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Challenging Abortion Informed Consent Regulations through the First Amendment: The Case for Protecting Physicians' Speech

Maia Dunlap[†]

INTRODUCTION

A woman finds out she is pregnant. She makes the choice to terminate her pregnancy. Maybe she decides this instantly. Perhaps she reaches her decision through a series of conversations with her partner, her family, or her friends. Regardless, there is only one person she will *need* to have a conversation with before she can have an abortion: her physician.

Right? Actually, wrong. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹ the Supreme Court allowed states to add themselves to the mix. While affirming a woman's right to have an abortion, the *Casey* Court also acknowledged states' rights to regulate and express disapproval of the practice. In so doing, the Court opened the door for states to join the private conversation between a woman and her physician. In the years since *Casey*, states have increasingly used this door to regulate what a physician must do or say to a woman before she can give her "informed consent" to an abortion.

Because of this, obtaining an abortion can be a dramatically different experience depending on where you live.² In some states, abortion is treated like any other medical procedure, can be completed in one day, and only requires the signing of a standard medical consent form.³ In contrast, many others states require all women seeking abortions to

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¹ 505 U.S. 833 (1992).

² *Counseling and Waiting Periods for Abortion*, GUTTMACHER INST. (Jan. 1, 2019), <https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion> [<https://perma.cc/V9ED-QU3M>].

³ Audrey Carlsen, Ash Ngu & Sara Simon, *What It Takes to Get an Abortion in the Most Restrictive U.S. State*, N.Y. TIMES (July 20, 2018), <https://www.nytimes.com/interactive/2018/07/20/us/mississippi-abortion-restrictions.html> [<https://perma.cc/WRA6-NHJ8>].

first receive an ultrasound,⁴ a medically unnecessary procedure for first-trimester abortions (which 89% of abortions are).⁵ Some states further regulate how physicians must narrate these ultrasounds and how women must listen.⁶ Many states require mandatory pre-abortion counseling and a waiting period between receiving counseling and obtaining the procedure.⁷ Women may also hear that personhood begins at conception,⁸ and medically inaccurate claims that medical abortion can be reversed⁹ and increases risk of breast cancer,¹⁰ suicide,¹¹ and future infertility.¹²

Claiming to balance the rights of women with those of the state, the *Casey* court created a new test, dubbed the undue burden standard. Under this test, regulations on abortion are permissible provided they do not impose an undue burden on a woman's choice to have an abortion before the fetus reaches viability (i.e. is potentially able to live outside the woman's body).¹³ Most subsequent challenges to state abortion regulations have thus claimed that the regulations at issue impose an undue burden on a woman's right to choose.¹⁴

However, the undue burden standard poses a low bar that most regulations clear. As an alternative, some challengers have brought their claims as violations of physicians' free speech rights under the First Amendment. Courts review First Amendment challenges under standards ranging from strict scrutiny to rational basis review, "depending on the type of regulation and the justifications and purposes underlying it."¹⁵ In the context of informed consent, First Amendment claims have been subject to an intermediate level of scrutiny that can invalidate regulations which would otherwise likely survive an undue burden challenge.

⁴ *Requirements for Ultrasound*, GUTTMACHER INST. (Jan. 1, 2019), <https://www.guttmacher.org/state-policy/explore/requirements-ultrasound> [<https://perma.cc/XK9E-6KXS>].

⁵ *Induced Abortion in the United States*, GUTTMACHER INST. (Jan. 2018), <https://www.guttmacher.org/fact-sheet/induced-abortion-united-states> [<https://perma.cc/QHU5-Z8NM>].

⁶ *Requirements for Ultrasound*, *supra* note 4.

⁷ *Counseling and Waiting Periods for Abortion*, *supra* note 2.

⁸ *Id.*

⁹ Rick Rojas, *Arizona Orders Doctors to Say Abortions with Drugs May Be Reversible*, N.Y. TIMES (Mar. 31, 2015), <https://www.nytimes.com/2015/04/01/us/politics/arizona-doctors-must-say-that-abortion-with-drugs-may-be-reversed.html> [<https://perma.cc/WAJ3-6HCQ>].

¹⁰ *Counseling and Waiting Periods for Abortion*, *supra* note 2.

¹¹ *Id.*

¹² *Id.*

¹³ *Roe v. Wade*, 410 U.S. 113, 160 (1973) (defining viability as "potentially able to live outside the mother's womb, albeit with artificial aid").

¹⁴ See Christine L. Raffaele, Annotation, *Validity of State "Informed Consent" Statutes by Which Providers of Abortions Are Required to Provide Patient Seeking Abortion with Certain Information*, 119 A.L.R. 5th 315 (originally published 2004).

¹⁵ *Stuart v. Camnitz*, 774 F.3d 238, 244 (4th Cir. 2014).

The challengers in *Casey* brought precisely such a claim, arguing that the informed consent provisions at issue infringed physicians' First Amendment rights. The Court dismissed this claim in an ambiguous three-sentence paragraph that left open the question of whether such challenges can be sustained in the abortion context.¹⁶ Whether the undue burden test is the exclusive way through which to assess the constitutionality of informed consent measures remains a live issue. A circuit split has developed, with the Eighth, Fifth, and Sixth Circuits disallowing separate First Amendment challenges to "truthful, nonmisleading, and relevant" informed consent disclosures while the Fourth Circuit permits them. This leads to a second open question: if *Casey* does not foreclose physicians' First Amendment challenges to informed consent laws, what standard of review should apply?

This Comment proceeds in four parts. Part I discusses the Supreme Court's abortion jurisprudence with particular emphasis on *Casey*. Part II analyzes the circuit split and the rationales of the Eighth, Fifth, Sixth, and Fourth Circuits. Part III looks closely at the language and reasoning of *Casey* and argues that it supports the view that First Amendment challenges to informed consent measures—even those that are truthful, nonmisleading, and relevant—can exist independently of the undue burden standard. Part IV advocates for intermediate scrutiny as the appropriate standard of review for such challenges.

I. ABORTION AT THE SUPREME COURT

A. Pre-*Casey*

A woman's right to have an abortion has been constitutionally protected since the Supreme Court decided *Roe v. Wade*¹⁷ in 1973. In *Roe*, a pregnant unmarried woman brought suit against Wade, a Texas district attorney, challenging an article of the Texas Penal Code that limited abortions to those done for the purpose of saving the life of the mother.¹⁸ *Roe* raised the question: does the constitutional right to privacy encompass a woman's decision to have an abortion?¹⁹

The Supreme Court answered in the affirmative and struck down the Texas statute.²⁰ However, while acknowledging that the right to personal privacy included a woman's decision to have an abortion, the Court did not leave this right unqualified. Instead, it developed a three-

¹⁶ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992).

¹⁷ 410 U.S. 113 (1973).

¹⁸ *Id.* at 120.

¹⁹ *Id.* at 153.

²⁰ *Id.* at 166.

part framework roughly aligned with the trimesters of pregnancy, allowing for increased state interference and regulation as pregnancy progresses.²¹ The Court acknowledged states' "important and legitimate interest in potential life,"²² but found this interest compelling only at the point of viability.²³ The framework broke down as follows: 1) until approximately the end of the first trimester, states could not interfere with a woman's right to have an abortion; 2) after the first trimester but before viability, states could regulate abortion only "in ways that are reasonably related to maternal health;"²⁴ 3) after viability, states could freely regulate abortion and even prohibit it, as long as exceptions existed for the health or life of the woman.²⁵

B. *Casey* and the Undue Burden Standard

Roe's trimester framework governed abortion regulations, albeit shakily,²⁶ for nearly two decades. In 1992, however, the Court offered a new approach in *Casey*. In *Casey*, Planned Parenthood brought a suit against Robert Casey, the governor of Pennsylvania, challenging a Pennsylvania law that restricted abortion access by requiring: 1) written informed consent from a woman seeking an abortion; 2) a twenty-four-hour waiting period between providing a woman with the informed consent information and performing an abortion; 3) if the woman was a minor, the informed consent of at least one parent; and 4) if the woman was married, a statement indicating her husband had been notified of the pending abortion.²⁷ The informed consent provisions required physicians to inform women of the nature of the procedure, the health risks of abortion and of childbirth, and the probable gestational age of the "unborn child."²⁸ Women had to be informed of the availability of printed materials published by the state that described fetal development and provided information about medical assistance for childbirth,

²¹ *Id.* at 164–65.

²² *Id.* at 163.

²³ *Id.*

²⁴ *Id.* at 164. The Court listed examples of "permissible state regulation in this area," which included regulating qualifications of the performing physicians and facilities in which abortions occur, including licensure. *Id.* at 163.

²⁵ *Id.* at 164–65.

²⁶ The *Casey* court acknowledged the uncertainty that followed *Roe* in its bold opening: "[l]iberty finds no refuge in a jurisprudence of doubt. Yet 19 years after our holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages . . . that definition of liberty is still questioned." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992).

²⁷ *Id.* at 844.

²⁸ *Id.* at 881 (quotation marks omitted).

child support, and agencies providing adoption and abortion alternatives.²⁹ If requested, physicians had to provide these materials.³⁰ Under its new undue burden standard, the Court upheld all of the Pennsylvania provisions except for spousal notification.³¹ Specifically, the Court noted that “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” did not create an undue burden.³²

While discarding Roe’s trimester framework, the Court claimed to affirm “Roe’s essential holding”³³ through the undue burden standard. This test has three clearly elucidated parts: first, a woman has the right to choose to have an abortion before viability and to obtain it without *undue interference* from the state;³⁴ second, the state has power to restrict abortions after fetal viability (but must allow exceptions for pregnancies endangering the life of the mother); and third, the state has a legitimate interest *from the outset of pregnancy* in protecting the health of women and the life of the fetus.³⁵ This new structure tempered Roe considerably: states could now regulate the procurement of abortions at all stages of pregnancy, provided the regulations did not constitute an undue burden having “the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”³⁶ Additionally, in an expression of the extent of its recognition of a state’s interest in “the life of the unborn,”³⁷ the *Casey* court allowed for “state measure[s] designed to persuade [women] to choose childbirth over abortion,”³⁸ provided the measures “reasonably related to that goal.”³⁹

While the petitioners in *Casey* challenged the Pennsylvania statute primarily as a violation of *Roe*, they also brought a First Amendment

²⁹ *Id.*

³⁰ *Id.*

³¹ *See id.* at 898.

³² *Id.* at 882.

³³ *Id.* at 846.

³⁴ The Court grounded this right in the Due Process Clause, a departure from *Roe*’s penumbral privacy approach. *See id.* at 846.

³⁵ *Id.*

³⁶ *Id.* at 877.

³⁷ *Id.*

³⁸ *Id.* at 878.

³⁹ *Id.* The measures must still conform to the undue burden standard and cannot create “a substantial obstacle to the woman’s exercise of the right to choose.” *Id.* at 877.

challenge, claiming the informed consent provisions impermissibly controlled physicians' speech.⁴⁰ After assessing the informed consent provisions under the undue burden standard, the Court dismissed this alternative claim in three sentences:

All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, see *Wooley v. Maynard* [citation omitted], but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, cf. *Whalen v. Roe* [citation omitted]. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.⁴¹

Thus, while overall the Court upheld the informed consent requirements under the undue burden standard,⁴² its treatment of the First Amendment claim lacks clarity and does not expressly foreclose independent First Amendment challenges to informed consent provisions.

The undue burden standard remains good law. The Court used it in *Gonzales v. Carhart*,⁴³ and more recently in *Whole Woman's Health v. Hellerstedt*.⁴⁴ While these watershed abortion cases demonstrate the Court's continued commitment to the undue burden test, they did not deal with informed consent provisions or First Amendment claims in the abortion context. Confusion over Casey's framing has created a circuit split regarding the permissibility of First Amendment challenges to abortion informed consent measures, with the Eighth, Fifth, and Sixth Circuits on one side, and the Fourth Circuit on the other.

A recent Supreme Court case also deserves mention. In *National Institute of Family and Life Advocates v. Becerra* ("NIFLA"),⁴⁵ crisis pregnancy centers challenged a California statute that (a) required licensed centers to post notices explaining the existence of publicly funded family-planning services, including abortion, and (b) required

⁴⁰ See *id.* at 881.

⁴¹ *Id.* at 884.

⁴² "[T]he right protected by *Roe* is a right to decide to terminate a pregnancy free of undue interference by the State . . . The informed consent requirement is not an undue burden on that right." *Id.* at 887.

⁴³ 550 U.S. 124 (2007) (upholding a federal ban on "partial-birth" abortions under the undue burden standard).

⁴⁴ 136 S. Ct. 2292 (2016) (striking down a Texas regulation on abortion clinics under the undue burden standard).

⁴⁵ 138 S. Ct. 2361 (2018).

unlicensed centers to post notices stating that they were not licensed.⁴⁶ The Court found the fact that the notice requirement for licensed centers was not directly tied to a medical procedure to be dispositive.⁴⁷ Removed from an informed consent context, the licensed requirements were viewed as pure content-based regulations of speech.⁴⁸ Subject to at least intermediate scrutiny, the Court held the licensed notice requirements unconstitutional.⁴⁹ The Court also struck down the unlicensed center requirements as “unjustified and unduly burdensome.”⁵⁰

Relevant here, in its opinion the *NIFLA* Court characterized the informed consent provisions in *Casey* as regulations of professional conduct only incidentally burdening speech, a category subject to a lower standard of review.⁵¹ This indicates a willingness of the current Supreme Court to consider informed consent provisions as regulations of conduct, not speech, thus weakening the case for robust First Amendment review. Respectfully, I do not believe the *NIFLA* Court’s framing conclusively demystifies *Casey*, as it occurs in dicta⁵² and does not engage with alternative explanations for *Casey*’s reasoning. Moreover, even assuming the *NIFLA* court correctly characterized *Casey*, this can be read as limited to *Casey*’s facts. At best, read in conjunction with *Casey*, *NIFLA* “create[s] the guiding principle that reasonable regulations that facilitate informed consent to a medical procedure are excepted from heightened scrutiny”⁵³—an uncontroversial proposition. Notwithstanding *NIFLA*, the scope of permissible First Amendment challenges to abortion informed consent measures remains an open question.

⁴⁶ *Id.* at 2368.

⁴⁷ *Id.* at 2373–74.

⁴⁸ *Id.* at 2375.

⁴⁹ *Id.* The state argued that the requirements should be considered professional speech and therefore receive a lower standard of review. The Court, although highly skeptical of the professional speech doctrine, determined it did not need to answer the professional speech question “because the licensed notice cannot survive even intermediate scrutiny.” *Id.*

⁵⁰ *Id.* at 2378. The State argued that, as commercial speech, the unlicensed requirements should be subject to the more deferential *Zauderer* standard. The Court again did not feel the need to answer whether *Zauderer* applied because it held that the unlicensed center notice requirements could not meet even its lower standard of review.

⁵¹ *Id.* at 2372–73.

⁵² The Court’s characterization of *Casey* provides only an example of a category of speech the Court notes as warranting lower protection. The Court supports this category with citations to many other cases as well. *Id.* at 2373. Defining *Casey* is therefore “not necessary” nor a “necessary antecedent” to the Court’s holding. In re Grand Jury Investigation, 916 F.3d 1047, 1053 (D.C. Cir. 2019).

⁵³ *EMW Women’s Surgical Center, P.S.C. v. Beshar*, 920 F.3d 421, 449 (6th Cir. 2019) (Donald, J., dissenting).

II. THE CIRCUIT SPLIT: SINGULARITY OF THE UNDUE BURDEN STANDARD?

A. Eighth, Fifth, and Sixth Circuits Dismiss First Amendment Challenges to Informed Consent Laws

The Eighth Circuit has twice upheld the supremacy of the undue burden test when considering First Amendment challenges to informed consent requirements. In *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds (Rounds I)*,⁵⁴ the Eighth Circuit, sitting *en banc*, rejected a compelled-speech challenge to a South Dakota law requiring doctors to provide several statements to women seeking abortions as part of obtaining informed consent. These included statements that abortion “will terminate the life of a whole, separate, unique, living human being,” which “the pregnant woman has an existing [constitutionally protected] relationship with,” and “[t]hat by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship will be terminated.”⁵⁵

Overruling the district court, the Eighth Circuit found the mandated statements well within the state’s regulatory power. The court concluded:

Casey and *Gonzales* establish that, while the State cannot compel an individual simply to speak the State’s ideological message, it can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient’s decision to have an abortion, even if that information might also encourage the patient to choose childbirth over abortion.⁵⁶

Therefore, in order to succeed on its compelled speech claim, Planned Parenthood had to show that the mandated disclosures were untruthful, misleading, or irrelevant.⁵⁷ The statute at issue defined “human being,” for the purposes of the informed consent provision, as “including the unborn human being during the entire embryonic and fetal ages from fertilization to full gestation,”⁵⁸ and the court held the statutory definition controlling.⁵⁹ Given this, the court found the challenged

⁵⁴ 530 F.3d 724 (8th Cir. 2008).

⁵⁵ *Id.* at 726.

⁵⁶ *Id.* at 734–35.

⁵⁷ *See id.* at 735.

⁵⁸ *Id.* at 727.

⁵⁹ “South Dakota recognizes the well-settled canon of statutory interpretation that ‘[w]here [a term] is defined by statute, the statutory definition is controlling.’” *Id.* at 735 (citing *Bruggeman v. S.D. Chem. Dependency Counselor Certification Bd.*, 571 N.W.2d 851, 853 (S.D. 1997)).

disclosures truthful and relevant.⁶⁰ In sum, the Eighth Circuit held *Casey* and *Gonzales* precluded First Amendment claims to informed consent laws when the speech at issue is truthful, nonmisleading, and relevant.

Four years later, the Eighth Circuit, again sitting *en banc* and again reversing the district court, reaffirmed its reading of *Casey* and upheld another part of the South Dakota statute in *Rounds II*.⁶¹ As part of obtaining informed consent, the statute required physicians to provide a written “description of . . . statistically significant risk factors to which the pregnant woman would be subjected, including . . . [i]ncreased risk of suicide ideation and suicide.”⁶² The Eighth Circuit held that this statement did not imply a causal link between abortion and suicide but rather indicated relative risk, which it found sufficiently supported by the scientific record and therefore truthful.⁶³ The court further held that despite medical and scientific uncertainty, the record did not conclusively rule out abortion as “a causal factor in the observed correlation between abortion and suicide,”⁶⁴ and therefore the required disclosure was not misleading or irrelevant.⁶⁵

The Fifth Circuit held similarly in *Texas Medical Providers Performing Abortion Services v. Lakey*.⁶⁶ In *Lakey*, physicians and abortion providers brought a section 1983 action against the state of Texas, challenging a recently enacted bill that significantly amended Texas’ informed consent laws.⁶⁷ The challenged amendments required physicians performing abortions to “perform and display a sonogram of the fetus, make audible the heart auscultation of the fetus . . . [and] explain . . . the results of each procedure.”⁶⁸ A woman had to certify her physician’s compliance with these measures and wait 24 hours before receiving an abortion.⁶⁹ The statute permitted a woman to decline to view the images or hear the heartbeat, but she could only decline to

⁶⁰ *Id.* at 735. The court did not explicitly discuss why this statement is not misleading, but did note that it would be “incumbent upon one preparing the disclosure form required by [the statute], and upon a physician answering a patient’s questions about it, to account for any applicable statutory definitions.” *Id.*

⁶¹ *Planned Parenthood of Minn., N.D., S.D. v. Rounds*, 686 F.3d 889 (8th Cir. 2012).

⁶² *Id.* at 894.

⁶³ “[T]he studies submitted by the State are sufficiently reliable to support the truth of the proposition that the relative risk of suicide and suicide ideation is higher for women who abort their pregnancies compared to women who give birth or have not become pregnant.” *Id.* at 898–99.

⁶⁴ *Id.* at 904.

⁶⁵ *Id.* at 905.

⁶⁶ 667 F.3d 570 (5th Cir. 2012).

⁶⁷ *Id.* at 572.

⁶⁸ *Id.* at 573.

⁶⁹ *Id.*

receive an explanation of the sonogram images under three conditions: 1) if her pregnancy resulted from rape or incest, 2) if she was a minor, or 3) if the fetus had a documented irreversible medical condition or abnormality.⁷⁰ The district court granted a preliminary injunction against the disclosure provisions as impermissible compelled speech.⁷¹

The Fifth Circuit reversed, finding that *Casey* precluded the plaintiffs' First Amendment challenge. The *Lakey* court focused on *Casey*'s brief discussion of the First Amendment claim, finding its absence of inquiry into compelling interests or narrow tailoring to be the "antithesis of strict scrutiny."⁷² The Fifth Circuit then turned to *Gonzales*, noting its reaffirmance of *Casey* in upholding states' "significant role . . . in regulating the medical profession" and the government's ability to "use its voice and regulatory authority to show its profound respect for the life within the woman."⁷³ The court found that these two cases clearly established that "informed consent laws that do not impose an undue burden on the woman's right to have an abortion are permissible if they require truthful, nonmisleading, and relevant disclosures," and "are part of the state's reasonable regulation of medical practice and do not fall under the rubric of compelling 'ideological' speech that triggers First Amendment strict scrutiny."⁷⁴ The court supported this interpretation of the case law by citing the Eighth Circuit in *Rounds I*.⁷⁵

The Fifth Circuit then noted that, unlike the plaintiffs in *Casey* and *Rounds*, the plaintiff-appellees in the case at hand had brought solely a First Amendment claim.⁷⁶ The court found this impermissible:

If the disclosures are truthful and non-misleading, and if they would not violate the woman's privacy right under the *Casey* plurality opinion, then Appellees would, by means of their First Amendment claim, essentially trump the balance *Casey* struck between women's rights and the states' prerogatives. *Casey*, however, rejected any such clash of rights in the informed consent context.⁷⁷

⁷⁰ *Id.* at 578 n.6.

⁷¹ *Id.* at 573. The provisions were also challenged as void for vagueness, outside of the scope of this Comment.

⁷² *Id.* at 575.

⁷³ *Id.* at 575–76 (citing *Gonzales v. Carhart*, 550 U.S. 124, 128 (2007)) (internal quotations omitted).

⁷⁴ *Id.* at 576.

⁷⁵ "Fortifying this reading, the Eighth Circuit sitting en banc construed *Casey* and *Gonzales* in the same way." *Id.* at 576–77 (citing *Planned Parenthood Minn. v. Rounds*, 530 F.3d 724, 735 (8th Cir. 2008)).

⁷⁶ *Id.* at 577.

⁷⁷ *Id.*

The Fifth Circuit finally denied the contention raised by plaintiff-appellees that the disclosure requirements at issue differed qualitatively from those in *Casey*.⁷⁸ The appellees' argument here focused on two distinctions. First, because the disclosures of the sonogram and fetal heartbeat were "medically unnecessary," they went "beyond the standard practice of medicine within the state's regulatory powers."⁷⁹ Second, requiring the physician to explain the results of the sonogram and fetal heart auscultation verbally "makes the physician the 'mouth-piece' of the state."⁸⁰ The Fifth Circuit dismissed the first point under *Casey* and *Gonzales*.⁸¹ As to the second point, the court held that this "mode of delivery does not make a constitutionally significant difference from the 'availability' provision in *Casey* . . . [t]he mode of compelled expression is not by itself constitutionally relevant, although the context is."⁸² For all these reasons, the court found that the provisions did not violate the First Amendment because they were "sustainable under *Casey* . . . [and] within the State's power to regulate the practice of medicine."⁸³ The Fifth Circuit denied petitioners appeal for en banc review.⁸⁴

The Sixth Circuit recently confronted the issue and aligned in decision with the Eighth and Fifth Circuits. In *EMW Women's Surgical Center, P.S.C. v. Beshar*,⁸⁵ the court overruled the district court and upheld the constitutionality of a Kentucky informed consent statute (H.B.2) against a First Amendment challenge.⁸⁶ Echoing the Texas law at issue in *Lakey*, H.B.2 required that before giving an abortion a physician perform an ultrasound, display and explain the images, and auscultate the fetal heartbeat.⁸⁷ Although any patient could request that

⁷⁸ *Id.* at 578.

⁷⁹ *Id.*

⁸⁰ *Id.* at 579.

⁸¹ "Appellees' argument ignores that *Casey* and *Gonzales* . . . emphasize that the gravity of the decision may be the subject of informed consent through factual, medical detail, that the condition of the fetus is relevant, and that discouraging abortion is an acceptable effect of mandated disclosures." *Id.*

⁸² *Id.* at 579–80.

⁸³ *Id.* at 580.

⁸⁴ Press Release, CENTER FOR REPRODUCTIVE RIGHTS, *Fifth Circuit Court of Appeals Denies Request to Rehear Texas Ultrasound Case* (Feb. 10, 2012), <https://www.reproductiverights.org/press-room/fifth-circuit-court-of-appeals-denies-request-to-rehear-texas-ultrasound-case> [<https://perma.cc/2X5L-7W5Y>].

⁸⁵ 920 F.3d 421 (6th Cir. 2019).

⁸⁶ *Id.* at 446.

⁸⁷ *Id.* at 424.

the physician turn down the volume of the auscultation, the law provided no exemptions from these disclosures except in the case of a medical emergency or a medically necessary abortion.⁸⁸

Relying heavily on its reading of *Casey* and *NIFLA*, the *Beshar* court determined that “First Amendment heightened scrutiny does not apply to incidental regulation of professional speech⁸⁹ that is part of the practice of medicine and . . . such incidental regulation includes mandated informed-consent requirements, provided that the disclosures are truthful, non-misleading, and relevant.”⁹⁰ Characterizing the sonogram provisions as “materially identical”⁹¹ to *Casey*’s requirements and highly relevant,⁹² the court found no constitutional infirmity in H.B.2. The court discussed *Lakey* and *Rounds I* at length, noting their “support [for] our holding today.”⁹³

B. Fourth Circuit Upholds First Amendment Challenge to Informed Consent Law

Two years after the Fifth Circuit’s decision in *Lakey*, but before the Sixth Circuit’s decision in *Beshar*, the Fourth Circuit addressed a compelled speech challenge to a strikingly similar statute. In *Stuart v. Camnitz*,⁹⁴ physicians and abortion providers challenged the Display of Real-Time View Requirement of the North Carolina Woman’s Right to Know Act (“WRKA”).⁹⁵ The requirement mandated ultrasounds for all women seeking abortions and required physicians to display the sonogram and “describe the fetus in detail, ‘includ[ing] the presence, location, and dimensions of the unborn child within the uterus and the number of unborn children depicted,’ . . . as well as ‘the presence of external members and internal organs, if present and viewable.’”⁹⁶ It also required physicians to provide women the option of hearing the fetal heart auscultation.⁹⁷ The WRKA allowed exceptions to these measures only in the case of medical emergency; however, a woman could always “avert[] her eyes from the displayed images’ and ‘refus[e] to hear the

⁸⁸ *Id.* at 424–25.

⁸⁹ The *Beshar* court made *NIFLA*’s characterization of *Casey* central to its analysis and dismissed the Fourth Circuit’s decision in *Stuart* (see part B) because it pre-dated *NIFLA* and therefore gave “insufficient regard” to *NIFLA*’s characterization of *Casey*. *Id.* at 435.

⁹⁰ *Id.* at 429.

⁹¹ *Id.* at 431 (internal citations omitted).

⁹² *Id.* (“one can hardly dispute the relevance of sonogram images for twenty-first-century informed consent.”).

⁹³ *Id.* at 434.

⁹⁴ 774 F. 3d 238 (4th Cir. 2014).

⁹⁵ *Id.* at 242–43.

⁹⁶ *Id.* at 243.

⁹⁷ *Id.*

simultaneous explanation and medical description' by presumably covering her eyes and ears."⁹⁸ The district court, applying heightened, intermediate scrutiny, held that these requirements violated the physicians' First Amendment rights to free speech and entered a permanent injunction.⁹⁹

Unlike in *Lakey* or *Rounds*, here a unanimous Fourth Circuit affirmed.¹⁰⁰ Analyzing the regulations first through a compelled speech lens, the Fourth Circuit held "[t]he Requirement [the regulations described above] is quintessential compelled speech. It forces physicians to say things they otherwise would not say. . . [T]he statement compelled here is ideological; it conveys a particular opinion."¹⁰¹ Referencing *Lakey*, the court acknowledged that the mandated disclosures at issue were factual but did not find this fact dispositive:

[While] it is true that the words the state puts into the doctor's mouth are factual, that does not divorce the speech from its moral or ideological implications. "[C]ontext matters." . . . [The regulations] explicitly promote[] a pro-life message by demanding the provision of facts that all fall on one side of the abortion debate—and does so shortly before the time of decision when the intended recipient is most vulnerable.¹⁰²

The Fourth Circuit then assessed the requirements as standard medical regulation, acknowledging that states retain rights to regulate professional speech and mandate informed consent to medical procedures.¹⁰³ Despite this, the court held "individuals [do not] simply abandon their First Amendment rights when they commence practicing a profession,"¹⁰⁴ and that "[w]ith all forms of compelled speech, [the court] must look to the context of the regulation to determine when the state's regulatory authority has extended too far."¹⁰⁵ In the context of the WRKA, the court held that "the confluence of these factors points toward borrowing a heightened intermediate scrutiny standard used in certain commercial speech cases."¹⁰⁶

⁹⁸ *Id.*

⁹⁹ *Id.* at 244.

¹⁰⁰ *Id.* at 256.

¹⁰¹ *Id.* at 246. Note that the state freely admitted "the purpose and anticipated effect of the Display of Real-Time View Requirement is to convince women seeking abortions to change their minds or reassess their decisions." *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 247.

¹⁰⁴ *Id.* The court supported this with reference to *Casey* ("[T]he physician's First Amendment rights not to speak *are* implicated.") *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 248.

The Fourth Circuit explicitly stated its reasons for diverging from the Fifth and Eighth Circuits:

With respect, our sister circuits read too much into *Casey* and *Gonzales*. The single paragraph in *Casey* does not assert that physicians forfeit their First Amendment rights in the procedures surrounding abortions, nor does it announce the proper level of scrutiny to be applied to abortion regulations that compel speech to the extraordinary extent present here . . . the plurality simply stated that it saw ‘no constitutional infirmity in the requirement that the physician provide the information mandated by the State *here*.’ That particularized finding hardly announces a guiding standard of scrutiny for use in every subsequent compelled speech case involving abortion.¹⁰⁷

The court also held *Gonzales*, an undue burden case raising no First Amendment claim, inapplicable to the issue at hand. The court noted that *Gonzales* “says nothing about the level of scrutiny courts should apply when reviewing a claim that a regulation compelling speech in the abortion context violates physicians’ First Amendment free speech rights.”¹⁰⁸ The Fourth Circuit thus found its First Amendment analysis consistent with *Casey* and *Gonzales*. The State appealed to the Supreme Court, which denied certiorari.¹⁰⁹

III. CASEY DOES NOT FORECLOSE PHYSICIANS’ FIRST AMENDMENT CHALLENGES TO INFORMED CONSENT LAWS

A. *Casey* Does Not Displace First Amendment Protection for Physicians

The Eighth, Fifth, and Sixth Circuits have curtailed First Amendment protection for physicians in the context of abortion informed consent measures. Each circuit held that when mandated informed consent disclosures are truthful, nonmisleading, and relevant to the decision to have an abortion, they are permissible under *Casey* as long as they do not constitute an undue burden. Essentially, these circuits have disallowed independent First Amendment analysis of physicians’ compelled speech claims by collapsing free speech analysis into the undue burden test. This reasoning misinterprets *Casey*. As Nadia Sawicki writes, “it is essential to recognize that the ‘truthful, not misleading, and relevant’ requirement is a condition on the constitutionality of disclosure laws

¹⁰⁷ *Id.* at 249.

¹⁰⁸ *Id.*

¹⁰⁹ Walker-McGill v. Stuart, 135 S. Ct. 2838 (2015).

under the Fourteenth Amendment's 'undue burden' standard, rather than a condition of the First Amendment."¹¹⁰ As recently articulated by Judge Donald in her powerful dissenting opinion in *Beshar*:

The majority relies on *undue burden jurisprudence* to fashion a test that they believe comprehensively captures informed consent. The result is erroneous . . . The three elements the majority identifies—truthful, nonmisleading, and relevant—were drawn from *Casey*, a controlling case that considered *both* an undue burden and a First Amendment challenge. These three elements, however, were central only to *Casey*'s undue burden analysis . . . Nowhere are these elements even mentioned in *Casey*'s discussion of the First Amendment. It is a mistake to transpose *Casey*'s holding on undue burden to the First Amendment challenge here.¹¹¹

In other words, *Casey* holds that truthful, nonmisleading, and relevant informed consent disclosures do not *per se* violate a woman's constitutional right to choose. *Casey* does not, however, indicate that such disclosures can never be subject to First Amendment review.

Common sense indicates that this must be the case. Imagine South Dakota revises its disclosure requirement with the only change being physicians are now required to stand up on a chair and yell at a woman that her abortion will end the life of a unique living human being. While this hypothetical obviously steps outside of the bounds of the regulations considered in *Casey*, the Eighth Circuit does not offer a framework through which to challenge it. The disclosure has already been held truthful, nonmisleading, and relevant, ending the First Amendment inquiry. While the yelling could be challenged as creating an undue burden, the Eighth Circuit would struggle to qualitatively differentiate it from the written statement, especially given the permissibility of regulations designed to dissuade women from choosing abortion.¹¹² Even if the Eighth Circuit invalidated this law under the undue burden standard, the fact remains that it would be impossible, under Eighth Circuit

¹¹⁰ Nadia N. Sawicki, *Informed Consent as Compelled Professional Speech: Fictions, Facts, and Open Questions*, 50 WASH. U. J. L. & POL'Y 11, 24–25 (2016).

¹¹¹ *EMW Women's Surgical Center, P.S.C. v. Beshar*, 920 F.3d 421, 448 (6th Cir. 2019) (Donald, J., dissenting).

¹¹² "*Casey* and *Gonzales* establish that, while the State cannot compel an individual simply to speak the State's ideological message, it can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion, even if that information might also encourage the patient to choose childbirth over abortion." *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 734–35 (8th Cir. 2008) (emphasis added).

precedent, for a physician to challenge this law under the First Amendment. This significantly reduces protection of physicians' speech.

It does not seem plausible that the Court would create this large exemption from First Amendment protection in such an ambiguous way. Justice Scalia famously wrote that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."¹¹³ The same reasoning should apply to Supreme Court holdings, particularly in the context of the First Amendment. The Supreme Court has historically been hesitant to create exceptions to free speech protection. As the Court recently stated in *NIFLA*, "[t]his Court has 'been reluctant to mark off new categories of speech for diminished constitutional protection,'"¹¹⁴ and "[we have] been especially reluctant to 'exemp[t] a category of speech from the normal prohibition on content-based restrictions.'"¹¹⁵ In this context, reading the three sentences in *Casey* as creating a new category of lessened speech protection—for truthful, nonmisleading, and relevant informed consent disclosures—seems all the more implausible.¹¹⁶ A simpler, more reasonable reading of *Casey* is that the Court, having already held the informed consent provisions permissible under the undue burden standard, and finding the regulations at issue within the usual confines of a state's regulatory power, did not feel the need to explore the First Amendment issue further.¹¹⁷

B. *Whalen* Does Not Trump *Wooley*

In its discussion of the First Amendment issues in *Casey*, the Court cited to *Wooley v. Maynard*¹¹⁸ and *Whalen v. Roe*,¹¹⁹ two seemingly conflicting cases. In *Wooley*, the Supreme Court applied strict scrutiny to a New Hampshire statute that required residents to display "Live Free

¹¹³ *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

¹¹⁴ *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018) (citing *Denver Area Ed. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 804 (1996)).

¹¹⁵ *Id.* (citing *United States v. Alvarez*, 567 U.S. 709, 722 (2012)).

¹¹⁶ I recognize the irony of using *NIFLA* to support this claim, given its characterization of *Casey*—but disputing that characterization does not rob other portions of the opinion of their persuasiveness.

¹¹⁷ The courts that have found otherwise have arguably fallen prey to a phenomenon recently articulated in a different context by Justice Gorsuch: "treating judicial opinions as if they were statutes, divorcing a passing comment from its context, ignoring all that came before and after, and treating an isolated phrase as if it were controlling." *Gundy v. United States*, 139 S. Ct. 2116, 2139 (2019) (Gorsuch, J., dissenting).

¹¹⁸ 430 U.S. 705 (1977).

¹¹⁹ 429 U.S. 589 (1977).

or Die” on their license plates.¹²⁰ In *Whalen*, the Court upheld, as an appropriate use of state police power, a New York statute requiring physicians to disclose to the government prescription records of certain drugs.¹²¹ As Robert Post writes, “[e]xactly how the strict First Amendment standards of *Wooley* are meant to qualify the broad police power discretion of *Whalen* is left entirely obscure.”¹²² However, a close look at each case shows that *Whalen* should not qualify *Wooley* to the extent of foreclosing a physician’s ability to bring First Amendment challenges to informed consent laws.

The Supreme Court struck down the license plate statute in *Wooley*, recognizing that “the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.”¹²³ In *Lakey*, the Fifth Circuit took up *Wooley* as a defense against the plaintiffs’ contention that requiring physicians to voice the mandated information was constitutionally significant. The *Lakey* court cited *Wooley* as support for the statement that “[t]he mode of compelled expression is not by itself constitutionally relevant, although the context is.”¹²⁴ However, *Wooley* suggests more than that. Comparing the case to *West Virginia State Board of Education v. Barnette*,¹²⁵ the seminal case in which the Supreme Court acknowledged a First Amendment right to be free from compelled speech in the context of the school flag salute, the *Wooley* Court stated that “[c]ompelling the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate, *but the difference is essentially one of degree.*”¹²⁶ This statement supports two suppositions: first, compelled speech is an infringement, and second, the extent to which it is compelled can affect the analysis. Therefore, the *Lakey* court’s exclusive focus on context is incomplete. *Wooley* indicates that the mode of compelled expression is also relevant insofar as it can heighten the severity of the infringement. A provision demanding that doctors voice the state’s information in their own words requires significantly more affirmative action than merely providing pamphlets. Thus,

¹²⁰ *Wooley*, 430 U.S. at 716 (“We must also determine whether the State’s countervailing interest is sufficiently compelling to justify requiring appellees to display the state motto on their license plates.”).

¹²¹ *Whalen*, 429 U.S. at 598.

¹²² Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, U. ILL. L. REV. 939, 946 (2007).

¹²³ *Wooley*, 430 U.S. at 714.

¹²⁴ *Tex. Medical Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 578, 580 (5th Cir. 2012).

¹²⁵ 319 U.S. 624 (1943).

¹²⁶ *Wooley*, 430 U.S. at 715 (emphasis added).

the provisions at issue in *Lakey* analogize more closely to *Barnette* than to *Wooley*, and *Wooley* suggests that this increases the gravity of the infringement.

Immediately following its reference to *Wooley*, the *Casey* court acknowledges that the medical context tempers its First Amendment analysis, citing to *Whalen*. In *Whalen*, the Court upheld, against a privacy challenge, a New York statute requiring that the state receive a copy of every prescription for a certain class of drugs categorized as highly dangerous.¹²⁷ In *Lakey*, the Fifth Circuit described *Whalen* in one sentence as a case “in which the Court had upheld a regulation of medical practice against a right to privacy challenge.”¹²⁸ Again, their synopsis is imprecise. In analyzing the constitutional validity of the provision, the *Whalen* court considered its effect on the independence of physicians and patients:

Nor can it be said that any individual has been deprived of the right to decide independently, with the advice of his physician, to acquire and to use needed medication . . . the decision to prescribe, or to use, is left entirely to the physician and the patient. We hold that . . . [the] impact of the patient-identification requirements in the [statute] on either the reputation or the independence of the patients is [not] sufficient to constitute an invasion of any right or liberty protected by the Fourteenth Amendment (emphasis added).¹²⁹

While the Court did uphold the medical regulation, it clearly weighed, as highly significant, the regulation’s effect on the independence of patients’ and physicians’ decision making. With regards to the independence of patients, *Casey* and *Gonzales* admittedly allow for states to voice their disapproval of abortion even if it results in altering a woman’s choice to have one. Application of the undue burden standard thus encompasses any infringement on patients’ decision making in its calculation. However, while the undue burden standard speaks to the relevance of women’s independence in receiving abortions, it does not speak to that of the physicians offering them.

The *Casey* Court’s citation to *Whalen* indicates that infringements on the independence of doctors should be factored into the permissibility of medical regulations. Excluding First Amendment challenges to informed consent measures, however, removes the only avenue through which such infringements can be considered. Although in *Casey*, like in

¹²⁷ *Whalen*, 429 U.S. at 603–04.

¹²⁸ *Lakey*, 667 F.3d at 575.

¹²⁹ *Whalen*, 429 U.S. at 604 (emphasis added).

Whalen, the extent of infringement on the independence of the physician-patient relationship fell within permissible grounds, that determination was limited to the facts of *Casey*.¹³⁰ The provisions in *Rounds*, *Lakey*, *Beshar*, and *Stuart*, which prescribed descriptive and invasive procedures doctors must follow, intrude on the physician-patient relationship significantly more.

In sum, allowing physicians to bring First Amendment challenges to informed consent provisions does not “trump the balance *Casey* struck between women’s rights and the states’ prerogatives.”¹³¹ *Casey* weighed women’s rights and states’ rights in crafting the undue burden standard, but it did no such careful weighing in regard to physicians’ First Amendment rights. Thus, when the burden on physicians’ speech goes significantly beyond the regulations upheld in *Casey*, *Casey* no longer applies.

IV. ADOPTING INTERMEDIATE SCRUTINY AS THE STANDARD OF REVIEW

A. Competing Interests Clash in the Context of Informed Consent Laws

Assuming that *Casey* does not foreclose physicians from bringing First Amendment challenges to informed consent laws, there remains an open question: what standard should courts use to review these challenges? With First Amendment claims, context drives this inquiry.¹³² As noted by the Fourth Circuit in *Stuart*, informed consent laws lie at a unique intersection between impermissible content-based compelled speech and permissible state regulations of mandated informed consent to a medical procedure.¹³³ The Supreme Court has not conclusively weighed in on this muddled area of First Amendment law; consequently, *Casey*, with all its resulting confusion, offers the Court’s clearest declaration on the issue.

Content-based restrictions on speech are generally assessed under strict scrutiny.¹³⁴ For a law to pass strict scrutiny, it must further a compelling government interest and be narrowly tailored to effectuate

¹³⁰ “We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State *here*.” *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (emphasis added).

¹³¹ *Lakey*, 667 F.3d at 577.

¹³² “Laws that impinge upon speech receive different levels of judicial scrutiny depending on the type of regulation and the justifications and purposes underlying it.” *Stuart v. Camnitz*, 774 F.3d 238, 244 (4th Cir. 2014).

¹³³ *Id.*

¹³⁴ *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

that interest.¹³⁵ Many commenters consider this rigorous standard essentially fatal, as the Supreme Court has upheld only two speech restriction laws under it.¹³⁶ Freedom from compelled speech, or the right not to speak, has long been recognized as protected under the First Amendment. Compelled speech is necessarily content-based and thus also assessed under strict scrutiny.¹³⁷ Viewed purely through this lens, informed consent laws that compel physician speech, like those in *Rounds*, *Lakey*, *Beshar*, and *Stuart*, would be reviewed under strict scrutiny and would almost certainly be stricken down.

However, compelled speech of medical professionals runs up against another line of precedent. States have police powers through which they can regulate medicine and other professions.¹³⁸ Courts generally review regulations of this sort under rational basis review, which merely requires a statute be rationally related to a legitimate government interest.¹³⁹ While not quite a rubber stamp, most laws pass this deferential standard. Additionally, the necessity of informed consent to medical procedures is well established under tort law.¹⁴⁰ Similarly, physicians are routinely held liable for malpractice, even when the harm results from a physician's speech or lack thereof (e.g. failure to inform a patient of a procedure's risks or giving incorrect medical advice).¹⁴¹

In *Casey*, the Court acknowledged both these lines of precedent: "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."¹⁴² Beyond this statement and the citations to *Wooley* and *Maynard* discussed in Part III, the *Casey* Court did not offer a precise standard through which to assess infringements on physicians' First Amendment rights.

¹³⁵ *Id.*

¹³⁶ Robert McNamara & Paul Sherman, *NIFLA v. Becerra: A Seismic Decision Protecting Occupational Speech*, CATO SUP. CT. REV. 197, 205 (2018).

¹³⁷ *Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 795 (U.S. 1988) ("Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech.").

¹³⁸ Police powers come from the Tenth Amendment. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend X. *See also* Sawicki, *supra* note 112 at 12 ("States are authorized to regulate medicine and other professions by virtue of their police power, the unenumerated power to protect the health, safety, and welfare of a state's citizenry"). *See also* *Dent v. W. Va.*, 129 U.S. 114, 122 (1889).

¹³⁹ Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627, 1629 (2016).

¹⁴⁰ *See generally* W.M. Moldoff, *Malpractice: Physician's Duty to Inform Patient of Nature and Hazards of Disease or Treatment*, 79 A.L.R. 2d 1028 (originally published 1961).

¹⁴¹ "Without so much as a nod to the First Amendment, doctors are routinely held liable for malpractice for speaking or for failing to speak." Post, *supra* note 122, at 950.

¹⁴² *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (internal citations omitted) (emphasis added).

B. Eliminating the Extremes (Strict Scrutiny and Rational Basis Review)

While the appropriate standard could thus fall anywhere from strict scrutiny to rational basis review, the endpoints of the range can be eliminated from consideration. A standard of strict scrutiny seems hard to reconcile with *Casey*.¹⁴³ As the *Lahey* court rightfully notes, the *Casey* Court's three-sentence First Amendment discussion "is clearly not a strict scrutiny analysis . . . [because] [i]t inquires into neither compelling interests nor narrow tailoring."¹⁴⁴ Moreover, applying strict scrutiny to abortion informed consent laws would run afoul of the Court's historic recognition of state laws regulating the medical profession, a point noted by the *Casey* court itself.¹⁴⁵ Sound policy reasons buoy this recognition. Patients depend on physicians to inform them of their treatment options, but they usually lack the necessary medical background or understanding to validate the information independently. Thus, by necessity, patients place blind trust in the advice they receive from their doctors. This trust is made less blind, however, by two systems working in tandem: indirect regulation through medical malpractice liability, and direct regulation by the state. Reviewing these regulations under strict scrutiny would inappropriately encumber this system, even in the limited context of abortion informed consent measures.

Rational basis review, at first blush, appears better supported by the language used by the *Casey* court in its discussion of the First Amendment claim. The Court's use of the word "reasonable" can be read as synonymous with rational,¹⁴⁶ and its cursory First Amendment analysis could indicate deference to the state's regulatory power. However, as Carl Coleman explains, "the plurality made this statement only after having already determined (in the context of its due process analysis) that the state had a 'substantial' interest in requiring the disclosures and noting 'the ways in which the speech requirement was narrowly

¹⁴³ This statement should not be taken as an endorsement of *Casey*'s holding. However, this Comment seeks to offer a standard that coheres with precedent and could be used with the current state of the law. Consistency with *Casey* is a necessary element of such a standard.

¹⁴⁴ *Tex. Medical Providers Performing Abortion Servs. v. Lahey*, 667 F.3d 570, 575 (5th Cir. 2012). See also Carl H. Coleman, *Regulating Physician Speech*, N.C. L. REV. 9 (forthcoming), available at <https://ssrn.com/abstract=3234300> ("The most that can be said about *Casey* is that the plurality was clearly not applying strict scrutiny in its First Amendment analysis, as it made no effort to determine whether the statute was 'narrowly tailored' or based on a 'compelling state interest.'").

¹⁴⁵ *Casey*, 505 U.S. at 884.

¹⁴⁶ "On the one hand, [the *Casey* plurality's] use of the word 'reasonable' might mean that such laws are permissible as long as they have a rational basis, given that the word 'reasonable' is often used as a synonym for 'rational.'" Coleman, *supra* note 144, at 9.

drawn.”¹⁴⁷ Given this context, the word “reasonable” alone should not determine the standard of review. Moreover, application of rational basis review would render the discussion in Part III largely academic, because all of the informed consent measures mentioned so far would likely survive. This would essentially allow the carve-out of First Amendment protection for informed consent measures functionally claimed by the Eighth, Fifth, and Sixth Circuits. Thus, for the reasons discussed in Part III, rational basis review cannot be the appropriate standard.

In sum, both extremes—strict scrutiny and rational basis review—fail as potential standards of review. Strict scrutiny is incompatible with the language in *Casey* and fails to acknowledge the state’s legitimate regulatory role in the realm of medical disclosures. Rational basis review ignores the context of *Casey* and would, in effect, impermissibly excuse abortion informed consent measures from meaningful review.

C. Searching the Middle for a Standard

Rejecting both strict scrutiny and rational basis review eliminates the clearest available standards, forcing an examination of the mushy middle ground of First Amendment protection. As will be discussed in sub-section D, intermediate scrutiny emerges from this search as the best standard. Reaching that conclusion requires analysis of why other possible intermediate standards fail in the context of informed consent to abortion.¹⁴⁸ In this section, two other potential standards that have been offered as options will be examined: “truthful, nonmisleading, and relevant” (hereinafter “TNR”), and “factual and noncontroversial” (the *Zauderer* standard). Both fail to strike the right balance of protection.

As discussed in section II(a), the Eighth, Fifth, and Sixth circuits used a “truthful, nonmisleading, and relevant” standard to assess the challenged informed consent measures. In so doing, these circuits inappropriately folded First Amendment analysis into the undue burden test (see section III). This does not, however, mean that a TNR standard should be disregarded per se. While the Eighth, Fifth, and Sixth circuits

¹⁴⁷ *Id.*

¹⁴⁸ For the purposes of this Comment I have set aside the concept of professional speech as a framework through which to consider abortion informed consent requirements. Professional speech has received varied and inconsistent treatment in the circuit courts. See Erika Schutzman, *We Need Professional Help: Advocating For a Consistent Standard of Review When Regulations of Professional Speech Implicate the First Amendment*, 56 B.C. L. Rev. 2019, 2023 (“Courts have provided little clarity as to the extent to which the First Amendment rights of professionals should be protected or balanced against the interests of the state . . . several circuits have tackled the issue of professional speech, with varying results.”). Moreover, the Court’s opinion in *NIFLA* casts doubt on the validity of the professional speech doctrine. See *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (“this Court has not recognized ‘professional speech’ as a separate category of speech.”).

erred in failing to acknowledge the necessity of an independent First Amendment analysis, had they done so, TNR could have been an appropriate standard. Such an approach would uphold informed consent measures that mandate truthful, nonmisleading, and relevant disclosures.

A TNR test has the benefit of seemingly easy compatibility with *Casey*. The *Casey* court held the truthful, nonmisleading, and relevant disclosures at issue in the Pennsylvania law admissible under the undue burden test. It then went on to find no First Amendment issue with the mandated disclosures. It follows that, at a minimum, truthful, nonmisleading, and relevant disclosures similar in kind to those seen in *Casey* pass First Amendment scrutiny.¹⁴⁹

Applied beyond *Casey*, however, TNR offers a slippery standard. The circuit split discussed in Part II illustrates this: in some jurisdictions, information relevant to having an abortion includes an often unnecessary and costly medical procedure, while in others it does not. Laboratories of democracy notwithstanding, a standard does not offer good guidance if speech relating to a medical procedure can be so differently conscripted depending on the state in which it occurs. Pulling a unique First Amendment standard from *Casey* stretches the Court's acknowledgment of abortion exceptionalism beyond recognition.¹⁵⁰

Another midway standard comes from the context of commercial speech. In *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*,¹⁵¹ the Court upheld an Ohio Disciplinary Rule that required attorneys advertising contingent-fee based representation to disclose that clients may have to pay certain costs if they lose.¹⁵² The Court in

¹⁴⁹ However, a reasonableness assessment also seems baked into the *Casey* Court's discussion of the informed consent measures. See *Casey*, 505 U.S. at 884 ("In short, requiring that the woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy to full term is a *reasonable* measure to ensure an informed choice") (emphasis added); *id.* at 885 ("Thus, we uphold the provision [requiring a physician as opposed to a qualified assistant to provide information regarding informed consent] as a *reasonable* means to ensure that the woman's consent is informed") (emphasis added). Therefore, truthful, nonmisleading, and *reasonable* (as opposed to or in addition to relevant) could be a more appropriate test to draw from *Casey*. Given that none of the circuits discussed in this Comment offered it as a standard, I am not giving this test full analysis. Moreover, I am not proffering it as an alternative standard because the flexibility of a reasonableness assessment would not adequately safeguard against free speech abuses in the abortion context.

¹⁵⁰ *Id.* at 852 ("Abortion is a unique act . . . the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law."). See also Linda Greenhouse, *Why Courts Shouldn't Ignore the Facts About Abortion Rights*, N.Y. TIMES (Feb. 27, 2016), <https://www.nytimes.com/2016/02/28/opinion/sunday/why-courts-shouldnt-ignore-the-facts-about-abortion-rights.html> ("abortion exceptionalism" is the argument "that abortion has a moral valence that makes it different from the many other medical procedures that states subject to less rigorous oversight. The Supreme Court's current abortion jurisprudence recognizes this").

¹⁵¹ 471 U.S. 626 (1985).

¹⁵² *Id.* at 652.

Zauderer indicated that disclosure requirements mandating only “purely factual and uncontroversial information about the terms under which . . . services will be available”¹⁵³ would be upheld if they “reasonably related to the State’s interest in preventing deception of consumers,”¹⁵⁴ and were not “unjustified or unduly burdensome.”¹⁵⁵ From this language the *Zauderer* standard emerged, namely “more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their ‘commercial speech.’”¹⁵⁶ Elements of the reach and scope of *Zauderer* remain unclear.¹⁵⁷

Some commentators have suggested that courts could use the *Zauderer* standard to assess regulations relating to abortion, including informed consent measures.¹⁵⁸ Such an approach would uphold the constitutionality of factual and uncontroversial informed consent disclosures. Prior to *NIFLA*, this approach arguably had legs. In the wake of *NIFLA*, however, the use of *Zauderer* in the abortion context cannot stand. In considering the appropriate standard of review for the California notice requirement for licensed clinics, the Court stated: “The *Zauderer* standard does not apply here . . . The notice in no way relates to the services that licensed clinics provide. Instead, it requires these clinics to disclose information about state-sponsored services—including abortion, anything but an ‘uncontroversial’ topic. Accordingly, *Zauderer* has no application here.”¹⁵⁹ Arguably, informed consent measures differ qualitatively from the notice provisions in *NIFLA* because they relate more directly to the service being offered (abortion). However, *NIFLA* clearly colors abortion as a controversial topic, sharply circumscribing *Zauderer*’s application. Moreover, even without considering *NIFLA*, *Zauderer* review would likely strike down many of the informed consent measures upheld in *Casey* (while describing the nature of the procedure and associated health risks might pass, requiring notice of

¹⁵³ *Id.* at 651.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2372 (2018).

¹⁵⁷ Open questions include whether state interests aside from preventing consumer deception can sustain disclosure requirements, and what qualifies as “controversial.” For one circuit’s take, see *Am. Meat Inst. v. U.S. Dep’t of Agric.*, 760 F.3d 18, 22 (D.C. Cir. 2014) (holding that government interests in addition to correcting deception can be invoked to sustain disclosure mandates under *Zauderer*); *Nat’l Ass’n of Manufacturers v. S.E.C.*, 800 F.3d 518, 530 (D.C. Cir. 2015) (holding as controversial an S.E.C. requirement that a company that could not determine the origin of its minerals must list its products as not Democratic Republic of the Congo conflict free).

¹⁵⁸ See Coleman, *supra* note 144, at 22 (noting the similarity between the *Rounds I* court’s focus on whether the compelled disclosures were “truthful and not misleading” and the *Zauderer* standard). Interestingly, this was the approach adopted by the Third Circuit in *Casey*. See *Planned Parenthood of Se. Pa. v. Casey*, 947 F.2d 682, 705–06 (3d Cir. 1991) *aff’d in part, rev’d in part*, 505 U.S. 833 (1992).

¹⁵⁹ *NIFLA*, 138 S. Ct. at 2372.

the probable gestational age of the child as well as state-sponsored materials regarding alternatives seems controversial). Given both this and the framing of abortion in *NIFLA*, it follows that abortion informed consent disclosures do not qualify for *Zauderer* review.

D. Intermediate Scrutiny Is the Appropriate Standard

Intermediate scrutiny (sometimes also referred to as heightened scrutiny) straddles the line between rational basis review and strict scrutiny. It developed as a response to gender discrimination claims under the Fourteenth Amendment¹⁶⁰ and more recently has emerged as the standard for assessing regulations of some commercial speech.¹⁶¹ Intermediate scrutiny requires that the state demonstrate “at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest,”¹⁶² with a “fit between the legislature’s ends and the means chosen to accomplish those ends.”¹⁶³ Courts sometimes define the appropriate fit as one that is not “more extensive than necessary.”¹⁶⁴ Under intermediate scrutiny, “[t]he court can and should take into account the effect of the regulation on the intended recipient of the compelled speech, especially where she is a captive listener.”¹⁶⁵

Intermediate scrutiny appropriately balances the tensions created by informed consent measures. On the one hand, the regulation of private medical decisions falls within the ambit of the state. On the other hand, abortion is a matter of public concern, and many informed consent measures are designed precisely to express the state’s disapproval of the practice *in general*. The Supreme Court has repeatedly noted that “[i]t is speech on ‘matters of public concern’ that is ‘at the heart of the First Amendment’s protection’ . . . In contrast, speech on matters of purely private concern is of less First Amendment concern.”¹⁶⁶ Governmental regulations of speech on matters of public concern traditionally trigger a higher level of scrutiny.¹⁶⁷ Abortion qualifies as an issue in both realms: private as applied to a woman’s particular circumstances,

¹⁶⁰ See *United States v. Virginia*, 518 U.S. 515, 531 (1996).

¹⁶¹ See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 566 (1980).

¹⁶² *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 572 (2011).

¹⁶³ *Id.* at 572 (citing *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)) (internal citations omitted).

¹⁶⁴ *Evergreen Ass’n, Inc. v. City of New York*, 740 F.3d 233, 245 (2d Cir. 2014) (defining intermediate scrutiny as looking to whether a law is “no more extensive than necessary to serve a substantial governmental interest”).

¹⁶⁵ *Stuart v. Camnitz*, 774 F. 3d 238, 250 (4th Cir. 2014).

¹⁶⁶ *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985).

¹⁶⁷ *Id.* at 759.

which are wholly her own, yet a controversial part of the public forum. In choosing the dialogue between a woman and her physician as a time during which to express disapproval of abortion, states have introduced the public forum into a “deeply personal decision[].”¹⁶⁸

This raises concerns of government overreach, flagged by Justice Thomas in *NIFLA*. Justice Thomas observed that the Supreme Court “has stressed the danger of content-based regulations ‘in the fields of medicine and public health, where information can save lives.’”¹⁶⁹ Noting that “[d]octors help patients make deeply personal decisions, and their candor is crucial,”¹⁷⁰ Justice Thomas warned that “[t]hroughout history, governments have ‘manipulat[ed] the content of doctor-patient discourse to increase state power and suppress minorities.’”¹⁷¹ Context can either increase or mitigate this concern. State regulations designed to empower personal and *private* decisions by requiring physicians to provide largely uncontroversial information lessen this concern. For example, a law requiring disclosure of specific risks about electroconvulsive treatment mostly affects a private treatment decision and does not implicate a greater public issue. Content-based regulations that touch on issues of public concern, however, increase the fear of government manipulation, and therefore require more protection under the First Amendment. Using intermediate scrutiny for abortion informed consent measures recognizes the state’s regulatory power while ensuring that regulations impacting speech on an issue of public concern receive adequate First Amendment protection.¹⁷²

Moreover, informed consent measures implicate two constitutional guarantees: a woman’s right to terminate her pregnancy, and her physician’s right to be free from compelled speech. As noted, the law handles each separately, under the undue burden test and the First Amendment, respectively. However, a better approach would recognize that each infringement does not occur in a vacuum. In compelling physicians’ speech and conduct, informed consent measures necessarily touch on a woman’s right to an abortion as well. The law should recognize this dual infringement by adopting a higher standard of review in

¹⁶⁸ Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2374 (2018) (citing *Wollschlaeger v. Governor of Florida*, 848 F.3d 1293, 1328 (11th Cir. 2017) (en banc)) (quotations omitted).

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

¹⁷⁰ *Id.* (citing *Wollschlaeger*, 848 F.3d at 1328).

¹⁷¹ *Id.* (citing *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice*, 74 B.U.L. REV. 201, 201–202 (1994)).

¹⁷² While this Comment has focused narrowly on abortion informed consent measures, this approach could supply a model for other regulations of physicians’ speech that touch issues of public concern, e.g. informed-consent to vaccinations.

assessing the relevant free speech claim—namely, intermediate scrutiny.¹⁷³ Notably, the Supreme Court has adopted such a hybrid rights approach in regard to one category of free speech claims.¹⁷⁴

Analogous reasoning should apply in the case of abortion informed consent measures. This is not to advocate for a generally more liberal adoption of the hybrid rights approach. However, such an approach would be particularly appropriate in the limited context of abortion informed consent measures, where the relevant harm to women is deemphasized when informed consent measures are challenged under the First Amendment (see part E). A hybrid rights approach would also help insulate informed consent measures from being challenged as regulations of conduct that only incidentally burden speech, thereby ensuring a higher standard of review.

Advocating for intermediate scrutiny as the correct standard for assessing abortion informed consent requirements necessitates addressing its consistency with *Casey*. The Fourth Circuit in *Stuart* offered intermediate scrutiny as consistent with Supreme Court precedent but did not explain its rationale.¹⁷⁵ Examined closely, consistency with *Casey* is the main weakness of intermediate scrutiny. The problem does not stem from the text;¹⁷⁶ rather, one can legitimately argue that the informed consent provisions upheld in *Casey* would flunk intermediate scrutiny. A state's substantial interest in the potentiality of life is clearly supported by *Casey* and *Gonzales*. This leaves only an inquiry into the fit between this end and the means used in *Casey*. It is not clear that requiring physicians to tell a woman the probable gestational age of the fetus, and give her information regarding abortion alternatives, are measures reasonably drawn to achieve that interest. Perhaps an

¹⁷³ Under this reasoning, the reverse, a higher standard of review for assessing the infringement on the constitutional right to an abortion when physicians' First Amendment rights are implicated, would also be true. This argument proves more difficult, given that in the case of abortion rights the Court has codified the standard of review *into* the constitutional test itself. One would have to argue that the threshold of what constitutes an undue burden rises when physicians' First Amendment rights are involved. While not untenable, there is more room to make the argument for a hybrid rights approach on the flip side, where the standard of review has not been set.

¹⁷⁴ Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 881–82 (1990) (defining hybrid rights as a Free Exercise Clause claims in conjunction with another constitutional violation).

¹⁷⁵ “[*Casey*] says nothing about the level of scrutiny courts should apply when reviewing a claim that a regulation compelling speech in the abortion context violates physicians' First Amendment free speech rights . . . A heightened intermediate level of scrutiny is thus consistent with Supreme Court precedent and appropriately recognizes the intersection here.” *Stuart v. Camnitz*, 774 F. 3d 238, 249 (4th Cir. 2014).

¹⁷⁶ As discussed in part B *supra*, while the word “reasonable” could be read to mean “rational,” the Court makes this statement only after having already concluded the existence of a substantial state interest and noting the tailoring of the regulation. Thus, the Court's language in *Casey* does not preclude intermediate scrutiny.

appropriate fit would only require that physicians *offer* to tell the gestational age, and that the state raise awareness about abortion alternatives through a general advertising campaign rather than through doctors. One can thus argue that the *Casey* provisions overstep a state's interest and therefore would fail intermediate scrutiny review.

However, one can also plausibly argue that the *Casey* requirements *would* withstand intermediate scrutiny review. In light of the weight the Supreme Court has given to this particular state interest, the disclosure requirements in *Casey* seem minimally invasive and appropriately tailored. To put it simply, this is a close call. However, given the other reasons weighing in favor of intermediate scrutiny, a slightly precarious relationship with *Casey* should not ultimately be disqualifying. Rather, courts should use *Casey* as a helpful guide for framing their fit inquiry. Regulations similar in kind to those in *Casey*, such as giving the age of the fetus or offering printed materials describing alternative options and support, can be seen as representative of the appropriate balance between a state's interest in potential life and the means it can use to further it.

E. #MeToo Movement Supports Use of Intermediate Scrutiny

The context of #MeToo also supports the use of intermediate scrutiny for assessing informed consent regulations. When *Casey* replaced *Roe*'s trimester system, it fundamentally altered the reproductive rights of women. *Casey*'s undue burden standard has allowed states to encumber pre-viability abortions through a wide range of regulations. The laxity of the undue burden standard as a tool through which to attack these increasingly severe state regulations has created a special need for First Amendment claims in this context.

First Amendment claims to informed consent measures, however, necessarily shift the focus from women to their doctors. The relevant constitutional harm is no longer the burden on the woman, but rather the infringement on her doctor. Particularly in the context of #MeToo, this should give us pause. The #MeToo movement has shone a bright and harsh light on the prevalence of sexual violence and harassment against women. While sexual harassment is a critical issue, #MeToo also goes beyond this. At its core, it speaks to our culture's historic and deeply-rooted disregard of women's agency in all aspects of life, from the bedroom, to the boardroom, to the street. The Court in *Casey* acknowledged that the right to an abortion is justified in part by "the right to physical autonomy."¹⁷⁷ We should consider the laws discussed earlier in this light. Giving a woman false information that abortion

¹⁷⁷ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992).

increases her suicide risk tells her that the state knows her better than she knows herself. Forcing her to endure an invasive medical procedure solely to show her images of the pregnancy she came to the doctor to terminate implies that she does not fully know what she is doing.

This harm is lost, though, when framing the legal issue under the First Amendment. This is not to question the exigency of free speech concerns. However, the informed consent laws considered in this Comment were designed, above all, to impact *women* seeking abortions, not their doctors. By focusing on physicians, we surrender the interests of women to those of others.¹⁷⁸ This denies women agency in yet another arena where it has been historically neglected: the courtroom. Particularly in the era of #MeToo, we shouldn't lose sight of this quiet injustice.

The undue burden test does not adequately protect women's agency and autonomy when seeking an abortion. Free speech challenges to abortion informed consent measures offer a second-best tool with which to attack invasive regulations. Assessing these regulations through intermediate scrutiny allows courts to consider how a state has tailored a regulation and its effect on the listener. In this inquiry, there is room to consider a regulation's impact on women. Therefore, adopting intermediate scrutiny as the standard of review for informed consent measures does some work toward remedying the harm done by the First Amendment framing of this issue.

CONCLUSION

In crafting the undue burden standard in *Casey*, the Supreme Court carefully weighed the rights of women and the rights of the state. The rights of physicians, however, received no such measured consideration. Reading *Casey* as exempting abortion informed consent provisions from First Amendment challenge bends reason to the breaking point. *Casey* does not foreclose these challenges, nor does it offer a precise standard with which to review them. Intermediate scrutiny is the only standard that appropriately handles the conflicting interests at the heart of abortion informed consent regulations, particularly in the era of #MeToo.

¹⁷⁸ Admittedly, many physicians are female. However, this does not negate the harm in a shift from an entirely female category—women seeking abortions—to a category that, while inclusive of women, also includes men. Moreover, the necessity of obtaining an abortion for the women seeking them makes them a particularly vulnerable group of women, a fact that does not extend to female physicians.