rendering mandatory narrated ultrasounds far more intrusive of physicians' First Amendment rights than the provisions upheld in *Casey*.[295]

Thus, even if the Supreme Court does not revise its *Casey* First Amendment holding, courts must still apply some level of heightened scrutiny to mandatory narrated ultrasound provisions because of the meaningful differences between mandatory narrated ultrasounds and the provisions upheld in *Casey*.[296] As previously discussed, mandatory narrated ultrasounds do not even survive intermediate scrutiny and thus are unconstitutional under the First Amendment.[297]

## CONCLUSION

In an era of widespread abortion regulation, the First Amendment has become an important avenue through which litigants can challenge the constitutionality of various abortion "informed consent" regulations, including mandatory narrated ultrasounds. However, First Amendment challenges to mandatory narrated ultrasounds have received mixed results in the lower courts, in part due to a lack of clarity from the Supreme Court about how to apply *Casey* and *NIFLA*—its controlling precedents in the abortion informed consent context.

The ongoing debate about the constitutionality of mandatory narrated ultrasounds highlights the need for a streamlined framework under which courts can assess the constitutionality of abortion provisions that compel physician speech. By applying *NIFLA*'s narrow definition of informed consent to mandatory narrated ultrasounds, lower courts can invalidate provisions that improperly infringe on physicians' free speech rights. While the Supreme Court should revise its First Amendment holding in *Casey* and clarify its definition of "informed consent," mandatory narrated ultrasound provisions are still unlikely to pass constitutional muster under *NIFLA*. State legislatures may continue to push back against a woman's right to terminate her pregnancy, but they cannot do so in a way that impermissibly compels physician speech.

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293. *See supra* Part II (outlining the circuit courts' various interpretations of the Supreme Court's compelled speech and abortion jurisprudence).

294. Stuart v. Camnitz, 774 F.3d 238, 253 (4th Cir. 2014).

295. *See id.*

296. *See supra* Parts II.A, III.C.

297. *See supra* Part III.A (applying the Fourth Circuit's intermediate scrutiny to the mandatory narrated ultrasound).