

CRIMINALIZING THE DOCTOR-PATIENT RELATIONSHIP: HOW ABORTION AIDING AND ABETTING LAWS VIOLATE A PHYSICIAN'S FIRST AMENDMENT RIGHTS

Abstract: The Supreme Court dismantled the right to an abortion in *Dobbs v. Jackson Women's Health Organization* by overturning *Roe v. Wade*. The holding opened the floodgates for state legislatures to pass total and near-total bans on abortion services across the United States. Included among the abortion bans passed are aiding and abetting laws that threaten to punish physicians criminally and civilly for advising pregnant individuals about abortion services. Aiding and abetting laws implicate the First Amendment because they restrict physicians from providing necessary counsel to patients about available healthcare options, both in-state and out-of-state. Denying this necessary counsel thus negatively impacts doctor-patient relationships. Before *Dobbs*, anti-abortion advocates utilized the First Amendment to slowly chip away at a woman's access to abortion services. Nonetheless, these pre-*Dobbs* practices also provide physicians with a constitutional framework to challenge aiding and abetting laws implicating their speech rights. This Note argues the Supreme Court's 2018 holding in *National Institute of Family and Life Advocates v. Becerra* requires federal courts to strike down abortion aiding and abetting laws as unconstitutional. In doing so, courts will protect the sanctity of the doctor-patient relationship and the right for physicians to be free of improper government influence when providing counsel about vital healthcare options.

INTRODUCTION

On September 6, 2021, just six days into Texas's new anti-abortion ban, known as the Heartbeat Act or S.B. 8, Dr. Alain Braid violated the law by offering a woman an abortion.¹ The woman was only in her first trimester, but

¹ TEX. HEALTH & SAFETY CODE ANN. § 171.204 (West 2021); Alan Braid, Opinion, *Why I Violated Texas's Extreme Abortion Ban*, WASH. POST (Sept. 18, 2021), <https://www.washingtonpost.com/opinions/2021/09/18/texas-abortion-provider-alan-braid/> [<https://perma.cc/C2NB-F5Y8>]. Dr. Braid has worked as a Texas OB/GYN since 1972—starting his practice one year before the Supreme Court's landmark *Roe v. Wade* decision. Braid, *supra*. His practice includes providing abortion services to patients. *Id.* Cisgender women, people who are assigned female when born, are not the only individuals who get pregnant. *What Do Transgender and Cisgender Mean?*, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/teens/all-about-sex-gender-and-gender-identity/what-do-transgender-and-cisgender-mean> [<https://perma.cc/Q6Q3-LL72>]. Transgender men and non-binary individuals may also become pregnant. AC Facci, *Why We Use Inclusive Language to Talk About Abortion*, ACLU (June 29, 2022), <https://www.aclu.org/news/reproductive-freedom/why-we-use-inclusive-language-to-talk-about-abortion> [<https://perma.cc/MS35-FWJ9>]. In this Note, for the sake of clarity, “women” refers to people with the capacity for pregnancy and their experience accessing abortion procedures. *Id.*

because of the new law, Dr. Braid could no longer perform the procedure.² Under the “heartbeat bills,” Texas women were ineligible for an abortion after doctors detected embryonic cardiac activity, typically at six weeks of pregnancy.³ Once Dr. Braid detected cardiac activity, he advised his patients to seek a legal abortion at the nearest facility: an Oklahoma clinic a nine-hour drive away.⁴ But that option is not always possible for many patients because of their lack of childcare and inability to take time off work—encouraging Dr. Braid to perform an abortion for one woman.⁵ After sharing his story, Dr. Braid became the first reported doctor since the enactment of S.B. 8 to be subject to a civil lawsuit for aiding and abetting an abortion procedure.⁶ The Texas law allows citizens to file lawsuits against doctors who assist individuals in abortion services.⁷ If the lawsuit succeeds, the court must award plaintiffs statutory damages of ten thousand dollars for every abortion aided and abetted by the de-

² Braid, *supra* note 1.

³ TEX. HEALTH & SAFETY CODE ANN. § 171.204(a); see Kaitlin Sullivan, “Heartbeat Bills”: Is There a Fetal Heartbeat at Six Weeks of Pregnancy?, NBC NEWS (Apr. 17, 2022), <https://www.nbcnews.com/health/womens-health/heartbeat-bills-called-fetal-heartbeat-six-weeks-pregnancy-rcna24435> [<https://perma.cc/U8DQ-AB2F>] (describing the misconception surrounding the development of a fetus’s heart). At about six weeks, ultrasounds detect cardiac activity, but the activity is not yet a heartbeat because the chambers of the fetus’s heart do not develop until about seventeen to twenty weeks of gestation. Sullivan, *supra*; see *Definition of Term Pregnancy*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, <https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2013/11/definition-of-term-pregnancy.pdf> [<https://perma.cc/MRU3-JVM4>] (defining the gestational age as starting on the first day of a woman’s last menstrual cycle); see also *ACOG Guide to Language and Abortion*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS (Sept. 2023), <https://www.acog.org/-/media/project/acog/acogorg/files/pdfs/publications/abortion-language-guide.pdf?la=en&hash=EDDEB0D9B24B7427A8F52378FA72E092> [<https://perma.cc/R6PQ-UAML>] (explaining that it is incorrect to describe the cardiac activity detected at six weeks as a fetal heartbeat because the heart has not yet developed into a four-chambered organ). Now, Texas bans all abortion services at any trimester unless the woman’s life is at risk. *Abortion in Texas*, ACLU TEX., <https://www.aclutx.org/en/know-your-rights/abortion-texas> [<https://perma.cc/Z3PL-WCFW>] (Aug. 29, 2022). The Texas legislature passed an abortion trigger ban after the Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization* in June 2022. See 597 U.S. 215, 231 (2022) (holding the Constitution does not protect the right to an abortion); *Abortion in Texas*, *supra* (explaining the trigger ban that went into effect following the Supreme Court’s decision to overturn *Roe v. Wade*).

⁴ See Braid, *supra* note 1 (describing one patient who had four children and was therefore unable to travel to an out-of-state abortion clinic).

⁵ See *id.* (explaining the implications for some Texas women who want to access an abortion procedure); Eleanor Klibanoff, *With the End of Roe, Texans Will Have to Travel Long Distances for Legal Abortions*, TEX. TRIB. (June 24, 2022), <https://www.texastribune.org/2022/06/23/supreme-court-abortion-roebobbs-texas/> [<https://perma.cc/785N-6DYU>] (describing that lower-income women are disproportionately impacted by abortion restrictions because of their inability to afford travel, pay for childcare, or miss work).

⁶ See Reese Oxner, *Texas Doctor Who Admitted to Violating the State’s Near-Total Abortion Ban Sued Under New Law*, TEX. TRIB. (Sept. 20, 2021), <https://www.texastribune.org/2021/09/20/texas-abortion-ban-doctor-alan-braid/> [<https://perma.cc/3NWH-T59B>] (detailing the two lawsuits filed against Dr. Braid since his newspaper op-ed).

⁷ TEX. HEALTH & SAFETY CODE ANN. § 171.208(a).

fendant.⁸ Although a Texas appellate court dismissed the lawsuit against Dr. Braid, the case demonstrates the legal consequences doctors face when counseling and treating pregnant individuals in abortion-hostile states.⁹

Abortion rights remain a highly controversial and partisan topic in the United States.¹⁰ In 1973, in *Roe v. Wade*, the U.S. Supreme Court held women have a constitutional right to abortion.¹¹ Nineteen years later, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court affirmed the right while also acknowledging the potential First Amendment implications of physician speech.¹² But the Supreme Court discarded the constitu-

⁸ *Id.* § 171.208(b)(2). Additionally, even if the defendant wins, the bill protects the plaintiff from paying the defendant's attorney's fees. *Id.* § 171.208(i); see Oxner, *supra* note 6 (describing the implications of Texas's bill in allowing any citizen to bring lawsuits against individuals who aid and abet an abortion procedure).

⁹ See *De Mino v. Gomez*, No. 04-22-00017-CV, 2022 WL 465397, at *1 (Tex. Ct. App. Feb. 16, 2022) (dismissing the case because the plaintiff failed to answer the defendant's motion to dismiss on the grounds that the plaintiff lacked standing). Abortion advocates labeled this case as a win for abortion rights because it stopped one group of citizens from filing a lawsuit simply because they were against abortion services. See Annie Gimbel, *Texas Court Dismisses Case Against Dr. Alan Braid for Violating Abortion Ban*, CBS NEWS TEX. (Dec. 9, 2022), <https://www.cbsnews.com/dfw/news/texas-court-dismisses-case-against-dr-alan-braid-violating-abortion-ban/> [<https://perma.cc/K9HB-STT8>] (interviewing abortion advocates who called the lawsuit dismissal a win against "S.B. 8's bounty-hunting scheme"); see also John Villasenor, *The First Amendment and Online Access to Information About Abortion: The Constitutional and Technological Problems with Censorship*, 20 NW. J. TECH. & INTEL. PROP. 87, 89 (2022) (describing the ambiguity the Texas law provides for individuals in determining if they could face legal consequences for aiding and abetting abortion services). Oklahoma passed a similar law in 2022 allowing civil penalties against individuals for aiding and abetting abortion procedures. Villasenor, *supra*, at 89 (citing OKLA. STAT. tit. 63, § 1-745.3–40 (2022)); see OKLA. STAT. tit. 63, § 1-745.39 (2022) (stating any person can face civil action if they knowingly aid and abet another in receiving an abortion).

¹⁰ See Joshua Prager, *The End of Roe, and How the Personal Became Political on the Supreme Court*, TIME (June 24, 2022), <https://time.com/6190861/roe-v-wade-supreme-court-politicized-abortion/> [<https://perma.cc/4DZZ-2MPL>] (describing the history of abortion in the United States and how it draws political scrutiny). See generally *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 215–417 (2022) (determining whether people have a right to an abortion).

¹¹ 410 U.S. 113, 153 (1973) (holding the Constitution guarantees a woman's right to an abortion), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022). At the time, the Court held a woman's right to an abortion was guaranteed under the Constitution's Due Process Clause in the Fourteenth Amendment. See U.S. CONST. amend. XIV (prohibiting the government from "depriv[ing] any person of life, liberty or property, without due process of law"); *Roe*, 410 U.S. at 153 (holding the right to an abortion falls under the right to privacy guaranteed under the Fourteenth Amendment). The 7-2 holding articulated that the fundamental right to privacy was broad enough to include abortion procedures. *Roe*, 410 U.S. at 154; see MARY ZIEGLER, DOLLARS FOR LIFE: THE ANTI-ABORTION MOVEMENT AND THE FALL OF THE REPUBLICAN ESTABLISHMENT 17–18 (2022) (describing the holding in *Roe*). Justice Henry Blackmun articulated in the opinion that the right to an abortion was not absolute. *Roe*, 410 U.S. at 154. States could instead regulate the procedure based on a trimester framework where the state interest would increase later into the pregnancy. *Id.* at 163. The state would have a sufficiently compelling state interest to protect the fetus when the fetus could survive outside the womb. *Id.* at 163–64.

¹² 505 U.S. 833, 846 (1992) (plurality opinion) (upholding *Roe v. Wade* and the right to an abortion), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022). The majority ex-

tional right to an abortion in June 2022 in *Dobbs v. Jackson Women's Health Organization* when it overruled *Roe* and *Casey*.¹³

The implications of the *Dobbs* holding are far-reaching and vast, with fourteen states—including Texas—imposing total bans on abortion services.¹⁴ One study analyzed pregnant women with complications at two Texas hospitals after the state passed stricter abortion laws.¹⁵ The study found the maternal morbidity rate among those women was higher than the maternal morbidity rate for women with similar complications in states without strict abortion restrictions.¹⁶ Experts now anticipate an increase in maternal mortality rates following total abortion bans and increased restrictions.¹⁷

plained that the right to an abortion not only impacted a woman's autonomy over her body, but also equality. *See id.* at 856 ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."). When addressing the petitioner's First Amendment arguments, the Court held the First Amendment was not implicated when the state compelled physicians to speak certain messages to pregnant patients. *See id.* at 884 (holding there were no constitutional violations by the state when mandating physicians to say certain information to patients before providing abortion services).

¹³ 597 U.S. at 231 (holding the U.S. Constitution does not guarantee the right to an abortion). In *Dobbs*, the majority stated that by overturning *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, abortion regulations would now return to "the people's elected representatives." *Id.* at 232. Further, the Court called the *Roe* holding "egregiously wrong" since it was first articulated and claimed the *Roe* holding only further divided the nation about abortion procedures instead of uniting it. *Id.* The three liberal justices jointly dissented and warned about future criminal laws states could enact to prevent individuals from seeking the procedure, including aiding and abetting laws. *See id.* at 361 (Breyer, J., Sotomayor, J., & Kagan, J., dissenting) (explaining how Texas has already passed a regulation encouraging individuals to turn on one another if they assist someone in receiving an abortion).

¹⁴ *United States*, CTR. FOR REPROD. SERVS., <https://reproductiverights.org/our-regions/united-states> [https://perma.cc/84AF-6P39]. This statistic represents the number of states imposing total bans as of March 2024.

¹⁵ *See* Anjali Nambiar et al., *Maternal Morbidity and Fetal Outcomes Among Pregnant Women at 22 Weeks' Gestation or Less with Complications in 2 Texas Hospitals After Legislation on Abortion*, 227 AM. J. OBSTETRICS & GYNECOLOGY 648, 648–50 (2022) (describing the study).

¹⁶ *Id.* at 649. The study analyzed twenty-eight women at a gestation period of twenty-two weeks or less who experienced pregnancy complications. *Id.* The study found 57% experienced severe maternal morbidity compared to 33% of women in states without stringent abortion restrictions. *Id.* Maternal morbidity is defined as any health issue caused by pregnancy that adversely impacts a woman's health. *What Are Maternal Morbidity and Mortality?*, NAT'L INST. OF HEALTH, <https://orwh.od.nih.gov/mmm-portal/what-mmm> [https://perma.cc/3XZS-2EC3].

¹⁷ *See* Eugene Declercq, Ruby Barnard-Mayers, Laurie C. Zephyrin & Kay Johnson, *The U.S. Maternal Health Divide: The Limited Maternal Health Services and Worse Outcomes of States Proposing New Abortion Restrictions*, COMMONWEALTH FUND (Dec. 14, 2022), <https://www.commonwealthfund.org/publications/issue-briefs/2022/dec/us-maternal-health-divide-limited-services-worse-outcomes> [https://perma.cc/6NFS-QZVT] (finding states with abortion restrictions experienced 28.8 maternal deaths per every 100,000 pregnant women compared to 17.8 maternal deaths per 100,000 pregnant women in states with abortion access in 2020). Not only did the maternal mortality rate increase in abortion-restrictive states, but the study also found a decrease in maternity care resources. *Id.* The study anticipated the maternal mortality rate would further increase after states enacted total abortion bans. *Id.*

Access to abortion services is not the only right implicated by the Court's decision to overturn *Roe*.¹⁸ State abortion regulations incorporating aiding and abetting laws implicate First Amendment speech, both for physicians and other individuals.¹⁹ Although the lawsuit against Dr. Braid extended beyond providing abortion counsel to performing the procedure, which falls outside First Amendment speech protection, doctors cite concerns about these laws affecting their right to advise patients.²⁰ Ambiguous laws make it uncertain if doctors will face legal consequences for counseling patients about abortion options, including legal abortion services available in other states.²¹ One doctor expressed that abortion-restrictive regulations keep them "awake at night" because the laws impede their ability to hold conversations with patients rooted in health-based facts, as those conversations could violate a law.²² In response to Texas's abortion aiding and abetting law, state providers filed a lawsuit against state officials arguing the restriction chilled their First Amendment rights to communicate with patients.²³

¹⁸ See *Dobbs*, 597 U.S. at 231 (holding there is no constitutional right to an abortion under the Due Process Clause); see also Yascha Mounk, *Why Freedom of Speech Is the Next Abortion Fight*, ATL. (Aug. 22, 2022), <https://www.theatlantic.com/ideas/archive/2022/08/freedom-speech-mississippi-abortion-rights/671202/> [<https://perma.cc/7G6E-P2Q4>] (describing how anti-abortion legislation infringes on an individual's First Amendment rights).

¹⁹ See Mounk, *supra* note 18 (explaining the First Amendment challenges that will come after the Supreme Court overruled *Roe v. Wade*).

²⁰ See *De Mino v. Gomez*, No. 04-22-00017-CV, 2022 WL 465397, at *1 (Tex. Ct. App. Feb. 16, 2022) (describing the lawsuit filed against Dr. Braid for performing abortion services on a patient); Whitney Arey et al., *A Preview of the Dangerous Future of Abortion Bans—Texas Senate Bill 8*, 387 NEW ENG. J. MED. 388, 388–89 (2022), <https://www.nejm.org/doi/full/10.1056/NEJMp2207423> [<https://perma.cc/7JAM-9YN6>] (reporting how some Texas physicians no longer provide abortion counseling about certain pregnancy risks or out-of-state options for fear they could face lawsuits for aiding and abetting the patient).

²¹ See Arey et al., *supra* note 20 (stating doctors worry they might face legal consequences if they counsel women about abortion procedures). This counseling could include doctors informing women of pregnancy complications that might encourage an abortion, discussing abortion options available in other states, and referring patients to out-of-state abortion providers. *Id.*; see Braid, *supra* note 1 (describing how Dr. Braid has counseled women to seek abortion services in states where the procedure remains legal, despite the potential legal consequences).

²² Michelle Oberman & Lisa Soleymani Lehmann, *Doctors' Duty to Provide Abortion Information*, 10 J.L. & BIOSCIENCES 1, 5 (2023) ("[A]s it stands, it gives me some comfort [if] I can tell a patient, at least like, here are the places you can go to get this done. But what I worry about is the inability to even offer that to a patient and to say, like, 'Your baby has a lethal anomaly, sorry.' And that'd be the end of the conversation. That really keeps me up at night.").

²³ *In re Paxton*, No. 22-50882, 2023 WL 1990153, at *1 (5th Cir. Feb. 14, 2023). The plaintiffs sued Attorney General Ken Paxton and other state officials for the anticipated enforcement of Texas's abortion law. *Id.* Specifically, the plaintiffs argued any action taken against them for patients' conduct outside Texas implicated the First Amendment. *Id.* The case is ongoing, but the Fifth Circuit held Attorney General Paxton was not required to testify. See *id.* at *2 (stating the district court abused its power in holding Attorney General Paxton must testify).

Texas, however, is not the lone state targeting physician speech rights.²⁴ Idaho passed a total abortion ban mirroring Texas's own abortion law, and it has already hindered doctors' speech rights when counseling patients about abortion procedures.²⁵ Jennifer Adkins was twelve-weeks pregnant when she went to her doctor for a routine ultrasound appointment.²⁶ During the appointment, her doctor discovered problems with the fetus that significantly decreased its viability.²⁷ Doctors informed Adkins that, given the fetal problems, the fetus would not survive the birth.²⁸ Further, doctors warned Adkins that continuing the pregnancy would increase her chances of developing a health condition that could result in maternal death or other severe complications.²⁹ Despite the dire outcomes to both Adkins and the fetus if the pregnancy continued to term, doctors feared performing an abortion or referring Adkins to out-of-state abortion clinics because of the state's strict abortion ban—thus leaving the patient to navigate her healthcare decisions on her own.³⁰ Adkins's doctors were not wrong in their concerns, though.³¹ In March 2023, Idaho Attorney General Raul Labrador issued a public letter stating that state doctors could face legal consequences if they so much as referred or counseled patients to seek out-of-state abortion services.³² Planned Parenthood and state doctors

²⁴ See, e.g., OKLA. STAT. tit. 64, § 1-745.39 (2022) (stating an individual or entity could face civil action if found aiding and abetting an individual in accessing an abortion).

²⁵ See IDAHO CODE § 18-622 (2023) (criminalizing abortion procedures at all stages of an individual's pregnancy unless doctors determine a medical emergency exists); Abigail Abrams, *What Idaho's Texas-Style Abortion Ban Means for the Rest of the Country*, TIME (Mar. 15, 2022), <https://time.com/6157455/idaho-abortion-ban-texas-impact/> [<https://perma.cc/5KTK-HHCQ>] (highlighting how Idaho's abortion ban matches what Texas passed in allowing citizens to file civil lawsuits against others); Nadine El-Bawab, *Women, Doctors Announce Legal Action Against Abortion Bans in 3 States*, ABC NEWS (Sept. 12, 2023), <https://abcnews.go.com/US/women-doctors-announce-legal-action-abortion-bans-3/story?id=103055654> [<https://perma.cc/QMT9-XM93>] (describing the speech implications of Idaho's abortion ban).

²⁶ El-Bawab, *supra* note 25.

²⁷ *Id.* Problems included the likelihood the fetus had cystic hygroma, which causes benign tumors along the fetus's neck. *Id.*; see *Cystic Hygroma*, CLEV. CLINIC (Mar. 15, 2022), <https://my.clevelandclinic.org/health/diseases/22492-cystic-hygroma> [<https://perma.cc/V8M5-QPWE>] (describing the condition as "life-threatening" and capable of leading to "miscarriage or still birth").

²⁸ El-Bawab, *supra* note 25.

²⁹ *Id.* Doctors were concerned Adkins could develop Mirror syndrome—a condition where the woman develops symptoms that mirror the fetus, such as edema. *Id.*; Tyra Jones & Susan R. Miesnik, *Mirror Syndrome: A Rare, Potentially Life-Threatening Obstetric Complication*, 44 J. OBSTETRIC, GYNECOLOGIC & NEONATAL NURSING (SUPPLEMENT 1) S85, S85 (2015) (describing the rare condition).

³⁰ El-Bawab, *supra* note 25.

³¹ See Devan Cole, *Idaho AG Rescinds Legal Opinion That Said Health Care Providers Can't Make Out-of-state Abortion Referrals*, CNN (Apr. 7, 2023), <https://www.cnn.com/2023/04/07/politics/idaho-abortion-referrals-guidance-rescinded/index.html> [<https://perma.cc/BUW2-GWCM>] (describing how the Idaho attorney general announced that doctors could face legal consequences if they counsel about or refer patients to out-of-state abortion procedures).

³² *Id.* The AG later rescinded the letter after public scrutiny and claimed that the letter's contents were "mischaracterized as law enforcement guidance." *Id.*

have since challenged the constitutionality of the attorney general's interpretation of the state's abortion ban by arguing that it violated physicians' First Amendment rights, among other legal challenges.³³ A federal judge agreed, emphasizing that the attorney general's interpretation of Idaho's abortion ban would likely impermissibly restrict physician speech when giving patients information about out-of-state abortion services.³⁴

Then, in Mississippi, the state attorney general subpoenaed a healthcare nonprofit for placing billboards with information about abortion access.³⁵ Also, nationwide, the National Right to Life Committee proposed a model aiding and abetting law states could pass criminalizing speech that encourages or facilitates an individual's ability to seek abortion services.³⁶ Experts anticipate First Amendment challenges will only grow as more states pass abortion laws implicating speech rights.³⁷

The Supreme Court has expanded First Amendment speech rights when government regulations compel individuals to speak or not speak.³⁸ Nonetheless, lower courts remain divided on what level of scrutiny to apply to cases where the regulation targets physician speech, specifically for politically charged topics like abortion, medical marijuana, gun rights, and conversion

³³ *Planned Parenthood Greater Nw. v. Labrador*, No. 23-cv-00142, 2023 WL 4864962, at *14 (D. Idaho July 31, 2023).

³⁴ *See id.* at *19, *22–23 (holding that the plaintiffs would likely succeed in their First Amendment claims and thus blocking the enforcement of the attorney general's letter).

³⁵ *See* Mounk, *supra* note 18 (reporting on the current First Amendment legal battle between the abortion nonprofit and Mississippi state officials). The article notes the nonprofit at issue is not promoting illegal drugs or procedures through its advertisements, but rather providing information. *Id.* Yet, the state attorney general has attempted to chill speech and remove the advertisements. *Id.*

³⁶ *See* E-mail from James Bopp, Jr., Gen. Coun., Nat'l Right to Life Comm., Courtney Turner Milbank & Joseph Maughon, to Nat'l Right to Life Comm. & Whom It May Concern (July 4, 2022), <https://www.nrlc.org/wp-content/uploads/NRLC-Post-Roe-Model-Abortion-Law-Version-2-1.pdf> [<https://perma.cc/3WKH-US6J>] [hereinafter *NRLC Post-Roe Model Abortion Law*] (describing its proposed model law that would give state officials broad enforcement powers for aiding and abetting laws addressing both abortion speech and services); *see also* Mounk, *supra* note 18 (explaining the implications this model law could have in stifling a variety of speech, including news reports). The National Right to Life Committee (NRLC) is known as one of the major anti-abortion groups that has successfully circulated and passed abortion-restrictive state legislation. *See* Kavitha Surana, *Some Republicans Were Willing to Compromise on Abortion Ban Exceptions. Activists Made Sure They Didn't*, *PROPUBLICA* (Nov. 27, 2023), <https://www.propublica.org/article/abortion-ban-exceptions-trigger-laws-health-risks> [<https://perma.cc/XP22-JKVY>] (describing the NRLC's influence on anti-abortion legislation).

³⁷ *See, e.g.*, Mounk, *supra* note 18 (describing the First Amendment regulations that might arise as abortion-hostile states further limit abortion access); *see also* Wynter K. Miller & Benjamin E. Berkman, *The Future of Physicians' First Amendment Freedom: Professional Speech in an Era of Radically Expanded Prenatal Genetic Testing*, 76 *WASH. & LEE L. REV.* 577, 646 (2019) (anticipating how abortion-hostile state legislatures will likely pass stricter regulations hindering abortion speech).

³⁸ *See, e.g.*, *Nat'l Inst. of Fam. & Life Advocs. v. Becerra (NIFLA)*, 588 U.S. 755, 778–79 (2018) (holding the government impacted physician speech rights compelling doctors to speak).

therapy.³⁹ But the Supreme Court's decision in *National Institute of Family and Life Advocates v. Becerra* (*NIFLA*) offers a framework abortion advocates should utilize to defend physician speech rights against abortion aiding and abetting laws.⁴⁰

This Note argues that following the Court's *NIFLA* holding, judges should find that abortion aiding and abetting laws unconstitutionally implicate physician speech rights.⁴¹ Part I provides an overview of the First Amendment speech doctrine as it pertains to physician-compelled speech, including the Court's *NIFLA* holding.⁴² Part II analyzes recent federal court decisions and the standard of scrutiny applied to physician speech that has resulted in circuit splits.⁴³ Finally, Part III argues abortion aiding and abetting laws are content- and viewpoint-based restrictions that unconstitutionally gag physician speech, requiring courts to apply heightened judicial scrutiny and strike down the speech-restricting regulations.⁴⁴

I. EVOLUTION OF A PHYSICIAN'S RIGHT TO SPEAK (AND NOT SPEAK)

Most state legislatures criminalize individuals for assisting another in the commission of a crime—otherwise known as aiding and abetting laws.⁴⁵ Although these laws typically target conduct, they can also criminalize an individual's speech when providing information about how to commit a crime.⁴⁶ In Texas, the state legislature passed an aiding and abetting law focused on those who assist someone's abortion access.⁴⁷ But scholars warn that officials in oth-

³⁹ Compare *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576, 580 (5th Cir. 2012) (applying rational basis review to a government regulation that requires physicians to act and speak in a way they might otherwise not), with *Stuart v. Camnitz*, 774 F.3d 238, 248–49 (4th Cir. 2014) (applying intermediate scrutiny when striking down a government abortion regulation that unconstitutionally compelled physicians to speak).

⁴⁰ See *NIFLA*, 588 U.S. at 768 (describing the test courts should apply when analyzing regulations compelling doctors to speak or not speak).

⁴¹ See *infra* notes 251–263 and accompanying text.

⁴² See *infra* notes 45–154 and accompanying text.

⁴³ See *infra* notes 155–213 and accompanying text.

⁴⁴ See *infra* notes 214–263 and accompanying text.

⁴⁵ See, e.g., TEX. PENAL CODE ANN. § 7.02(a)(2) (West 2023) (criminalizing an individual assisting another in committing a crime); see also *Aid and Abet*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining the act as an individual who “assist[s] or facilitates[s] the commission of a crime”).

⁴⁶ See TEX. PENAL CODE ANN. § 7.02(a)(2) (articulating that encouraging another to engage in criminal conduct qualifies as aiding in committing a crime); Michele Goodwin & Mary Ziegler, Opinion, *The Next Anti-Abortion Tactic: Attacking the Spread of Information*, N.Y. TIMES (Dec. 3, 2022), <https://www.nytimes.com/2022/12/03/opinion/abortion-first-amendment-free-speech.html> [<https://perma.cc/ZE9N-RVVY>] (referencing how aiding and abetting laws implicate an individual's speech as it relates to assisting another in committing a crime); Villasenor, *supra* note 9, at 89 n.9 (explaining how some states passed broader aiding and abetting laws targeting individuals who “encourage[d]” or “induce[d]” another to commit the act).

⁴⁷ See TEX. HEALTH & SAFETY CODE ANN. § 171.208(a) (West 2021) (allowing individuals to file lawsuits against another for aiding and abetting abortion procedures).

er abortion-hostile states could enforce a state's *regular* aiding and abetting laws against those who assist with abortion access.⁴⁸

To comprehend the speech implications of abortion aiding and abetting laws, first one must understand how the First Amendment jurisprudence developed for government regulations compelling individuals to speak or not speak.⁴⁹ Section A of this Part discusses what speech the First Amendment protects and the applicable levels of judicial scrutiny.⁵⁰ Section B articulates the compelled speech doctrine and how government regulations implicate speech.⁵¹ Section C then analyzes professional speech as it relates to the compelled speech doctrine and the Supreme Court's expansion of professional speech rights.⁵²

A. The First Amendment: Who Can Speak and When

Under the First Amendment, an individual has the constitutional right to speak freely without the risk of government punishment.⁵³ When government officials restrict that right and punish an individual for their speech, then the regulation triggers constitutional scrutiny.⁵⁴ First, when analyzing free speech constitutional claims, the Supreme Court must determine if the burdened act in question is expressive or non-expressive conduct.⁵⁵ The Court finds expressive conduct—written, oral, or nonverbal—at issue when the speaker intended to articulate a specific message and the message was one those listening would understand.⁵⁶ If the Court does not find expressive conduct, it then bypasses

⁴⁸ See Goodwin & Ziegler, *supra* note 46 (describing how state officials might use aiding and abetting laws to enforce criminal and civil penalties against those who assist with abortions).

⁴⁹ See U.S. CONST. amend. I (prohibiting government officials from criminalizing an individual's speech); B. Jessie Hill, *Look Who's Talking: Conscience, Complicity, and Compelled Speech*, 97 IND. L.J. 913, 914 (2022) (describing the compelled speech doctrine as prohibiting government officials from forcing another to speak a particular message they would otherwise not speak, if not for the regulation).

⁵⁰ See *infra* notes 53–75 and accompanying text.

⁵¹ See *infra* notes 76–97 and accompanying text.

⁵² See *infra* notes 98–154 and accompanying text.

⁵³ U.S. CONST. amend. I.

⁵⁴ See, e.g., *Texas v. Johnson*, 491 U.S. 397, 399–400, 412 (1989) (describing a government regulation that punished individuals if they burned American flags and thus triggered constitutional scrutiny).

⁵⁵ See *id.* at 403 (articulating the test courts must first apply to determine if the regulation burdens expressive conduct or not).

⁵⁶ *Id.* at 404 (quoting *Spence v. Washington*, 418 U.S. 405, 410–11 (1974)). In *Texas v. Johnson*, the conduct at issue was an individual's right to burn American flags as self-expression. *Id.* at 402–03. The Supreme Court stated the First Amendment does not only cover oral or written speech, meaning conduct like burning a flag to protest the country could draw constitutional protections. *Id.* at 404 (citing *Spence*, 418 U.S. at 409). Based on the facts of the case, the Court held the conduct was expressive and burdened by the regulation. See *id.* at 406 (holding the conduct featured elements parallel to what the First Amendment protects).

the rest of the constitutional analysis because non-expressive conduct does not receive First Amendment protection.⁵⁷

Once the Court determines expressive conduct is at issue, the analysis then turns to whether the government regulation restricting speech is facially content neutral or not.⁵⁸ Content-based distinctions involve speech restrictions targeting a particular topic or message an individual wishes to express.⁵⁹ When found, these content-based regulations typically draw strict scrutiny by the Court—the uppermost level of judicial scrutiny applied to determine if a regulation is unconstitutional.⁶⁰ The government must prove it has a compelling interest and the regulation is narrowly tailored to withstand strict scrutiny.⁶¹ But, given the high burden this scrutiny places on the government, courts most often will strike down the regulation as unconstitutional.⁶²

Nonetheless, the First Amendment right to speech is not infinite, and the Supreme Court articulated several tests for unprotected or less protected

⁵⁷ See, e.g., *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 66–68 (2006) (holding a law school's recruiting services lacked the expressive qualities to implicate the First Amendment). The regulation at issue in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* required school campuses to grant access to military recruiters or forfeit federal funding. *Id.* at 55. Petitioners argued the law unconstitutionally implicated schools' speech rights by requiring the schools to allow recruiters on campus. *Id.* at 64–65. But the Supreme Court said expressive conduct was not at issue because the regulation did not implicate the content of the schools' recruitment services, just what groups the school must include. *Id.*

⁵⁸ See *Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015) (citing *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 563–64 (2011)) (articulating the test for determining whether a statute is content neutral on its face). The expressive conduct at issue was a town's sign ordinance restricting the size of the sign depending on the type of content. *Id.* at 159–60. Ideological and political signs received stricter size and placement requirements than other signs. *Id.*

⁵⁹ See *id.* at 163–64 (describing how courts can determine whether the regulation has content-based distinctions or not). The Supreme Court explained not all content-based distinctions are apparent on the regulation's face, but some are obvious to courts. *Id.* The Court said the sign ordinance at issue in *Reed v. Town of Gilbert* was not content-neutral because it placed different requirements for types of signs based on what the sign was communicating. See *id.* at 164 (holding the sign requirements focused solely on the content the signs communicated).

⁶⁰ See *id.* at 164 (stating courts must apply strict scrutiny to content-based regulations); see also *Miller & Berkman*, *supra* note 37, at 608 (articulating strict scrutiny as “high-value core speech” receiving the highest level of scrutiny by the court). In *Reed*, the Court said the sign ordinance was content based, meaning the government had to provide a compelling interest for the ordinance that was narrowly tailored to satisfy strict scrutiny. 576 U.S. at 171. There, the Court held the government failed to articulate compelling reasons for why the content-based distinctions were necessary. See *id.* (stating aesthetics and preventing traffic issues were not compelling issues sufficient to survive strict scrutiny).

⁶¹ See *Reed*, 576 U.S. at 171 (detailing the strict scrutiny test the Court must apply because the government regulation was content based). In this case, the government failed to prove the regulation served a compelling government interest and was narrowly tailored, which meant the regulation was unconstitutional. *Id.* at 172.

⁶² See, e.g., *id.* at 172 (holding the content-based restriction drew strict scrutiny and was unconstitutional because it was not narrowly tailored); *United States v. Stevens*, 559 U.S. 460, 481–82 (2010) (holding an animal cruelty statute targeting speech failed strict scrutiny because the statute was overly broad).

speech that does not draw strict scrutiny.⁶³ For example, incitements, fighting words, “true threats,” obscenity, and profanity all receive less protection under the First Amendment.⁶⁴ In this vein, child pornography-related speech draws rational basis review that requires the government only demonstrate a legitimate justification that is rationally related to the regulation at issue.⁶⁵ Rational basis review falls at the opposite end of the scrutiny spectrum when analyzing regulations that burden speech, with the Court often deferring to the government and upholding the regulation.⁶⁶

⁶³ See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring) (articulating “core political speech” as the “most protected” whereas “obscenity and fighting words receive the least protection”).

⁶⁴ See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (incitements); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (fighting words); *Virginia v. Black*, 538 U.S. 343, 359–60 (2003) (true threats); *Miller v. California*, 413 U.S. 15, 24 (1973) (obscenity); *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 747–48 (1978) (profanity). In 1969, in *Brandenburg v. Ohio*, the Court held the government could not restrict violent speech unless the speech intended to yield “imminent lawless action” from the listeners. 395 U.S. at 447. If such intent was found, then the speech would receive no First Amendment protection. See *id.* at 448 (articulating the test where incitements received no First Amendment protection). The *Brandenburg* test is one of the most expansive protections of speech because of the high bar it requires to show an individual not only intended for their speech to produce lawless action, but then the action imminently happened. See *Hess v. Indiana*, 414 U.S. 105, 108–09 (1973) (holding the government failed to demonstrate an individual’s words to a crowd went beyond mere advocacy to incite lawless action); see also *Miller & Berkman*, *supra* note 37, at 605 n.155 (describing the *Brandenburg* test as the strongest test articulated by the Supreme Court when protecting an individual’s freedom of speech). In 1942, in *Chaplinsky v. New Hampshire*, the Court first articulated the fighting words doctrine. See 315 U.S. at 572 (articulating categories of speech receiving less protection, including fighting words). There, the Court stated certain speech was unprotected by the First Amendment when aimed at an individual, and “men of common intelligence” would find the words would provoke the individual to fight. *Id.* at 573. In 2003, in *Virginia v. Black*, the Court held cross burning constituted a “true threat” because it intended to strike fear of harm or death in the receiver of that message. See 538 U.S. at 363 (labeling the speech regulation as permissible under the First Amendment). The regulation prohibited this type of expressive conduct; thus, it did not implicate the First Amendment because it only targeted “true threats.” *Id.* In 1973, in *Miller v. California*, the issue was whether the distribution of advertisements of adult material books in the mail constituted obscene speech and thus received no First Amendment protection. 413 U.S. at 16–18. The Court held sexually explicit words or images that are depicted offensively, appeal to the “prurient interest,” and lack value will receive no First Amendment protection. See *id.* at 24 (articulating the obscenity test to determine if certain speech receives First Amendment protection). Profanity, depending on the context, also does not receive First Amendment protection according to the Court’s holding in 1978 in *F.C.C. v. Pacifica Foundation*. See 438 U.S. at 746–48 (stating certain speech is not entitled to First Amendment protection in every situation). The speech at issue was a comedy monologue played on the radio calling out seven profane words. *Id.* at 729–30. The Court held some speech would receive less First Amendment protection depending on factors like what medium the speech appears in and if it is accessible to children. See *id.* at 747–50 (describing the speech at issue as “vulgar, offensive, and shocking”). The Court emphasized that this holding was narrow and would not apply to the rogue profane utterance. *Id.* at 750.

⁶⁵ See *New York v. Ferber*, 458 U.S. 747, 758 (1982) (holding the Court will defer to the government’s judgment in passing child pornography regulations).

⁶⁶ See Maia Dunlap, *Challenging Abortion Informed Consent Regulations Through the First Amendment: The Case for Protecting Physicians’ Speech*, 2019 U. CHI. LEGAL F. 443, 462 (describ-

As First Amendment jurisprudence has developed, so too has another standard of review the Court uses when analyzing speech.⁶⁷ Intermediate scrutiny works as a “middle-tier” test between rational basis review and strict scrutiny for speech receiving some First Amendment protection, but not enough protection that core First Amendment speech warrants.⁶⁸ Commercial speech, content-neutral government regulations, and “time, place, or manner” restrictions all draw intermediate scrutiny.⁶⁹ Although the constitutional outcomes of rational basis review and strict scrutiny are easy to anticipate, intermediate scrutiny invites a spectrum of results from courts.⁷⁰

What further complicates the First Amendment jurisprudence is that not every category of speech draws a clear-cut distinction of which judicial scrutiny test applies.⁷¹ For example, in 1988, in *Riley v. National Federation of the Blind of North Carolina*, the Supreme Court stated that government-compelled speech

ing how courts take a deferential approach to government officials once rational basis review is applied to a regulation).

⁶⁷ See Miller & Berkman, *supra* note 37, at 610–11 (describing the development of intermediate scrutiny as a test situated between strict scrutiny and rational basis review).

⁶⁸ *Id.* Courts utilize First Amendment theories, such as the marketplace of ideas, public discourse, and autonomy theories, to determine how to interpret the First Amendment and what types of speech are at the core of constitutional protections. See David S. Ardia, *Beyond the Marketplace of Ideas: Bridging Theory and Doctrine to Promote Self-Governance*, 16 HARV. L. & POL'Y REV. 275, 280–82 (2022) (describing three theories and how they apply to the First Amendment).

⁶⁹ See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 568–71 (1980) (articulating a test for commercial speech to determine whether the regulation violates the First Amendment); *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (applying an intermediate scrutiny test to a content-neutral government regulation implicating an individual's free speech rights); *Ward v. Rock Against Racism*, 491 U.S. 781, 798–99 (1989) (holding the regulation did not violate the First Amendment when applying intermediate scrutiny because it only restricted the time, place, and manner of where the speech could occur, not the content). The speech at issue in *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York* was a government regulation restricting utility companies from advertising their energy rates. 447 U.S. at 559–60. Under the *Central Hudson* test, courts must resolve whether there is a substantial (not compelling) government interest “no more extensive than necessary” when regulating commercial speech. *Id.* at 568–70. In 1968, in *United States v. O'Brien*, the Court considered what level of scrutiny should apply to a regulation prohibiting an individual from burning their draft card. 391 U.S. at 369. The *O'Brien* test determined intermediate scrutiny was applicable because the regulation was content-neutral, so the government had to show it had an important interest “no greater than essential.” *Id.* at 377, 382. In 1989, in *Ward v. Rock Against Racism*, the Court addressed whether a noise ordinance at New York's Central Park impacted individuals' speech rights. 491 U.S. at 784–85. The *Ward* test articulated that “time, place, or manner” restrictions are constitutional when they are “narrowly tailored to serve a significant government interest” and leave open “ample alternative channels for communication.” *Id.* at 791.

⁷⁰ See J. Aidan Lang, Note, *The Right to Remain Silent: Abortion and Compelled Physician Speech*, 62 B.C. L. REV. 2091, 2102 (2021) (describing rational basis review and strict scrutiny applications as more “predictable” compared to intermediate scrutiny).

⁷¹ Compare *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795–96 (1988) (holding content-based restrictions where an individual is compelled to speak a message draws a strict scrutiny analysis by the court), with *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion) (holding the government's compelled speech regulations regarding abortion did not draw strict scrutiny), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

regulations must trigger strict scrutiny because the restrictions were inherently content based.⁷² Yet, in a different case, the Court upheld government-compelled speech regulations without applying strict scrutiny, despite those regulations also including content-based restrictions.⁷³ Similarly, professional speech, such as physician speech, draws a spectrum of judicial scrutiny tests.⁷⁴ Nevertheless, the Supreme Court has declined to explicitly categorize government-compelled speech that implicates physicians, leading to a split among circuit courts.⁷⁵

B. Compelled Speech and Gag Laws

The First Amendment not only protects the freedom to speak but also the freedom from being compelled to speak.⁷⁶ In 1943, in *West Virginia State Board of Education v. Barnette*, the Supreme Court first articulated the compelled speech doctrine when public school students faced expulsion if they failed to stand and salute the American flag.⁷⁷ There, the Court held the First Amendment prohibited government officials from compelling individuals to speak an ideological government message.⁷⁸

Ideological compelled government speech is one of the more easily discernable areas of the compelled speech doctrine because the regulation involves aspects like one's religion or political beliefs.⁷⁹ But, like many areas of First Amendment jurisprudence, gray areas exist for what the Court categorizes

⁷² See 487 U.S. at 795 (stating a regulation requiring an individual to say what they would otherwise not say alters the content, thus making it a content-based restriction).

⁷³ See, e.g., *Casey*, 505 U.S. at 884 (declining to apply a First Amendment analysis to the government's compelled speech regulation because the Court held physician speech rights were not implicated, despite the government requiring doctors to speak a particular message).

⁷⁴ See *Nat'l Inst. of Fam. & Life Advoc. v. Becerra (NIFLA)*, 585 U.S. 755, 766 (2018) (indicating certain professional speech should draw strict scrutiny); *Zauderer v. Off. of Disciplinary Couns. of the Sup. Ct. of Ohio*, 471 U.S. 626, 637–38, 641 (1985) (applying intermediate scrutiny when articulating how a lawyer's commercial speech received First Amendment protection so long as the speech was truthful and non-misleading). But see *Casey*, 505 U.S. at 883 (upholding the government's compelled speech regulation against doctors because it served a "legitimate" government interest—a lower standard than strict scrutiny).

⁷⁵ Compare *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 575–76, 580 (5th Cir. 2012) (holding a government regulation compelling a physician to act and speak in a way they otherwise might not draws rational basis review), with *Stuart v. Camnitz*, 774 F.3d 238, 248–49 (4th Cir. 2014) (applying intermediate—not strict—scrutiny when striking down a government abortion regulation that unconstitutionally compelled physicians to speak).

⁷⁶ *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (articulating that the First Amendment protects individuals who "refrain from speaking").

⁷⁷ 319 U.S. 624, 626 (1943).

⁷⁸ See *id.* at 642 (emphasizing that no government official can determine "what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein").

⁷⁹ See *id.* (defining ideological compelled speech as "what shall be orthodox in politics, nationalism, religion, or other matters of opinion").

as ideological speech that triggers strict scrutiny.⁸⁰ For example, abortion has become a politicized topic that elicits strong opinions across the aisle.⁸¹ Yet, the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* upheld government regulations compelling physicians to speak ideological abortion-related warnings—no matter if healthcare providers agreed with the warnings or not.⁸² Scholars argue this form of compelled speech goes beyond content discrimination to viewpoint discrimination by requiring physicians to adopt an opposite point of view to their healthcare practices and beliefs, prompting a strict scrutiny analysis.⁸³ But the Court has shown no inclination to extend ideological compelled speech beyond the scope of its *Barnette* holding.⁸⁴

Besides purely ideological speech, the Court expanded the compelled speech doctrine to include several other categories for when the government can or cannot force an individual to speak.⁸⁵ One category relating to government interference of physician speech is when regulations compel doctors (and other professionals) to divulge truthful and accurate information to patients about commercial services or products.⁸⁶ In 1985, in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, the Court first addressed this compelled speech category when analyzing lawyers' speech rights, particularly

⁸⁰ See Alan K. Chen, *Compelled Speech and the Regulatory State*, 97 IND. L.J. 881, 887 (2022) (discussing the disagreements between legal scholars about what courts might consider as ideological compelled speech depending on the interests involved).

⁸¹ See Cassandra Burke Robertson & Sharona Hoffman, *Professional Speech at Scale*, 55 U.C. DAVIS L. REV. 2063, 2089–90 (2022) (describing the political environment of abortions and how state courts choose to interpret government regulations related to abortion services).

⁸² See 505 U.S. 833, 884 (1992) (plurality opinion) (ignoring the First Amendment implications with the compelled government speech regulation and instead holding physician speech rights were not violated); see also Sarah Kramer, *Not Your Mouthpiece: Abortion, Ideology, and Compelled Speech in Physician-Patient Relationships*, 21 U. PA. J.L. & SOC. CHANGE 1, 21–22 (2018) (describing the ideological compelled speech implications of Pennsylvania's abortion provisions the Supreme Court ignored in its holding).

⁸³ See *Barnette*, 319 U.S. at 642 (articulating the test for compelled speech); Chen, *supra* note 80, at 887 (describing the viewpoint discrimination problem some compelled speech regulations create for individuals who are forced to speak government messages). Viewpoint discrimination goes beyond content discrimination because it targets a specific viewpoint on a topic. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (describing the test for deciding whether a regulation is viewpoint biased). The Court labels viewpoint discrimination as an "egregious" category of speech restrictions, thus triggering a strict scrutiny analysis. *Id.*

⁸⁴ See Chen, *supra* note 80, at 885–86 (explaining how courts barely use the pure ideological compelled speech framework, which has only appeared in two Supreme Court cases).

⁸⁵ See *id.* (stating the different theories of the compelled speech doctrine).

⁸⁶ See *id.* at 886 (citing Nat'l Inst. of Fam. & Life Advoc. v. Becerra (*NIFLA*), 585 U.S. 755 (2018); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988); *Zauderer v. Off. of Disciplinary Couns. of the Sup. Ct. of Ohio*, 471 U.S. 626 (1985)) (describing how the compelled speech theory applies to physician speech). The other categories of compelled speech include when the government compels individuals or companies to allow other speakers on their property, and laws requiring individuals or groups to associate with others they would otherwise not. *Id.*

in relation to service advertisements.⁸⁷ There, the Court upheld a state law mandating lawyers advertise only “purely factual and uncontroversial information” about their services.⁸⁸ Because the Court characterized the service advertisements as commercial speech, the speech received less First Amendment protection and strict scrutiny did not apply.⁸⁹

Ambiguity in the compelled speech doctrine has worked in anti-abortion advocates’ favor, as state legislatures utilized the doctrine to chip away at abortion rights for individuals.⁹⁰ These restrictions come in the form of laws mandating narrative ultrasounds, abortion reversal advisements, and mental health risk disclosures, to name a few—none of which the Supreme Court has addressed.⁹¹

⁸⁷ 471 U.S. at 651.

⁸⁸ *See id.* (holding the government’s compelled speech regulation was constitutional in requiring the professional to provide only “purely factual and uncontroversial information”).

⁸⁹ *See id.* (emphasizing the Court would only allow government disclosure regulations on professional commercial speech if the regulation was “reasonably related” to the government interest). The commercial speech test only applied to lawyers promoting their services through advertisements and other means, not attorney-client communications when providing counsel to clients, which would fall into a different category of speech. *See id.* (articulating that the test is to protect consumers from hearing false or deceptive advertisements about commercial services available).

⁹⁰ *See, e.g.,* TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(4) (West 2021) (mandating Texas physicians perform a sonogram and explain the results to the patient before providing an abortion); OKLA. STAT. tit. 63, § 1-756(B)(1) (2019) (instructing Oklahoma physicians to inform patients there are drugs available that might reverse an abortion procedure if the woman chooses); S.D. CODIFIED LAWS § 34-23A-10.1(1)(e) (2021) (requiring South Dakota physicians to inform patients about potential depression or suicide risks before performing an abortion procedure).

⁹¹ *See* Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 580 (5th Cir. 2012) (holding the state’s compelled speech requirements on abortion were constitutional under the First Amendment); Planned Parenthood Minn., N.D., S.D. v. Rounds, 686 F.3d 889, 905–06 (8th Cir. 2012) (holding regulations compelling physicians to tell patients that abortion procedures could increase suicide risk did not violate the physicians’ First Amendment rights); Robertson & Hoffman, *supra* note 81, at 2089–90 (citing state codes compelling physicians to tell pregnant women they can reverse a medicated abortion after taking a medication); *see also* Abigail Tobin, Note, *Mandatory Narrated Ultrasounds: A First Amendment Perspective on Abortion Regulations*, 90 FORDHAM L. REV. 1853, 1869–70 (2022) (describing how courts must reconcile the difference between *Planned Parenthood of Southeastern Pennsylvania v. Casey* with *National Institute of Family and Life Advocates v. Becerra*—the only two cases in the Court’s recent history to address physician compelled speech rights). In 2012, in *Texas Medical Providers Performing Abortion Services v. Lakey*, the Fifth Circuit analyzed Texas law H.B. 15 that required physicians to perform a sonogram and fetal heart rate test on pregnant women and then discuss those results before offering abortion services. 667 F.3d at 574. The Court declined the physicians’ ideological compelled speech argument and held the law permissible under the First Amendment. *See id.* at 576 (noting the law did not fall under “ideological” compelled speech). Several state legislatures passed abortion reversal regulations requiring physicians to tell women there were prescription drugs available to reverse an abortion following an abortion procedure. *See, e.g.,* OKLA. STAT. tit. 63, § 1-756(B)(1) (2019) (instructing Oklahoma physicians on what information they must give abortion-seeking patients); N.D. CENT. CODE § 14-02.1-02.1 (2023) (describing that North Dakota physicians must inform patients a specific drug might reverse medication abortions before the patient consents to the procedure); *see also* Robertson & Hoffman, *supra* note 81, at 2089–90 (citing the state codes). In 2012, in *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*, the Eighth Circuit upheld an abortion regulation that compelled physicians to disclose potential risks to patients if they received an abortion, such as a higher risk of depres-

In the above examples, state legislatures compelled doctors to speak messages to patients they might not otherwise speak before providing abortion services.⁹² Conversely, physician gag laws or compelled silence laws prohibit doctors from discussing specific topics with patients; otherwise, they risk criminal or civil liability.⁹³ Courts and legal scholars disagree on whether to address physician gag laws the same as compelled speech laws.⁹⁴ This is because physician gag laws prohibit a doctor from providing a patient with information that could assist the individual in deciding what healthcare services or procedures to pursue.⁹⁵ Compelled speech laws, in comparison, give patients additional information that may assist them in making healthcare decisions.⁹⁶ The Supreme Court has analyzed only one case where a government regulation compelled silence from physicians, but the Court avoided addressing whether the government regulation implicated physicians' First Amendment rights.⁹⁷

C. Implications of Government-Compelled Speech for Physicians

As mentioned in Section A, the Supreme Court crafted several categories of speech that receive little to no First Amendment protection.⁹⁸ Compelled speech regulations do not always draw a strict scrutiny analysis, despite those

sion and suicidal thoughts. 686 F.3d at 905–06. The court declined to strike down the law because it held that the compelled speech regulation only required doctors to state truthful and non-misleading information. *See id.* (stating the information was relevant to the patient's decision-making process).

⁹² *See, e.g.*, N.D. CENT. CODE § 14-02.1-02.1 (describing that North Dakota doctors must advise patients a specific drug may reverse medication abortions).

⁹³ *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 796–97 (1988) (explaining how compelled silence laws implicate First Amendment speech rights like compelled speech laws); Martha Swartz, *Physician-Patient Communication and the First Amendment After Sorrell*, 17 MICH. ST. U. J. MED. & L. 101, 113–14 (2012) (discussing the implications of physician gag laws).

⁹⁴ *See Swartz, supra* note 93, at 113–14 (discussing the disagreement between courts about how to analyze compelled speech laws and gag laws).

⁹⁵ *Id.* at 114.

⁹⁶ *See Robertson & Hoffman, supra* note 81, at 2087 (defining compelled speech regulations as it relates to physicians).

⁹⁷ *See Rust v. Sullivan*, 500 U.S. 173, 200 (1991) (holding that the government withholding funding from hospitals and clinics providing abortion services did not violate the First Amendment). There, the Court said the government choosing to fund one program over another was not viewpoint discrimination. *Id.* at 193. Prominent health institutions advise against compelled speech and compelled silence legislation because of the significant harm these regulations pose to the doctor-patient relationship. *See Legislative Interference with Patient Care, Medical Decisions, and the Patient-Physician Relationship*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, <https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2019/legislative-interference-with-patient-care-medical-decisions-and-the-patient-physician-relationship> [<https://perma.cc/J9NQ-AYXS>] (Aug. 2021) (articulating why medical experts advise against legislation restricting or altering physician communications with patients); *Confidentiality, Patient/Physician*, AM. ACAD. OF FAM. PHYSICIANS, <https://www.aafp.org/about/policies/all/confidentiality-patient-physician.html> [<https://perma.cc/93ZZ-M9VZ>] (explaining the importance of patient confidentiality for the doctor-patient relationship).

⁹⁸ *See supra* notes 63–70 and accompanying text.

regulations relying on content-based distinctions.⁹⁹ Professional speech, specifically as it relates to physicians and how they communicate with patients, also draws differing results when government regulations compel a physician to speak or not speak.¹⁰⁰

Section 1 of this Part discusses the Supreme Court's *Planned Parenthood of Southeastern Pennsylvania v. Casey* holding and its implications on physician speech.¹⁰¹ Section 2 analyzes the Court's *National Institute of Family and Life Advocates v. Becerra* holding and its expansion of physician speech rights.¹⁰² Section 3 looks at the Court's *Dobbs v. Jackson Women's Health Organization* decision and whether the holding implicates the First Amendment.¹⁰³

1. *Planned Parenthood of Southeastern Pennsylvania v. Casey*: Lower Protection for Physician Speech?

In 1992, the Supreme Court's *Planned Parenthood of Southeastern Pennsylvania v. Casey* decision obtained prominence in constitutional law jurisprudence when the Court upheld the right to abortion.¹⁰⁴ Although the case reaffirmed the right, the Court also created an avenue for state legislatures to restrict abortion access by moving from *Roe v. Wade*'s trimester framework to an undue burden test.¹⁰⁵ Then, in a lesser discussed part of the holding, the Court addressed whether physician speech received First Amendment protection—causing confusion among courts and legal commentators.¹⁰⁶

⁹⁹ See, e.g., *Zauderer v. Off. of Disciplinary Couns. of the Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985) (holding intermediate scrutiny would apply to the compelled speech regulation); *Tingley v. Ferguson*, 47 F.4th 1055, 1077–78 (9th Cir. 2022) (applying rational basis review to a regulation that constrained physicians from speaking about conversion therapy).

¹⁰⁰ See, e.g., *Tingley*, 47 F.4th at 1077–78 (applying rational basis review to physician compelled speech); *Otto v. City of Boca Raton*, 981 F.3d 854, 867–68 (11th Cir. 2020) (striking down a regulation that compelled physicians to speak by applying strict scrutiny); *Stuart v. Camnitz*, 774 F.3d 238, 249 (4th Cir. 2014) (applying intermediate scrutiny to physician compelled speech).

¹⁰¹ See *infra* notes 104–119 and accompanying text.

¹⁰² See *infra* notes 120–149 and accompanying text.

¹⁰³ See *infra* notes 150–154 and accompanying text.

¹⁰⁴ See 505 U.S. 833, 845–46 (1992) (plurality opinion) (affirming the essential aspects of *Roe v. Wade*'s decision regarding the right to an abortion), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

¹⁰⁵ See *id.* at 877–78 (holding Pennsylvania could pass regulations on abortion services if it did not place an “undue burden” on a woman's right to an abortion); see also Linda Greenhouse & Reva B. Siegel, *Casey and the Clinic Closings: When “Protecting Health” Obstructs Choice*, 125 YALE L.J. 1428, 1444–49 (2016) (describing the increased legislation regarding abortion clinic closings and how courts interpret those restrictions differently under *Casey*'s undue burden test). Under the undue burden test, courts uphold abortion restrictions unless they place a “substantial obstacle in the path of a woman seeking an abortion.” *Casey*, 505 U.S. at 877.

¹⁰⁶ See *Casey*, 505 U.S. at 884 (holding the abortion regulations did not violate the First Amendment); Miller & Berkman, *supra* note 37, at 615 (citing commentators who described the First Amendment analysis in *Casey* as “cryptic,” “puzzling,” and “limited”).

Casey involved petitioners challenging five provisions in the 1982 Pennsylvania Abortion Control Act as unconstitutionally restricting abortion access.¹⁰⁷ One provision sparking First Amendment scrutiny was an informed consent requirement.¹⁰⁸ The provision mandated physicians disclose to the woman the fetus's estimated gestational age, procedural health risks, and availability of published materials detailing alternative options for the fetus, among other requirements prior to her abortion procedure.¹⁰⁹

Before *Casey*, the Court invalidated informed consent provisions mandating physicians provide patients with anti-abortion rhetoric ahead of abortion procedures.¹¹⁰ The unconstitutional provisions included requiring physicians to tell patients that an abortion may cause an increase in future miscarriages or sterilization, and may cause physical or mental health problems.¹¹¹ According to the Court, the compelled speech provisions were unconstitutional because they went beyond what was relevant for the patient to know before consenting to the abortion procedure.¹¹² At the time, the Court stressed the doctor-patient relationship required a physician to make their own medical evaluation when choosing what to disclose to individuals about their healthcare options.¹¹³

Nonetheless, in a strict departure from past precedent, the Court in *Casey* upheld abortion informed consent laws if the compelled speech provided "truthful, non-misleading information" to patients about the subsequent procedure.¹¹⁴

¹⁰⁷ *Casey*, 505 U.S. at 844; see 18 PA. CONS. STAT. §§ 3203–3220 (1990) (articulating the Act's provisions that required physicians to inform patients of specific information before the patient consented to the abortion procedure).

¹⁰⁸ *Casey*, 505 U.S. at 844.

¹⁰⁹ *Id.* at 881.

¹¹⁰ See *City of Akron v. Akron Cent. for Reprod. Health*, 462 U.S. 416, 444 (1983) (holding abortion informed consent provisions were unconstitutional), *overruled by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (plurality opinion); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 764 (1986) (holding the compelled speech regulations were unconstitutional), *overruled by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (plurality opinion).

¹¹¹ See *City of Akron*, 462 U.S. at 423 n.5, 444 (holding the informed consent provisions requiring physicians to warn of future sterilization or miscarriage issues extended beyond the permissible limits); *Thornburgh*, 476 U.S. at 764 (holding the compelled government speech warning about detrimental psychological effects was the "antithesis" of what informed consent laws should allow). In 1983, in *City of Akron v. Akron Center for Reproductive Health*, the Court stated the government-compelled speech was not intended to inform women of necessary information about the procedure but to instead "persuade her" from getting an abortion. 462 U.S. at 444. Similarly, in 1986, in *Thornburgh v. American College of Obstetricians and Gynecologists*, the Court said the government-compelled speech at issue surpassed the purpose of informed consent laws within the healthcare industry. 476 U.S. at 764.

¹¹² *City of Akron*, 462 U.S. at 445; *Thornburgh*, 476 U.S. at 764.

¹¹³ *City of Akron*, 462 U.S. at 427.

¹¹⁴ See *Casey*, 505 U.S. at 882 (holding state officials have a legitimate purpose in passing these informed consent laws so a patient knows the "full consequences of her decision" when seeking an abortion). The Court's holding overruled *City of Akron v. Akron Center for Reproductive Health* and *Thornburgh v. American College of Obstetricians and Gynecologists*. *Id.* at 883.

Although this test was not articulated under the First Amendment, the holding encouraged federal courts to apply the logic to other compelled speech cases.¹¹⁵

As for the First Amendment claims in *Casey*, the Court said the government did not violate physicians' rights to refrain from speaking when it compelled doctors' speech.¹¹⁶ Although the regulation incidentally burdened speech, the Court determined that the regulation was designed to target professional medical conduct, an area the government could reasonably regulate.¹¹⁷ The holding, which scholars hypothesized was never intended to provide an intelligible professional speech framework, divided courts.¹¹⁸ Then, twenty-six years later, the Supreme Court granted certiorari in *National Institute of Family and Life Advocates v. Becerra* on the question of whether physician speech receives lessened First Amendment protection.¹¹⁹

2. *National Institute of Family and Life Advocates v. Becerra* (NIFLA): A Watershed Moment for Physician Speech Rights

Under the Roberts Court, the interpretation of First Amendment protections has expanded, both for individuals' free speech and free exercise rights.¹²⁰ This First Amendment expansion has collided with the government's regulatory powers, allowing the Supreme Court to strike down government regulations restraining speech.¹²¹ In 2018, in *NIFLA*, the Court stunned constitutional law scholars by distancing itself from its previous deferential approach to government regulations.¹²²

¹¹⁵ See *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 580 (5th Cir. 2012) (applying *Casey*'s First Amendment analysis when determining physician First Amendment rights were not violated by the mandated ultrasound narrative laws); *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 686 F.3d 889, 905–06 (8th Cir. 2012) (applying the analysis outlined in *Casey* when determining an abortion regulation compelling physician speech did not violate the First Amendment).

¹¹⁶ See *Casey*, 505 U.S. at 884 (holding there is no constitutional issue in allowing the government to regulate physician speech through informed consent laws).

¹¹⁷ *Id.*

¹¹⁸ See *Miller & Berkman*, *supra* note 37, at 618 (acknowledging the divide between scholars and lower courts about the speech implications of *Casey*'s holding); Erika Schutzman, Note, *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, 2037 (2015) (identifying differing applications circuit courts apply to professional speech following *Casey*).

¹¹⁹ 585 U.S. 755, 755 (2018).

¹²⁰ See, e.g., *Robertson & Hoffman*, *supra* note 81, at 2067 (stating the Roberts Court was most "notable" for its vast expansion of First Amendment rights for individuals).

¹²¹ See, e.g., *Nat'l Inst. of Fam. & Life Advocs. v. Becerra* (*NIFLA*), 585 U.S. 755, 778 (2018) (holding a government disclosure requirement unconstitutionally implicated physicians' First Amendment rights to free speech); *Chen*, *supra* note 80, at 905–06 (hypothesizing the implications to the regulatory state and the government's ability to pass regulations without implicating the First Amendment following the Court's *NIFLA* holding).

¹²² 585 U.S. at 778 (holding the disclosure requirements likely violated the First Amendment because they compelled the physicians to speak); see *Robertson & Hoffman*, *supra* note 81, at 2074

In *NIFLA*, crisis pregnancy centers (CPCs) challenged two disclosure requirements in California's Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act).¹²³ State legislators passed the FACT Act to address their concerns about CPCs.¹²⁴ These centers, which often hold anti-abortion affiliations, advertise themselves as reproductive health organizations that assist pregnant women.¹²⁵ Nevertheless, these centers aim to discourage or prevent women from obtaining an abortion.¹²⁶ Under the FACT Act, the first requirement mandated licensed CPCs to inform patients of the state's available reproductive services, such as abortions.¹²⁷ Second, the FACT Act mandated unlicensed CPCs to post a notice at their entrances informing individuals the facilities were unlicensed.¹²⁸ Petitioners argued both requirements violated physicians' First Amendment rights.¹²⁹

The Court had grounds to uphold California's regulation, given how past precedent addressed informed consent and disclosure regulations for the healthcare industry.¹³⁰ In California's respondent brief, the state argued the first requirement did not violate licensed clinics' First Amendment rights because mandated notices were not expressive conduct.¹³¹ As for the second require-

(stating how constitutional law scholars initially anticipated the Supreme Court would uphold the government regulations).

¹²³ *NIFLA*, 585 U.S. at 764–65; see CAL. HEALTH & SAFETY CODE §§ 123470–123473 (West 2016) (articulating the required notices facilities must post under California's Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act)). Crisis pregnancy centers (CPCs) offer women free pregnancy services, counseling, and other services. *NIFLA*, 585 U.S. at 761. But the mission of these crisis centers, according to a California State Assembly report, was also to preclude individuals from receiving abortions. *Id.*

¹²⁴ See 2015 Cal. Legis. Serv. Ch. 700, §§ 1–2 (West) (stating the purpose of the bill was to inform individuals of the alternative services available in the state, including abortion procedures).

¹²⁵ *Crisis Pregnancy Centers*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, <https://www.acog.org/advocacy/abortion-is-essential/trending-issues/issue-brief-crisis-pregnancy-centers> [<https://perma.cc/YH2J-2FQ9>].

¹²⁶ *Id.*; see Ziegler, *supra* note 11, at 89 (describing the development of CPCs by anti-abortion advocates). Tactics these centers use to discourage pregnant women from seeking abortion services include misleading the patient about abortion risks, misrepresenting the clinic as a licensed facility, and overreporting the fetus's gestational age. *Crisis Pregnancy Centers*, *supra* note 125. These centers tend to target women who are of lower income and uneducated. See Lang, *supra* note 70, at 2113 (describing the implications of CPCs).

¹²⁷ *NIFLA*, 585 U.S. at 762–63; see CAL. HEALTH & SAFETY CODE § 123472(a)(1)–(3) (describing the notice).

¹²⁸ *NIFLA*, 585 U.S. at 762–64.

¹²⁹ *Id.* at 764.

¹³⁰ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion) (holding physician speech rights were not implicated because the government regulation only inadvertently harmed speech while restricting medical conduct), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

¹³¹ See Brief for the State Respondents, *Nat'l Inst. of Fam. & Life Advoc. v. Becerra (NIFLA)*, 585 U.S. 755 (2018) (No. 16-1140), 2018 WL 1027815, at *43 (explaining that patients were aware the notices provided in healthcare facilities were not intended as “self-expression” for the physicians); see also Miller & Berkman, *supra* note 37, at 620 (describing that the state's argument relied on how

ment, the state argued the unlicensed disclosure was neutral in informing patients about the unlicensed facility.¹³² The state relied on *Casey*, which allowed government-compelled speech regulations if the notices were “non-ideological statements of fact” individuals would not accredit as the physician or clinic’s individual speech.¹³³

Nonetheless, in a 5-4 decision by Justice Thomas, the Court held both requirements violated the pregnancy centers’ First Amendment speech rights.¹³⁴ First, the Court denied the state’s argument that professional speech, including physician speech, categorically receives less protection than other speech.¹³⁵ Professional speech, Justice Thomas said, would not automatically receive lower protection just because professionals communicate the message—emphasizing that a content-based restriction implicating physician speech should trigger strict scrutiny.¹³⁶

But the Court articulated two exceptions where professional speech receives lower or no First Amendment protection.¹³⁷ First, the speech receives less protection when the government regulation requires the physician to disclose “factual, noncontroversial information” related to commercial services.¹³⁸ Justice Thomas argued the FACT Act’s first requirement was not privy to this exception because the government required physicians to disclose information about “state-sponsored” procedures unrelated to the patient’s reason for the visit.¹³⁹ Also, the provisions involved a controversial topic: abortion.¹⁴⁰ The Supreme Court did not elaborate on how lower courts should de-

these notices neither counted as a referral nor endorsement for abortion services, but instead provided patients with information about their healthcare options).

¹³² See Brief for the State Respondents, *supra* note 131, at *22 (arguing the unlicensed disclosure did not offer advice to women on how they should proceed, but merely informed the patient neutrally that the clinic lacked a government license).

¹³³ *Id.* at *15–16.

¹³⁴ See *NIFLA*, 585 U.S. at 778 (holding the disclosure requirements likely violated the First Amendment because they compelled physicians to speak).

¹³⁵ See *id.* at 766–69 (explaining that the Court has never categorized professional speech as less protected speech under the First Amendment).

¹³⁶ See *id.* at 767 (stating the Court does not allow for content-based government regulations impacting speech unless the government provides “persuasive evidence” supporting the regulations).

¹³⁷ *Id.* at 768. Despite these exceptions falling under the professional speech category, the Court said they did not receive lower protection simply because a professional was the one speaking. *Id.*

¹³⁸ *Id.* The Court utilized its 1985 decision in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio* to support the first exception. *Id.* (citing *Zauderer v. Off. of Disciplinary Coun. of the Sup. Ct. of Ohio*, 471 U.S. 626 (1985)). In *Zauderer*, the Court held lawyers have a First Amendment right to promote their services to the public. See 471 U.S. at 647 (holding attorneys had a First Amendment right to advertise their services if the advertisement was truthful and did not mislead individuals).

¹³⁹ *NIFLA*, 585 U.S. at 769; see CAL. HEALTH & SAFETY CODE § 123472(a)(1)–(3) (articulating the information doctors must provide verbally or through written notices in a licensed facility when a patient visited a CPC for healthcare services).

¹⁴⁰ *NIFLA*, 585 U.S. at 769.

termine whether the regulation involves noncontroversial information or not.¹⁴¹ Instead, Justice Thomas's articulation of the test insinuated a topic like abortion, which attracts political controversy, could violate this test even if the regulation involves factual information.¹⁴²

The second exception to professional speech protections articulated in *NIFLA* is when the law regulates professional conduct that "incidentally involves" speech.¹⁴³ Justice Thomas distinguished the first *NIFLA* requirement from the *Casey* provisions by claiming the disclosure requirement here was unconnected to any services CPCs provided.¹⁴⁴ Because of this, the FACT Act could not fall under the second exception.¹⁴⁵ In Justice Breyer's dissent, he argued the upheld *Casey* disclosures mirrored the *NIFLA* disclosures about available abortion services.¹⁴⁶ Both regulations related to providing women with reproductive health information, Justice Breyer argued, so no distinction between the regulations existed—yet different outcomes developed from each case.¹⁴⁷

Although this decision was lauded as a win for anti-abortion advocates, it also provided a framework for abortion advocates to challenge other compelled physician speech regulations.¹⁴⁸ And federal courts already utilized the *NIFLA* holding to do just that.¹⁴⁹

¹⁴¹ See *id.* (stating the abortion restrictions violated the noncontroversial requirement because abortion was "anything but an 'uncontroversial' topic" but providing no other explanation of how to apply the test).

¹⁴² See *id.* (holding the regulations on abortion were "anything but an 'uncontroversial' topic" under the test); see also Claudia E. Haupt & Wendy E. Parmet, *Public Health Originalism and the First Amendment*, 78 WASH. & LEE L. REV. 231, 254–55 (2021) (explaining the broad ways courts could interpret "noncontroversial" based on Justice Thomas's articulation of the test in *NIFLA*).

¹⁴³ See *NIFLA*, 585 U.S. at 767–69 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022)) (explaining why the regulation at issue in *NIFLA* did not implicate the holding in *Casey*).

¹⁴⁴ *Id.* at 769–72. Justice Thomas went on to say the Act required clinics to produce the information "regardless of whether a medical procedure is ever sought, offered, or performed," thus making the notice regulation fall outside the second exception. *Id.* at 770; see CAL. HEALTH & SAFETY CODE § 123472(a)(1)–(3) (detailing the notices CPCs and other licensed facilities must post to comply with the Act, including information about the state offering abortion services).

¹⁴⁵ See *NIFLA*, 585 U.S. at 770 (holding the licensed disclosure requirements regulated "speech as speech" and did not fall under a less protected category of physician speech). The Court also held the FACT Act's second requirement fell outside both exceptions of professional speech that received less First Amendment protection and thus struck down the requirement because it burdened physician speech rights. See *id.* at 774–78 (articulating why the second requirement also violated physician speech rights).

¹⁴⁶ *Id.* at 790–93 (Breyer, J., dissenting).

¹⁴⁷ See *id.* (describing the "cramped view" the Court applied when interpreting *Casey*'s holding and how it created a new framework for government regulations requiring physician disclosures).

¹⁴⁸ See Miller & Berkman, *supra* note 37, at 623 (describing the decision as a "tepid win" for First Amendment speech rights and loss for abortion advocates).

¹⁴⁹ See, e.g., *All-Options, Inc. v. Att'y Gen. of Ind.*, 546 F. Supp. 3d 754, 769–70 (S.D. Ind. 2021) (utilizing the Supreme Court's *NIFLA* holding to enjoin a compelled speech regulation mandating physicians inform patients about the existence of a drug that could reverse a medication abortion because of its First Amendment implications); *Am. Med. Ass'n v. Stenehjem*, 412 F. Supp. 3d 1134,

3. *Dobbs v. Jackson Women's Health Organization*: The Fall of Abortion Rights

Decades of state legislation and political attacks on abortion rights came to fruition in June 2022 when the Supreme Court overturned the right to an abortion in its *Dobbs v. Jackson Women's Health Organization* holding.¹⁵⁰ In an opinion authored by Justice Alito, the Court overruled *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*—punting abortion regulations to state legislators.¹⁵¹

In *Dobbs*, the Court made clear it was overturning the substantive due process analysis, used in *Roe* and *Casey*, that gave individuals the right to abortion under the Fourteenth Amendment.¹⁵² But *Casey*'s First Amendment analysis, which became the foundation for when physician speech receives less constitutional protection, went unacknowledged in the *Dobbs* holding.¹⁵³ This has left behind questions on whether *Casey*'s First Amendment analysis, like the due process analysis, was also overturned and thus no longer applicable.¹⁵⁴

1150–51 (D.N.D. 2019) (same). The district courts in both cases said that the compelled speech regulation required physicians to speak non-truthful and misleading information to the patient about medication abortion services. *All-Options*, 546 F. Supp. 3d at 770; *Am. Med. Ass'n*, 412 F. Supp. 3d at 1150–51. Therefore, the courts held that the regulation violated physicians' First Amendment rights, and the petitioners would likely succeed in proving their case. *See All-Options*, 546 F. Supp. 3d at 770 (holding the petitioners would likely succeed in proving their First Amendment rights were violated by the compelled speech regulation); *Am. Med. Ass'n*, 412 F. Supp. 3d at 1151 (same).

¹⁵⁰ *See* 597 U.S. 215, 231 (2022) (holding the right to an abortion is not a fundamental right under the Fourteenth Amendment).

¹⁵¹ *Id.* The Court stated that the right to abortion did not exist in the Fourteenth Amendment's Due Process Clause. *Id.*; *see* U.S. CONST. amend. XIV (prohibiting the government from "depriv[ing] any person of life, liberty or property, without due process of law").

¹⁵² *See* U.S. CONST. amend. XIV (addressing what government officials must do before restricting an individual's life, liberty, or property); *Dobbs*, 597 U.S. at 231 (holding that the Constitution does not protect abortion access). Before *Dobbs*, government officials could not restrict abortion access if it placed an undue burden on an individual's ability to obtain the procedure. *See* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 883 (1992) (plurality opinion) (holding that the right to an abortion exists under the Constitution), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

¹⁵³ *See Dobbs*, 597 U.S. at 286 (articulating that *Roe* and *Casey* led to a distortion of the First Amendment jurisprudence, but not elaborating on what that meant for *Casey*'s First Amendment test utilized by federal courts).

¹⁵⁴ *See* *Tingley v. Ferguson*, 47 F.4th 1055, 1074 (9th Cir. 2022) (utilizing *Casey*'s First Amendment analysis when determining the constitutionality of a government's compelled speech regulation because *Casey*'s holding was "overruled on other grounds"); *Doe v. Rokita*, 54 F.4th 518, 520 (7th Cir. 2022) (stating *Dobbs* only overturned a state's inability to restrict abortion access, not the requirement for doctors to provide patients with accurate information); David S. Cohen, Greer Donley & Rachel Rebouché, *Rethinking Strategy After Dobbs*, 75 STAN. L. REV. ONLINE 1, 6 (2022), <https://www.stanfordlawreview.org/online/rethinking-strategy-after-dobbs/> [<https://perma.cc/A3FZ-E2GK>] (articulating the Court's *Dobbs* holding as eliminating a federal right to an abortion but making no mention of the implications to *Casey*'s First Amendment test).

II. FEDERAL COURT DIVIDE: HOW COURTS INTERPRET COMPELLED PHYSICIAN SPEECH REGULATIONS

Circuit courts are divided on applying First Amendment protections to compelled physician speech regulations where the government requires a physician to speak or not speak.¹⁵⁵ Furthermore, the courts are split on what level of judicial scrutiny to apply to physician speech.¹⁵⁶ Although the 2018 Supreme Court decision in *National Institute of Family and Life Advocates v. Becerra* (*NIFLA*) held promise to resolve some of the division, circuit courts still differ on how to apply portions of the test.¹⁵⁷ Section A of this Part discusses how circuit courts align in striking down some government regulations gagging physician speech.¹⁵⁸ Section B explains the post-*NIFLA* circuit court split on what constitutes regulating physician conduct versus physician speech.¹⁵⁹ Section C analyzes the circuit and district courts' division in interpreting compelled abortion speech regulations implicating physician speech.¹⁶⁰

A. Gun Rights, Medical Marijuana, and Attempts to Gag Physician Speech

Regulations gagging physicians from speaking about specific topics often face harsher First Amendment scrutiny in comparison to laws compelling physician speech.¹⁶¹ For example, in 2017, in *Wollschlaeger v. Governor of Florida*, the Eleventh Circuit Court of Appeals struck down a law prohibiting physicians from asking questions related to gun ownership.¹⁶² Florida legislators

¹⁵⁵ Compare *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576, 580 (5th Cir. 2012) (holding a mandated ultrasound requirement did not implicate physician speech rights), with *Stuart v. Camnitz*, 774 F.3d 238, 255–56 (4th Cir. 2014) (holding a mandated ultrasound requirement violated physician speech rights).

¹⁵⁶ Compare *Lakey*, 667 F.3d at 576 (applying rational basis review to a regulation compelling physician speech), with *Camnitz*, 774 F.3d at 249 (applying intermediate scrutiny to a regulation implicating physician speech).

¹⁵⁷ Compare *Tingley*, 47 F.4th at 1082–83 (holding a conversion therapy regulation targeted professional conduct, not speech), with *Otto v. City of Boca Raton*, 981 F.3d 854, 867–68 (11th Cir. 2020) (reasoning a conversion therapy law unconstitutionally implicated physician speech); see also *Nat'l Inst. of Fam. & Life Advocs. v. Becerra* (*NIFLA*), 585 U.S. 755, 778 (2018) (holding that a disclosure requiring physicians to inform patients about the availability of abortion procedures would likely violate the First Amendment).

¹⁵⁸ See *infra* notes 161–171 and accompanying text.

¹⁵⁹ See *infra* notes 172–185 and accompanying text.

¹⁶⁰ See *infra* notes 186–213 and accompanying text.

¹⁶¹ See *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1319 (11th Cir. 2017) (en banc) (striking down a regulation prohibiting physicians from speaking about gun ownership with patients); *Conant v. Walters*, 309 F.3d 629, 639 (9th Cir. 2002) (striking down a regulation preventing physicians from speaking with patients about medical marijuana); see also Swartz, *supra* note 93, at 113–14 (describing speech regulations precluding physicians from communicating certain messages as more problematic than compelled speech regulations).

¹⁶² See 848 F.3d at 1307–08 (holding the state's law prohibiting doctors from asking patients about whether they own a gun or not was content based, therefore heightened scrutiny applied).

passed the Firearm Owners' Privacy Act (FOPA) that prevented physicians, in part, from questioning patients' gun ownership either orally or in writing.¹⁶³ When analyzing the regulation, the Eleventh Circuit held the law was content biased (and potentially viewpoint biased) because it prohibited a specific profession from speaking about a specific topic.¹⁶⁴ The regulation also went beyond incidentally burdening physician speech because it targeted doctors' oral and written communications, not just their conduct.¹⁶⁵ In striking down the law, the Eleventh Circuit declined to address which level of scrutiny applied to this First Amendment violation—intermediate or strict—because the regulation failed both.¹⁶⁶

Similarly, in 2002, in *Conant v. Walters*, the Ninth Circuit Court of Appeals analyzed whether a federal law forbidding doctors from “recommending or prescribing” medical marijuana to patients violated their First Amendment rights.¹⁶⁷ The Ninth Circuit emphasized that just because doctors worked with-

¹⁶³ FLA. STAT. § 790.338(1)–(2) (2011), *invalidated in part by* *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293 (11th Cir. 2017) (en banc). One FOPA provision at issue prevented physicians or other medical professionals from making records of a patient's gun ownership and asking if those patients were aware of the safety and health risks associated with gun ownership. *Id.* Another provision restricted physicians from asking patients orally or in writing if they owned a gun unless the physician believed the information was necessary to know when treating the patient. *Id.* The Florida state legislature passed FOPA after patients reported that they faced questions from doctors about their gun ownership status. *Wollschlaeger*, 848 F.3d at 1302. Doctors who failed to comply with FOPA could face disciplinary measures, such as fines, suspensions, or revocation of their medical licenses. *Id.* at 1303.

¹⁶⁴ *See Wollschlaeger*, 848 F.3d at 1307 (stating there was “no doubt” the regulation triggered First Amendment scrutiny because of how the law limits the speech's content). The court alluded to the notion that the regulation might also restrict speech based on viewpoint because it specifically prohibited physicians from advocating against gun ownership. *See id.* (referencing how the regulation could draw a viewpoint analysis by courts). Nonetheless, the Eleventh Circuit declined to call the regulation viewpoint based. *See id.* at 1307–08 (confirming the regulation restricted speech based on the content while declining to analyze viewpoint bias).

¹⁶⁵ *See id.* at 1308 (“Saying that restrictions on writing and speaking are merely incidental to speech is like saying that limitations on walking and running are merely incidental to ambulation.”). This Eleventh Circuit holding came out prior to the Supreme Court's *National Institute of Family and Life Advocates v. Becerra* decision that addressed physician speech. *See* 585 U.S. 755, 768–69 (2018) (explaining why physician speech receives heightened judicial scrutiny unless the regulation targets conduct that only inadvertently restricts speech). Nevertheless, the holding indicates the Eleventh Circuit would likely come out the same post-*NIFLA* because it does not view the regulation as falling in one of the two exceptions to physician speech protections articulated in the *NIFLA* holding. *See Wollschlaeger*, 848 F.3d at 1308 (describing how the regulation at issue restricted physician communications, not just conduct); *see also NIFLA*, 585 U.S. at 768 (articulating the exceptions to First Amendment-protected physician speech and when those exceptions apply).

¹⁶⁶ *See Wollschlaeger*, 848 F.3d at 1311 (stating that three FOPA provisions would fail heightened First Amendment scrutiny; therefore, they would also fail strict scrutiny).

¹⁶⁷ *See* 309 F.3d 629, 632, 639 (9th Cir. 2002) (holding the federal regulation unconstitutionally implicated physician speech rights under the First Amendment). In 1996, the federal government passed its marijuana policy that prohibited doctors from “recommending or prescribing” marijuana to patients. *Id.* at 632; *see* Administration Response to Arizona Proposition 200 and California Proposition 215, 62 Fed. Reg. 6164, 6164 (Feb. 11, 1997) (stating physicians violated the Act when discuss-

in a regulated practice did not mean they gave up constitutional rights.¹⁶⁸ The doctor-patient relationship required the two parties to feel comfortable discussing and disclosing information as it pertained to a patient's health and safety.¹⁶⁹ The government argued doctors aided and abetted patients' illegal conduct by advising patients about medical marijuana options, but the Ninth Circuit dismissed the argument and said mere encouragement was insufficient to establish aiding and abetting.¹⁷⁰ Because the regulation targeted physician speech and prevented doctors from counseling patients about the benefits of medical marijuana, the Ninth Circuit defined the regulation as content- and viewpoint-based and applied strict scrutiny to strike it down.¹⁷¹

B. Conversion Therapy: Regulating Physician Conduct Versus Speech

A division between circuit courts exists when determining whether government regulations target physician conduct or physician speech.¹⁷² For example, in 2022, in *Tingley v. Ferguson*, the Ninth Circuit held a Washington law prohibiting doctors from providing conversion therapy services to minors

ing marijuana as a treatment option with patients). The federal government passed this policy after Arizona and California legalized medical marijuana. *Conant*, 309 F.3d at 632. Doctors who failed to comply with the law could face revocation of their prescription license. *Id.* at 633.

¹⁶⁸ *Conant*, 309 F.3d at 637. Instead, the Ninth Circuit noted professional speech might receive the highest level of protection out of any speech, based on past Supreme Court precedent. *Id.* (citing *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995)). The Supreme Court has protected lawyer-client communications unless the government regulation at issue only narrowly restricts those professionals' speech. *See, e.g.*, *NAACP v. Button*, 371 U.S. 415, 433 (1963) (holding only narrow restrictions on speech are allowed to protect the First Amendment right). Therefore, the Ninth Circuit said physician speech should receive similar First Amendment flexibility as lawyer communications. *See Conant*, 309 F.3d at 637 (citing Supreme Court cases articulating the constitutional rights the First Amendment affords to professionals).

¹⁶⁹ *Conant*, 309 F.3d at 637. The Ninth Circuit highlighted that restricting doctor-patient relationships through the threat of punishment could impact a doctor's ability to diagnose and treat their patient properly. *Id.*

¹⁷⁰ *Id.* at 638. In denying the government's argument, the Ninth Circuit cited the Supreme Court's *Ashcroft v. Free Speech Coalition* holding that struck down a child pornography statute that broadly implicated free speech rights. *Id.* (citing *Ashcroft v. Free Speech Coal.*, 536 U.S. 234 (2002)). In 2002, in *Ashcroft*, the government argued that the Supreme Court should uphold the child pornography statute to prevent individuals from encouraging and forcing minors to participate in illegal sexual conduct. 536 U.S. at 252. But the Supreme Court held potential or future illegal conduct was an insufficient reason to restrict an individual's First Amendment speech rights. *See id.* at 252–53 (holding the government regulations should focus on restricting illegal conduct, not targeting speech). Similarly, in *Conant*, the Ninth Circuit stated that the government could not restrict speech based on its potential to lead to criminal conduct. 309 F.3d at 638.

¹⁷¹ *See Conant*, 309 F.3d at 637 (articulating how the policy condemns the pro-medical marijuana viewpoint). The Ninth Circuit concluded that the government failed to meet its burden under strict scrutiny by not narrowly tailoring its law to serve its compelling interest. *Id.* at 639.

¹⁷² Compare *Tingley v. Ferguson*, 47 F.4th 1055, 1082–83 (9th Cir. 2022) (holding a conversion therapy regulation implicated therapists' conduct and not their speech rights under the First Amendment), with *Otto v. City of Boca Raton*, 981 F.3d 854, 867–68 (11th Cir. 2020) (holding a conversion therapy regulation unconstitutionally restricted physician speech and not the therapists' conduct).

only inadvertently restricted physician speech while targeting professional conduct.¹⁷³ Previously in 2014, in *Pickup v. Brown*, the Ninth Circuit upheld a similar conversion therapy regulation as constitutional, but the court analyzed the issue again in 2022 following the Supreme Court's *NIFLA* decision.¹⁷⁴ In *Tingley*, the Washington legislature added conversion therapy as unprofessional conduct under the state's Uniform Disciplinary Act.¹⁷⁵ Physicians argued the Washington regulation unconstitutionally implicated their speech rights, but the Ninth Circuit disagreed.¹⁷⁶ The court, in applying *NIFLA*'s holding, reaffirmed its decision in *Pickup* by concluding the regulation only inadvertently limited speech when restricting professional conduct.¹⁷⁷ This regulation differed from the *Conant v. Walters* medical marijuana regulation because providers could still discuss and recommend conversion therapy to patients.¹⁷⁸ Washington's law only prohibited the actual conduct of applying conversion therapy

¹⁷³ See 47 F.4th at 1077 (holding the regulation falls under an exception to physician speech that allows the government to restrict physician conduct that only "incidentally burdens speech"). See generally WASH. REV. CODE ANN. § 18.130.450 (West 2023) (preventing licensed healthcare professionals from practicing conversion therapy services on children).

¹⁷⁴ See 740 F.3d 1208, 1230–31 (9th Cir. 2014) (holding a government regulation prohibiting conversion therapy did not violate physicians' First Amendment rights); see also *Tingley*, 47 F.4th at 1075, 1077 (articulating how its *Pickup* precedent remained intact following the Supreme Court's *NIFLA* holding because the regulation fell within an exception to physician speech protection). In *NIFLA*, the Supreme Court cited *Pickup* because the Ninth Circuit incorrectly stated that professional speech was a category automatically receiving less First Amendment protection. See 585 U.S. 755, 767–69 (2018) (first citing *King v. Governor of N.J.*, 767 F.3d 216, 232 (9th Cir. 2014); then citing *Pickup v. Brown*, 740 F.3d 1208, 1227–29 (9th Cir. 2014); and then citing *Moore-King v. County of Chesterfield*, 708 F.3d 560, 568–70 (9th Cir. 2013)) (stating that the Court has never categorized professional speech as receiving less or no First Amendment protection). Instead, the Court held that professional speech only received less First Amendment protection in two instances. See *NIFLA*, 585 U.S. at 767–69 (articulating how professional speech receives less protection when it entails factual and noncontroversial commercial speech or professional conduct that incidentally harms speech).

¹⁷⁵ See generally WASH. REV. CODE ANN. § 18.130.450 (West 2023) (stating licensed health providers performing conversion therapy services on minors constitutes unprofessional conduct). The American Academy of Child and Adolescent Psychiatry, among other organizations, advises against conversion therapy because it lacks scientific evidence and harms individuals, especially minors—highlighting why some states outlaw the procedure. *Conversion Therapy*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, https://www.aacap.org/aacap/Policy_Statements/2018/Conversion_Therapy.aspx [https://perma.cc/L2K6-WBNR].

¹⁷⁶ *Tingley*, 47 F.4th at 1066, 1078.

¹⁷⁷ See *id.* at 1077 (holding the regulation restricted healthcare providers conduct while it incidentally restrained their speech). The Ninth Circuit held the law at issue in *Pickup* was nearly identical to the law in *Tingley*. *Id.* at 1072. Therefore, the Ninth Circuit applied the same analysis it did in *Pickup* and said the Washington law only implicitly burdened physician speech rights when restricting professional conduct. *Id.* at 1077.

¹⁷⁸ See *id.* at 1072–73 (citing *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002)) (holding the *Tingley* law was identical to the *Pickup* law, thus repeating its *Pickup* analysis of how the conversion therapy laws restrict speech differently than the medical marijuana regulation at issue in *Conant*). In contrast, the law at issue in *Conant* prohibited doctors from counseling patients about medical marijuana and if the substance was a beneficial healthcare option. 309 F.3d at 632.

practices to minors.¹⁷⁹ Therefore, the Ninth Circuit applied rational basis review and upheld the law.¹⁸⁰

In contrast, in 2020, in *Otto v. City of Boca Raton*, the Eleventh Circuit held a law prohibiting physicians from practicing conversion therapy was unconstitutional because of its implications on physician speech rights.¹⁸¹ When articulating its holding, the court acknowledged how other circuit courts upheld conversion therapy regulations because those mandates restricted physician conduct that only inadvertently harmed speech.¹⁸² But the circuit court differed in its interpretation of the regulation and held it directly limited speech by prohibiting therapist communications.¹⁸³ Additionally, the Eleventh Circuit said the regulation restricted a particular message—therapists advising their clients about sexual or gender identity—which made it a content-based regulation.¹⁸⁴ The court held strict scrutiny must apply and struck down the conversion therapy regulation for burdening physician speech rights.¹⁸⁵

C. Abortion Compelled Speech and the Recasting of Casey

Before *Planned Parenthood of Southeastern Pennsylvania v. Casey*, anti-abortion advocates tried and often failed to pass regulations limiting abortion access.¹⁸⁶ But post-*Casey*, the Supreme Court invited state legislatures to enact

¹⁷⁹ See *Tingley*, 47 F.4th at 1073 (referencing the California law in *Pickup* that the court determined was nearly identical to the Washington law at issue).

¹⁸⁰ See *id.* at 1078 (upholding the Washington law under rational basis review).

¹⁸¹ See 981 F.3d 854, 859, 867–68 (11th Cir. 2020) (holding a state’s conversion therapy regulation was content based and violated physician speech rights).

¹⁸² See *id.* at 865–67 (warning that labeling conversion therapy as conduct could open the door for categorizing other speech-focused activities, such as teaching or debating, as conduct instead of speech).

¹⁸³ See *id.* (holding the regulation restricted physician speech rights because it directly limited what a therapist or healthcare provider could communicate with a patient). The Eleventh Circuit utilized its past precedent of labeling physician speech as speech when analyzing the government regulations at issue. See *id.* at 866 (citing *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1307 (11th Cir. 2017) (en banc)) (referencing a previous case where the Eleventh Circuit held a government regulation forbidding doctors to discuss gun ownership with patients violated the First Amendment). The Eleventh Circuit stated that government officials could not avoid heightened judicial scrutiny by defining the speech at issue as conduct. *Id.* at 865.

¹⁸⁴ See *id.* at 866 (noting that the regulation prohibited therapists from giving a particular message to their clients).

¹⁸⁵ See *id.* at 859, 867–68 (holding the content-based regulation must draw strict scrutiny).

¹⁸⁶ See, e.g., *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 444 (1983) (holding an informed consent provision requiring doctors to warn of potential sterilization or miscarriage after an abortion procedure was unconstitutional), *overruled by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (plurality opinion); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 764 (1986) (holding the compelled speech regulations mandating doctors warn of potential psychological effects post-abortion procedure were unconstitutional), *overruled by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (plurality opinion); see also *Tubin*, *supra* note 91, at 1862 (describing the legislation anti-abortion advocates attempted to pass in states following the Supreme Court’s *Roe v. Wade* decision). States attempted to ban abortion procedures altogether or

abortion restrictions if the laws abstained from placing an undue burden on abortion access and only incidentally harmed speech.¹⁸⁷

Mandatory ultrasound narration laws were one attempt anti-abortion state legislatures made to restrict abortion access while complying with the Supreme Court's undue burden standard.¹⁸⁸ But physicians challenged those laws under the First Amendment because the regulations compelled doctors to speak and perform actions they might not otherwise.¹⁸⁹ Before *NIFLA*, in 2012, in *Texas Medical Providers Performing Abortion Services v. Lakey*, the Fifth Circuit Court of Appeals held physicians' First Amendment rights were not violated by the Texas's mandatory ultrasound regulation.¹⁹⁰ The regulation mandated doctors take a woman's ultrasound image and explain the results before performing the abortion procedure.¹⁹¹ Doctors argued the regulation compelled them to

pass regulations impeding abortion access, but these attempts were often blocked. Tubin, *supra* note 91, at 1862.

¹⁸⁷ See 505 U.S. 833, 883–84 (1992) (plurality opinion) (holding a government regulation is unconstitutional only when it causes an undue burden on the individual and purposefully burdens physician speech rights), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022); see also Tubin, *supra* note 91, at 1862 (articulating how *Casey* provided a framework for state legislatures to pass abortion restrictions under the new constitutional standard). The Court held the mandate did not implicate physician speech rights because it only required doctors to tell patients about procedure-related information. See *Casey*, 505 U.S. at 884 (holding that the ordinance did not unconstitutionally violate physicians' speech rights).

¹⁸⁸ See *Requirements for Ultrasound*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/requirements-ultrasound> [<https://perma.cc/QDW3-L68N>] (describing the ultrasound provisions states passed since the 1990s and what they required of both physicians and patients seeking an abortion). Twenty-seven states passed ultrasound provisions for abortion procedures, as of March 2024. See *id.* (describing the regulations enacted by state legislatures involving ultrasound requirements). Some regulations require physicians to provide patients with verbal and written communication about the availability of an ultrasound before an abortion procedure. *Id.* Other provisions require doctors to administer an ultrasound for the patient, display the image, and then discuss it before providing the service. *Id.*

¹⁸⁹ See, e.g., *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 574 (5th Cir. 2012) (articulating how the doctors argued the mandatory ultrasound law forced them to speak the state's "ideological message"); *Stuart v. Camnitz*, 774 F.3d 238, 245 (4th Cir. 2014) (stating how the doctors argued the court should apply strict scrutiny to the regulation because it was content based and mandated physicians to communicate a particular message). The regulations at issue in both cases mandated doctors first perform an ultrasound on a pregnant individual, display the image, and then describe the ultrasound before receiving informed consent from the patient to perform the abortion procedure. See TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(4) (West 2021) (articulating what Texas physicians must do and say before performing an abortion procedure on a patient); N.C. GEN. STAT. § 90-21.85 (2011) (same).

¹⁹⁰ 667 F.3d at 580 (holding that the regulation fell under "informed consent" and was thus permissible because it provided the patient with necessary information related to the procedure).

¹⁹¹ *Id.* at 573. The law at issue, H.B. 15, not only required the doctor to relay the results to the pregnant patient following the ultrasound but also required the individual to wait an additional twenty-four hours before receiving an abortion. *Id.*; see TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(4) (articulating the ultrasound procedure a doctor must perform on an individual before they could receive an abortion). Then, before the procedure, the woman would have to fill out a form acknowledging she received all necessary information required by the state to assist with making her decision.

speak the government's own "ideological message" and discourage abortion procedures.¹⁹² The Fifth Circuit disagreed and held the provision only incidentally restricted speech when mandating a doctor speak truthful and accurate information about the status of a patient's pregnancy—combining *Casey*'s due process and First Amendment tests.¹⁹³ Because the court determined the regulation complied with *Casey*, it declined to apply heightened judicial and upheld the ultrasound requirement.¹⁹⁴

In contrast, in 2014, in *Stuart v. Camnitz*, the Fourth Circuit Court of Appeals struck down North Carolina's mandatory ultrasound provision because it unconstitutionally burdened physician speech rights.¹⁹⁵ Like the *Lakey* regulation, the state mandate ordered doctors to administer an ultrasound, show the image, and describe it to the individual seeking an abortion.¹⁹⁶ The court stated that the ultrasound regulation differed from the *Casey* regulation because it required physicians to act as mouthpieces for the state's ideological message.¹⁹⁷ Further, physicians delivered this message while the patient was at her

Lakey, 667 F.3d at 573; see TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(5) (stating the form patients must first sign before receiving an abortion). If doctors failed to comply with the regulation, they risked revocation of their medical license. *Lakey*, 667 F.3d at 573.

¹⁹² *Lakey*, 667 F.3d at 574.

¹⁹³ See *id.* at 577–78 (explaining how the provision mandated the doctor to tell the patient about up-to-date information on fetal development, which was both "truthful and non-misleading"). The Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* only stated the regulation was truthful and non-misleading when articulating why it did not violate a patient's constitutional rights. See 505 U.S. 833, 882 (1992) (plurality opinion) (holding state legislatures did not violate a patient's due process rights by requiring doctors to relay truthful and non-misleading information). The Fifth Circuit compared the provision in *Lakey* to the one analyzed in *Casey*. *Lakey*, 667 F.3d at 577–78. It determined the regulations were nearly identical in the accurate information the doctors were required to disclose to the patient. *Id.* The court did concede, however, that the Texas regulation required "more graphic and scientifically up-to-date" information than the *Casey* regulation. *Id.* at 578. But despite that, it held the information was truthful and accurate, thus relevant for the women to hear before the procedure. *Id.*

¹⁹⁴ See *Lakey*, 667 F.3d at 575 (describing the level of scrutiny applied in *Casey* as the "antithesis of strict scrutiny"); see also Miller & Berkman, *supra* note 37, at 642 (describing the scrutiny the *Lakey* court applied when upholding the Texas ultrasound requirement). Although the Fifth Circuit did not describe this scrutiny as rational basis review, scholars assume the regulation received no heightened scrutiny when it was struck down. See Miller & Berkman, *supra* note 37, at 642 (explaining how the court characterized this law as closer to medical conduct than physician speech).

¹⁹⁵ See 774 F.3d 238, 242 (4th Cir. 2014) (holding the regulation forced doctors to speak a state's ideological message and thus violated physicians' First Amendment rights).

¹⁹⁶ *Id.* at 243; see N.C. GEN. STAT. § 90-21.85 (2011) (describing what physicians must do before performing an abortion on a patient). The North Carolina law allowed patients to look away from the ultrasound image or plug their ears from hearing the message. N.C. GEN. STAT. § 90-21.85. Physicians who violated the law could face disciplinary action, such as losing their medical licenses. *Stuart*, 774 F.3d at 243.

¹⁹⁷ *Stuart*, 774 F.3d at 246. The Fourth Circuit stated that not all government regulations related to a fetus would be automatically characterized as relaying an ideological message. *Id.* But the North Carolina law, the court said, was so clearly pro-life in what it mandated physicians to tell patients that the court concluded the physicians were forced to act as state mouthpieces. *Id.*

most vulnerable: unclothed on an examination table.¹⁹⁸ Under the regulation, patients could avoid the ideological message by covering their eyes and plugging their ears.¹⁹⁹ But the Fourth Circuit said the allowance only proved the regulation compelled doctors to speak unhelpful information that conveyed the “state’s moral condemnation” about the procedure.²⁰⁰ In striking down the law, the court applied intermediate scrutiny and articulated what the Supreme Court’s *NIFLA* holding would later affirm: physicians maintain First Amendment rights when government regulations implicate speech.²⁰¹

Post-*NIFLA*, in 2019, in *EMW Women’s Surgical Center, P.S.C. v. Beshear*, the Sixth Circuit Court of Appeals analyzed Kentucky’s mandatory ultrasound law and sided with the Fifth Circuit when holding the regulation was constitutional.²⁰² The Sixth Circuit stated the provision fell under the *Casey* exception articulated in the Supreme Court’s *NIFLA* holding where government regulations could restrict professional conduct that inadvertently harmed speech.²⁰³ But the Sixth Circuit recharacterized the *Casey* exception as allowing government regulations that implicate physician speech rights when the compelled speech (1) entails a healthcare procedure, (2) is “truthful and not misleading,” and (3) is pertinent to the individual’s decision-making process.²⁰⁴ Although

¹⁹⁸ *Id.* at 255.

¹⁹⁹ See N.C. GEN. STAT. § 90-21.85 (stating the regulation would not prohibit women from choosing not to hear the information); *Stuart*, 774 F.3d at 255 (articulating how the physician must keep communicating the warnings to the woman even if she refuses to hear those warnings).

²⁰⁰ See *Stuart*, 774 F.3d at 255 (reasoning the provision went against what the patient needed or wanted to know before receiving the abortion procedure).

²⁰¹ See *id.* at 249, 255–56 (holding a “heightened” intermediate scrutiny must apply to regulations affecting speech, specifically regulations like this one that coerced doctors to speak ideological state messages); see also *Nat’l Inst. of Fam. & Life Advoc. v. Becerra (NIFLA)*, 585 U.S. 755, 767–69 (2018) (explaining how physicians would not receive less First Amendment protections simply because of their profession). The Fourth Circuit described abortion services as a “special case” where legislatures might consider certain factors when deciding how to regulate the practice. *Stuart*, 774 F.3d at 255–56. But the court said the government cannot ignore physician rights when regulating medicine. *Id.* at 256.

²⁰² See 920 F.3d 421, 432 (6th Cir. 2019) (holding the regulation was constitutional because it only required doctors to inform patients about truthful and accurate information); see also *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 580 (5th Cir. 2012) (holding Texas’s mandatory ultrasound law was constitutional because it provided patients with medically necessary information). Like in *Lakey*, the law at issue mandated that physicians perform, display, and discuss with the patient an ultrasound image before providing them with an abortion procedure. KY. REV. STAT. ANN. § 311.727(2) (West 2017); *EMW Women’s Surgical Ctr.*, 920 F.3d at 424.

²⁰³ See *EMW Women’s Surgical Ctr.*, 920 F.3d at 426 (stating the state’s ultrasound mandate regulated physician conduct because it involved physicians conducting abortions).

²⁰⁴ See *id.* at 428–29 (holding it would not strike down an informed consent provision if the court held affirmatively for each of the three categories listed). The majority addressed its recharacterization of the *Casey* holding in its opinion. See *id.* at 429 (stating that although *Casey*’s holding largely focused on the due process clause, the opinion also relied on the First Amendment when making its conclusion). Because the Sixth Circuit likened the regulation to *Casey*’s informed consent provision, it then held the truthful and non-misleading test was applicable. *Id.*

the Supreme Court's *Casey* decision labeled the abortion regulation at issue as truthful and non-misleading, it did so within its due process analysis.²⁰⁵ Furthermore, the Supreme Court's *NIFLA* holding never articulated that government regulations implicating physician speech could withstand heightened judicial scrutiny if they provided the patient with truthful and non-misleading information.²⁰⁶ Nonetheless, the Sixth Circuit held the provision fell under a physician speech exception, applied rational basis review, and upheld the regulation as constitutional.²⁰⁷

Federal court confusion on how to apply *NIFLA*'s physician speech exceptions extends to the district courts.²⁰⁸ For example, Indiana and North Dakota district courts enjoined state abortion reversal bills as unconstitutional under the First Amendment because the laws required physicians to speak nontruthful and misleading information.²⁰⁹ Abortion reversal bills mandated physicians inform patients a prescription drug might reverse a medication abortion procedure if the woman later changed her mind—a statement lacking scientific evidence.²¹⁰ When analyzing each bill, Indiana and North Dakota

²⁰⁵ See 505 U.S. 833, 882 (1992) (plurality opinion) (holding that the state legislature did not violate a patient's due process rights by requiring doctors to relay truthful and non-misleading information), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

²⁰⁶ See 585 U.S. 755, 768–71 (2018) (articulating the *Casey* exception to physician speech rights as when the state regulates professional conduct that incidentally restricts physician speech). The Supreme Court emphasized the importance of allowing a state legislature to pass informed consent provisions because those laws require physicians to provide specific information to patients related to their procedure. *Id.* at 769–70. Nonetheless, there has been pushback from critics regarding whether this second exception only narrowly applies to informed consent provisions and no other government regulations, as well as whether the test requires the regulation to be both truthful and non-misleading. See, e.g., Tubin, *supra* note 91, at 1877–78 (describing the pushback from law professors on how to distinguish the Supreme Court's *Casey* and *NIFLA* holdings when analyzing physician speech regulations); Lang, *supra* note 70, at 2121–22 (noting the criticism from other judges on using *Casey*'s due process analysis for its First Amendment test).

²⁰⁷ See *EMW Women's Surgical Ctr.*, 920 F.3d at 432 (holding a lower level of scrutiny must apply because the provision only incidentally burdens physician speech).

²⁰⁸ See, e.g., *All-Options, Inc. v. Att'y Gen. of Ind.*, 546 F. Supp. 3d 754, 765 (S.D. Ind. 2021) (articulating *Casey*'s factual and non-misleading due process test when discussing whether physician speech rights were implicated by an abortion regulation); *Am. Med. Ass'n v. Stenehjem*, 412 F. Supp. 3d 1134, 1150–51 (D.N.D. 2019) (same).

²⁰⁹ See *All-Options*, 546 F. Supp. 3d at 770 (holding Indiana's abortion reversal bill would likely not survive a First Amendment analysis because it forced physicians to speak an untruthful and misleading message); *Am. Med. Ass'n*, 412 F. Supp. 3d at 1150–51 (enjoining a North Dakota abortion reversal bill because the petitioners would likely succeed in proving the law implicated physicians' First Amendment speech rights).

²¹⁰ See *All-Options*, 546 F. Supp. 3d at 757 (explaining the state's abortion reversal bill); *Am. Med. Ass'n*, 412 F. Supp. 3d at 1138 (same); see also *Facts Are Important: Medication Abortion "Reversal" Is Not Supported by Science*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, <https://www.acog.org/advocacy/facts-are-important/medication-abortion-reversal-is-not-supported-by-science> [<https://perma.cc/2QNW-EERP>] (describing the abortion reversal bills state legislatures passed and the lack of scientific evidence supporting these bills). During a medication abortion, the individual takes two pills within twenty-four to forty-eight hours of each other. *All-Options*, 546 F. Supp. 3d at

district courts held the laws restricted physician speech, not conduct.²¹¹ Further, the compelled speech provisions failed *Casey*'s test because they required physicians to speak false and misleading information about medication abortion reversals.²¹² Scholars warn clashes between federal courts will persist when analyzing abortion regulations implicating physician speech rights unless the Supreme Court addresses the contrasting *Casey* and *NIFLA* tests.²¹³

III. THE RIGHT TO COUNSEL: AIDING AND ABETTING LAWS UNCONSTITUTIONALLY RESTRICT PHYSICIAN SPEECH

From the outset of the Supreme Court's holding in *Roe v. Wade*, affirming the constitutional right to abortion, the decision faced attacks from anti-abortion advocates.²¹⁴ Those attacks were forceful, spreading through state legislatures and infiltrating the highest court in the United States.²¹⁵ Anti-abortion advocates' work reached fruition once the Supreme Court held in 2022, in *Dobbs v. Jackson Women's Health Organization*, that the Constitution does not guarantee a right to abortion.²¹⁶ Yet, despite success in dismantling abortion access, state legislatures and anti-abortion advocates' efforts continue,

757. Under these bills, the state legislature mandated doctors inform patients that large doses of progesterone could reverse the effects of a medication abortion if taken between the first and second dosage. *Id.* Medical organizations, such as the American College of Obstetricians and Gynecologists, warn against providing this information to patients because the information lacks scientific proof and disrupts the doctor-patient relationship. *Facts Are Important, supra.*

²¹¹ See *All-Options*, 546 F. Supp. 3d at 769–70 (explaining how the state's abortion reversal bill violated the First Amendment); *Am. Med. Ass'n*, 412 F. Supp. 3d at 1150–51 (same).

²¹² *All-Options*, 546 F. Supp. 3d at 769–70 (articulating how the government could still provide patients with the message if they chose to do so, but officials could not compel physicians to speak that message to patients); *Am. Med. Ass'n*, 412 F. Supp. 3d at 1151 (stating government officials cannot just choose one side of a medical debate and force the view on physicians, especially if the compelled information misleads the patient).

²¹³ See Abner S. Greene, "Not in My Name" *Claims of Constitutional Right*, 98 B.U. L. REV. 1475, 1496–97 (2018) (describing the tension the Supreme Court's *Casey* and *NIFLA* holdings create when analyzing compelled speech regulations); Robertson & Hoffman, *supra* note 81, at 2074 (articulating the confusion about *NIFLA*'s professional conduct versus speech test).

²¹⁴ See 410 U.S. 113, 153–54 (1973) (articulating the constitutional right to abortion), *overruled by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022); Kramer, *supra* note 82, at 2–3 (describing the types of anti-abortion legislation states passed in the last couple of decades to restrict a woman's access to an abortion).

²¹⁵ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882–83 (1992) (plurality opinion) (expanding the ability for states to restrict abortion services by changing the due process analysis to an undue burden test), *overruled by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022); see also N.C. GEN. STAT. § 90-21.85 (2011) (describing what North Carolina physicians must do before performing an abortion on a patient); TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(4) (West 2021) (requiring Texas physicians to perform ultrasound procedures and share certain information to patients before performing an abortion procedure).

²¹⁶ See *Dobbs*, 597 U.S. at 231 (overturning the right to abortion because the Court concluded that it was not guaranteed by the U.S. Constitution).

as they propose harsher restrictions that criminalize speech through abortion aiding and abetting laws.²¹⁷

Section A of this Part applies the *National Institute of Family and Life Advocates v. Becerra* (*NIFLA*) test to abortion aiding and abetting laws and argues federal courts should find these laws unconstitutionally implicate physician speech rights, therefore triggering heightened judicial scrutiny.²¹⁸ Section B contends that *Planned Parenthood of Southeastern v. Casey*'s overruled holding supports striking down abortion aiding and abetting laws as unconstitutional under *NIFLA*.²¹⁹ Finally, Section C argues federal courts should apply strict scrutiny and strike down abortion aiding and abetting laws because these regulations restrict speech based on the content.²²⁰

A. NIFLA Application: Why Physician Speech Receives First Amendment Protection Against Abortion Aiding and Abetting Laws

When the Supreme Court analyzed California's FACT Act in *NIFLA*, the Court held that licensed notice regulations that required CPCs to notify individuals about the availability of other reproductive health services, such as abortion, violated physicians' First Amendment rights.²²¹ First, the Court concluded that physicians maintained First Amendment rights, so if those rights were violated, then federal courts must apply heightened judicial scrutiny—either intermediate or strict—to the regulation.²²² But two exceptions exist where government regulations do not implicate physician speech rights: (1) when the regulation requires truthful and noncontroversial information about a doctor's commercial services; and (2) when the regulation only incidentally

²¹⁷ See OKLA. STAT. tit. 63, § 1-745.39 (2022) (articulating how an individual or entity could face civil action in Oklahoma if found aiding and abetting an individual in receiving or accessing an abortion); TEX. HEALTH & SAFETY CODE ANN. § 171.208(a) (stating individuals could face civil liability if they knowingly engage in conduct resulting in another receiving an abortion); NRLC Post-Roe Model Abortion Law, *supra* note 36 (proposing an abortion aiding and abetting law criminalizing speech that encourages or facilitates an individual in accessing abortion procedures).

²¹⁸ See *infra* notes 221–241 and accompanying text.

²¹⁹ See *infra* notes 242–250 and accompanying text.

²²⁰ See *infra* notes 251–263 and accompanying text.

²²¹ See Nat'l Inst. of Fam. & Life Advocs. v. Becerra (*NIFLA*), 585 U.S. 755, 778–79 (2018) (holding the disclosure requirements likely violate the First Amendment because they compel physicians to speak a specific message).

²²² See *id.* at 766–69 (stating the Court never labeled professional speech, such as physician speech, as less protected under the First Amendment). The conservative-leaning Court made this conclusion when determining whether the government unconstitutionally restricted CPCs' physicians, who advocate against abortion services, and their speech rights. See *id.* at 761 (referring to CPCs as "pro-life" with the goal to discourage women getting an abortion). Nonetheless, the Court made no distinction between the First Amendment rights of anti-abortion physicians versus pro-abortion physicians in its holding, which is why the same *NIFLA* analysis should equally apply to abortion aiding and abetting laws. See *id.* at 766–69 (emphasizing that physicians maintain First Amendment rights even when they work under a regulated practice).

harms speech while targeting physician conduct.²²³ Abortion aiding and abetting laws do not fall under either of the *NIFLA* exceptions.²²⁴

Under the *NIFLA* framework, federal courts should strike down abortion aiding and abetting laws that criminalize physician speech when counseling patients about their reproductive health options.²²⁵ The first exception, first articulated in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, does not apply because, as Justice Thomas stated in *NIFLA*, abortion regulations are highly controversial.²²⁶ States forbidding physicians from counseling and recommending abortion options—both in-state and out-of-state—advances a state-sponsored message about its views on abortion procedures.²²⁷ Although the regulation in *NIFLA* compelled speech, whereas aiding and abetting laws gag speech, states still advance their own controversial message by forbidding physicians to speak about specific topics.²²⁸ Further, circuit courts agree *NIFLA*’s first exception does not apply to doctor-patient communications unrelated to commercial speech, whether compelled to speak or compelled not to speak.²²⁹ Therefore, federal courts should similarly find this

²²³ *Id.* at 768. The first exception was created by the Court’s 1985 decision in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*. *Id.* (citing *Zauderer v. Off. of Disciplinary Coun. of the Sup. Ct. of Ohio*, 471 U.S. 626 (1985)). The Court then used its holding in *Planned Parenthood of Southeastern Pennsylvania v. Casey* to form the second exception where professional speech might receive less First Amendment protection. *See id.* (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion), *overruled by Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022)) (explaining the regulation at issue in *NIFLA* did not implicate the holding in *Casey*).

²²⁴ *See id.* (articulating the two exceptions where regulations may restrict physician speech).

²²⁵ *See Otto v. City of Boca Raton*, 981 F.3d 854, 859, 867–68 (11th Cir. 2020) (striking down a similar regulation under the Supreme Court’s *NIFLA* test that prohibited physicians from speaking about a particular topic).

²²⁶ *See NIFLA*, 585 U.S. at 768–69 (describing the regulation at issue in *NIFLA* as requiring physicians to speak a message about services that was “anything but an ‘uncontroversial’ topic”). In *NIFLA*, the majority emphasized the regulation at issue chilled speech because it required the speaker to speak about certain topics. *Id.* at 778. Similarly, aiding and abetting laws directed at individuals who advise or recommend abortion services to others target the speaker and chills speech. *See, e.g.*, NRLC Post-Roe Model Abortion Law, *supra* note 36 (describing the proposed aiding and abetting law that would criminalize encouraging or recommending abortion services).

²²⁷ *See NIFLA*, 585 U.S. at 769 (labeling the procedure at issue as a “state-sponsored service[]”).

²²⁸ *See Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1310 (11th Cir. 2017) (en banc) (referencing how the Supreme Court has declined to apply lower scrutiny to regulations forbidding a professional from speaking to clients about specific topics); *see also Miller & Berkman, supra* note 37, at 647–48 (discussing the negative impact to the doctor-patient relationship if state regulations forbid physicians from openly discussing abortion-related services with their patients).

²²⁹ *See, e.g.*, *Tingley v. Ferguson*, 47 F.4th 1055, 1077 (9th Cir. 2022) (analyzing the conversion therapy regulation under *NIFLA*’s second exception and not the first exception); *Otto*, 981 F.3d at 865 (declining to analyze a conversion therapy regulation under *NIFLA*’s first exception); *EMW Women’s Surgical Center, P.S.C. v. Beshear*, 920 F.3d 421, 426 (6th Cir. 2019) (holding *NIFLA*’s first exception does not apply to a regulation mandating physicians perform ultrasounds on patients prior to an abortion procedure).

exception does not apply to aiding and abetting laws prohibiting a physician from counseling abortion-seeking patients.²³⁰

Similarly, federal courts should find *NIFLA*'s second exception, articulated first in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, does not apply because abortion aiding and abetting laws extend beyond regulating conduct to implicating abortion-related speech.²³¹ State legislatures could, and likely will, argue abortion aiding and abetting laws target conduct that indirectly implicates physician speech.²³² But the argument ignores how these laws explicitly halt physicians from discussing and recommending abortion services, not just from performing the procedure.²³³ The Ninth Circuit and Eleventh Circuit split about what constitutes professional conduct versus physician speech supports this conclusion.²³⁴ Although the circuit courts interpreted conversion therapy regulations differently, both analyses would strike down abortion aiding and abetting laws.²³⁵ This is because the laws directly limit doctor-patient communications involving counseling or referring the patient, not conduct relating to a performed procedure—thus differing from a therapist conducting conversion therapy on a patient.²³⁶ Further, as the Ninth Circuit rea-

²³⁰ See *Otto*, 981 F.3d at 865 (finding the first *NIFLA* exception does not apply to a regulation prohibiting physicians from speaking and treating patients with conversion therapy).

²³¹ See *NIFLA*, 585 U.S. at 768 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022)) (explaining professional speech draws less protection when the regulation restricts conduct while indirectly implicating speech); see also OKLA. STAT. tit. 63, § 1-745.39 (2022) (stating how an individual could face civil action in Oklahoma if found aiding and abetting another in receiving an abortion); NRLC Post-Roe Model Abortion Law, *supra* note 36 (describing the proposed aiding and abetting law that would criminalize encouraging or recommending abortion services to individuals).

²³² See, e.g., *Tingley*, 47 F.4th at 1065 (articulating how the government argued its intent for the conversion therapy regulation was to regulate professional physician conduct, not speech).

²³³ See *id.* at 1073 (describing the difference between regulations restricting actual physician conduct from physician speech where the doctor recommends or prescribes a certain type of therapy or procedure).

²³⁴ See *id.* at 1077 (holding a conversion therapy regulation targeted conduct and not speech because the therapists were performing treatments on the patients); *Otto*, 981 F.3d at 865–66 (concluding a conversion therapy regulation unconstitutionally implicated physician speech because it restricted therapists' communications with patients).

²³⁵ See *Tingley*, 47 F.4th at 1077 (holding the conversion therapy regulation did not violate the First Amendment because it only restricted professional conduct); *Otto*, 981 F.3d at 865–66 (stating that the state's conversion therapy regulation violated the First Amendment because it unconstitutionally restricted physician speech).

²³⁶ See *Tingley*, 47 F.4th at 1077 (holding the conversion therapy regulation restricted professional conduct because it prohibited medical professionals from practicing these therapeutic methods, not just discussing the therapy option); *Otto*, 981 F.3d at 865–66 (stating the conversion therapy regulation violated physician speech rights because it prohibited communications between licensed therapists and patients). Under the Ninth Circuit's *Tingley* analysis, the circuit court would likely agree that abortion aiding and abetting laws differ because they restrict doctor-patient communications about abortion options, not the actual treatment. See 47 F.4th at 1072–73 (noting the difference between professional speech and professional conduct). Under the Eleventh Circuit's *Otto* analysis, courts would likely strike down the abortion aiding and abetting laws because they criminalize doctor-patient

soned in *Conant v. Walters*, the mere encouragement of potentially illegal activity is insufficient to establish aiding and abetting by the physician.²³⁷ Government regulations may not restrict First Amendment-protected speech under the guise of preventing potential or future illegal conduct.²³⁸ If a regulation forbids doctors from openly discussing a woman's reproductive health options, it restricts speech and is not illegal conduct.²³⁹ Further, the law erodes the doctor-patient relationship and deprives the patient of necessary information about her reproductive health.²⁴⁰

Because neither exception articulated in *NIFLA* applies, then federal courts must analyze abortion aiding and abetting laws that restrict physician communications under heightened judicial scrutiny.²⁴¹

B. Casey's Due Process Framework Supports Striking Down Abortion Aiding and Abetting Laws

In *Dobbs v. Jackson Women's Health Organization*, the Court neglected to acknowledge what might remain of *Casey's* First Amendment analysis.²⁴² This lack of guidance only further exacerbates the tension between *Casey* and *NIFLA's* holdings regarding how federal courts should analyze government abortion regulations implicating speech.²⁴³ Nonetheless, the tension between the two holdings should not alter federal courts' analyses when reviewing abortion

communications. See 981 F.3d at 866 (emphasizing how the government cannot regulate speech simply because it labeled the speech at issue as conduct).

²³⁷ See 309 F.3d 629, 638 (9th Cir. 2002) (declining to find doctors recommending and prescribing medical marijuana to patients established they aided and abetted illegal conduct).

²³⁸ See *Ashcroft v. Free Speech Coal.*, 536 U.S. 234, 252–53 (2002) (holding a government's concerns about future illegal conduct was an insufficient reason for restricting speech rights); *Conant*, 309 F.3d at 638 (stating the government may not restrict speech simply because illegal conduct might follow the speech).

²³⁹ See *Ashcroft*, 536 U.S. at 252–53 (articulating why government officials cannot restrict speech to avoid potential illegal conduct); see also NRLC Post-*Roe* Model Abortion Law, *supra* note 36 (crafting an abortion aiding and abetting law that restricts physicians from discussing or encouraging another to receive an abortion).

²⁴⁰ See Arey et al., *supra* note 20 (articulating the legal consequences doctors worry they might face if they counsel patients about abortion options); see also Declercq et al., *supra* note 17 (anticipating an increase to the United States maternal mortality rate following an increase in abortion bans).

²⁴¹ See, e.g., *Otto*, 981 F.3d at 867–68 (applying strict scrutiny after holding a conversion therapy regulation did not fall under either exception articulated in *NIFLA*).

²⁴² See *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231 (2022) (explaining why the Court must overturn *Roe v. Wade* and *Casey* because the right to abortion does not exist in the U.S. Constitution). The Court explicitly referenced *Casey's* due process analysis when overruling the holding, but it did not reference the First Amendment analysis. *Id.*

²⁴³ See Greene, *supra* note 213, at 1496–97 (describing the tension the Supreme Court's *Casey* and *NIFLA* holdings create when analyzing compelled speech regulations); Tubin, *supra* note 91, at 1869 (articulating the inconsistent analyses that exist between *Casey* and *NIFLA*).

aiding and abetting laws.²⁴⁴ These laws prohibit physicians from discussing truthful, non-misleading, and relevant information with the pregnant patient as she weighs her reproductive health options.²⁴⁵ In comparison, the regulations at issue in both *Casey* and *NIFLA* further provided information to the patient about her health status and options.²⁴⁶ As Justice Thomas articulated in *NIFLA*, First Amendment protections matter in instances like healthcare where “information can save lives.”²⁴⁷ Physicians holding a candid conversation with a pregnant patient about her abortion options provides her with potentially life-saving information.²⁴⁸ These important discussions should take place without

²⁴⁴ See *Nat'l Inst. of Fam. & Life Advocs. v. Becerra (NIFLA)*, 585 U.S. 755, 767–72 (2018) (holding a licensed notice requirement unconstitutionally implicated physician speech rights because the regulation did not involve commercial speech or target conduct that incidentally burdened speech); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882, 884 (1992) (plurality opinion) (striking down an informed consent regulation because it did not implicate physician speech rights and provided the patient with truthful and accurate information), *overruled by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022).

²⁴⁵ See OKLA. STAT. tit. 63, § 1-745.39 (2022) (stating an individual or entity could face civil action in Oklahoma if found aiding and abetting an individual in receiving or accessing an abortion); TEX. HEALTH & SAFETY CODE ANN. § 171.208(a) (West 2021) (stating how individuals in Texas could face civil liability if they knowingly engage in conduct resulting in another receiving an abortion); NRLC Post-Roe Model Abortion Law, *supra* note 36 (describing how abortion aiding and abetting laws would restrict physicians from encouraging or assisting an individual in accessing abortion procedures); see also *Planned Parenthood Greater Nw. v. Labrador*, No. 23-cv-00142, 2023 WL 4864962, at *22 (D. Idaho July 31, 2023) (concluding medical providers would likely succeed in showing a state official's decision to criminalize doctors for counseling and referring patients about out-of-state abortion procedures violates their First Amendment rights).

²⁴⁶ See *NIFLA*, 585 U.S. at 758–65 (describing how the regulation at issue required CPCs to provide certain notices to patients about other family planning options, such as abortion procedures, the state offered); *Casey*, 505 U.S. at 881 (articulating how the regulation at issue required physicians inform patients about potential risks of the procedure and the fetus's gestational age, among other information).

²⁴⁷ See *NIFLA*, 585 U.S. at 771 (citing *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 556 (2011)) (stating the dangers of content-based regulations and why the Supreme Court struck down those regulations). Some of the dangers of content-based regulations in medicine included government suppression of unpopular ideas and the manipulation of the doctor-patient relationship against communities, such as minority populations. *Id.*

²⁴⁸ See Declercq et al., *supra* note 17 (estimating an increase in the maternal mortality rate following the increase in abortion restrictions and bans). A Texas woman almost died after doctors waited to perform an abortion until her health was severe enough to circumvent the state's abortion ban. Elizabeth Cohen & John Bonifield, *Texas Woman Almost Dies Because She Couldn't Get an Abortion*, CNN (Nov. 16, 2022), <https://www.cnn.com/2022/11/16/health/abortion-texas-sepsis/index.html> [<https://perma.cc/LUK7-3YBU>]. The woman's water broke when she was eighteen-weeks pregnant, and doctors informed her the fetus would not survive. *Id.* Yet, she could not undergo an abortion procedure to remove the fetus until her condition was severe enough, so she was told to wait until her health deteriorated. *Id.* If the doctor had counseled the woman about seeking an abortion in another state instead of waiting, and she had obtained the procedure, the doctor could have faced legal penalties under Texas's abortion aiding and abetting law. See TEX. HEALTH & SAFETY CODE ANN. § 171.208(a) (stating individuals could face civil liability if they knowingly engage in conduct resulting in another receiving an abortion); Cohen & Bonifield, *supra* (reporting how the woman almost died before receiving emer-

government intrusion into the examination room and without physicians fearing they may lose their medical licenses, or worse.²⁴⁹ Therefore, federal courts should find *Casey*'s overruled due process analysis does not alter the conclusion that abortion aiding and abetting laws violate the First Amendment.²⁵⁰

C. Aiding and Abetting Laws Are Content-based and Draw Strict Scrutiny

As discussed in Section A of this Part, federal courts should conclude neither of the *NIFLA* exceptions to physician speech rights applies to abortion aiding and abetting laws; therefore, the laws undergo heightened judicial scrutiny.²⁵¹ The Supreme Court and some federal courts waiver on articulating exactly what scrutiny level—intermediate or strict—should apply once a court determines the regulation hinders First Amendment physician speech rights.²⁵² This Note argues courts should adopt the Ninth Circuit's reasoning in *Conant v. Walters* and apply strict scrutiny to the regulations because they discriminate based on the speech's content.²⁵³ Decades of Supreme Court precedent struck down content-based regulations under strict scrutiny because the regulations chilled First Amendment-protected speech.²⁵⁴ Similar to the regulation in *Conant*, abortion aiding and abetting laws explicitly prohibit speech based on its content: abortion communications.²⁵⁵ Further, these laws regulate speech based on viewpoint because they prohibit pro-abortion communications, not anti-

agency medical treatment in Texas); Arey et al., *supra* note 20 (describing the legal consequences doctors may face when counseling abortion-seeking patients).

²⁴⁹ See Arey et al., *supra* note 20 (discussing the potential legal risks doctors may face in counseling and referring patients if states pass abortion aiding and abetting laws).

²⁵⁰ See *NIFLA*, 585 U.S. at 771–72 (articulating the importance of physicians providing patients with information that could save their lives).

²⁵¹ See *supra* notes 221–241 and accompanying text.

²⁵² See, e.g., *NIFLA*, 585 U.S. at 773 (declining to decide what heightened scrutiny level applied when striking down a government regulation that unconstitutionally violated physician speech rights); *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1311 (11th Cir. 2017) (en banc) (refusing to address which heightened judicial scrutiny level applied because the Eleventh Circuit held the regulation would fail either test).

²⁵³ See 309 F.3d 629, 637–39 (9th Cir. 2002) (concluding the medical marijuana policy restricted the content of physicians' speech, making it "presumptively invalid" and drawing strict scrutiny).

²⁵⁴ See, e.g., *Reed v. Town of Gilbert*, 576 U.S. 155, 163–64, 171 (2015) (striking down an ordinance under strict scrutiny that regulated town signs based on the content each sign communicated); *Texas v. Johnson*, 491 U.S. 397, 412 (1989) (citing *Boos v. Barry* 485 U.S. 312, 321 (1988)) (applying "the most exacting scrutiny" to a content-based regulation because it restricted an individual's speech based on its specific content).

²⁵⁵ See *Conant*, 309 F.3d at 637–38 (discussing how the medical marijuana regulation at issue sought to punish doctors who recommended or prescribed medical marijuana, not doctors who spoke against the treatment). Similarly, abortion aiding and abetting laws punish doctors who discuss the procedure with patients, not doctors who condemn the procedure with patients. See NRLC Post-*Roe* Model Abortion Law, *supra* note 36 (describing how abortion aiding and abetting laws would restrict physicians from recommending or encouraging abortion services).

abortion communications.²⁵⁶ Content- and viewpoint-based regulations are presumptively invalid for how they inhibit speech; therefore, federal courts should apply strict scrutiny and strike down abortion aiding and abetting laws as unconstitutional.²⁵⁷

Nonetheless, courts might decline to characterize this type of First Amendment action as warranting strict scrutiny and instead apply heightened (intermediate) scrutiny.²⁵⁸ Even so, courts should adopt the Eleventh Circuit's reasoning in *Wollschlaeger v. Governor of Florida* and conclude the content-based regulation requires courts to strike it down.²⁵⁹ Both intermediate and strict scrutiny increase the burden on the government to prove the regulation furthers an important or compelling interest, and the regulation is substantially related to that interest.²⁶⁰ Condemning doctors for providing necessary counsel and referral for patients about their reproductive healthcare needs and out-of-state options simply because of the government's own denunciation of abortion procedures extends beyond an important or compelling interest.²⁶¹ Especially when that interest prevents patients from hearing vital information about their

²⁵⁶ See NRLC Post-Roe Model Abortion Law, *supra* note 36 (articulating an aiding and abetting law that would apply specifically to pro-abortion communications).

²⁵⁷ See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) (describing how regulations drawing strict scrutiny are "presumptively invalid" because the regulations allow the government to push its own viewpoint of an issue onto private individuals). Under the strict scrutiny test, the government must show it has narrowly tailored the regulation at issue to fit its compelling interest for courts to uphold the regulation. See *Reed*, 576 U.S. at 171 (detailing the strict scrutiny test courts must apply once it is determined that the government regulation is content based). Courts tend to strike down the regulation once it draws strict scrutiny because government officials cannot articulate an interest compelling enough to support the regulation's restriction on First Amendment speech. See, e.g., *id.* (holding the content-based restriction drew strict scrutiny and was unconstitutional because it was not narrowly tailored).

²⁵⁸ See *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1311 (11th Cir. 2017) (en banc) (declining to explicitly apply strict scrutiny to a content-based regulation when striking it down for violating the First Amendment).

²⁵⁹ See *id.* at 1308 (concluding that a state regulation prohibiting physicians from asking about a patient's gun ownership was content based and unconstitutional).

²⁶⁰ See *Reed*, 576 U.S. at 171 (explaining the test courts apply after determining a regulation is subject to strict scrutiny); *United States v. O'Brien*, 391 U.S. 367, 377, 382 (1968) (describing the test courts apply after determining that a regulation is subject to intermediate judicial scrutiny).

²⁶¹ See *Wollschlaeger*, 848 F.3d at 1317 (holding that the government's content-based regulation condemning doctors from discussing gun ownership with patients went beyond a permissible interest by the government under heightened judicial scrutiny). State legislatures could, and likely will, argue that state interest in protecting fetal life satisfies the requirement of providing an important or compelling interest for the regulation. See *Stuart v. Camnitz*, 774 F.3d 238, 255 (4th Cir. 2014) (referencing the state's argument that the abortion regulation protects fetal life). Nonetheless, courts should find this interest is outweighed because abortion aiding and abetting laws "compromise physicians' free speech rights, professional judgment, patient autonomy, and other important state interests in the process." See *id.* (articulating why the state interest to protect fetal rights was insufficient to survive heightened judicial scrutiny).

health.²⁶² No matter if courts apply intermediate or strict scrutiny to abortion aiding and abetting laws, they should conclude the government has not met its heightened burden and the regulations unconstitutionally hinder physician speech rights.²⁶³

CONCLUSION

When the Supreme Court eviscerated a woman's right to an abortion in its *Dobbs v. Jackson Women's Health Organization* holding, the decision invited states to enact strict legislation restricting abortion access. Reactionary legislation was swift and vast, with state legislatures passing aiding and abetting laws that threatened to punish physicians and other individuals if they assisted women in accessing abortion procedures. Before *Dobbs*, anti-abortion advocates utilized the First Amendment as one avenue to slowly chip away at abortion access in states. But the Supreme Court's *National Institute of Family and Life Advocates v. Becerra* (*NIFLA*) holding, which was lauded as a win for anti-abortion advocates, also provides physicians with a framework to avoid legal consequences when counseling patients about abortion services.

When analyzing abortion aiding and abetting laws, federal courts should find the laws trigger neither the noncontroversial commercial speech exception nor the professional conduct exception articulated in *NIFLA*. Moreover, federal courts should find abortion aiding and abetting laws directly target First Amendment-protected physician communications—thus triggering heightened judicial scrutiny. Federal courts should then strike down abortion aiding and abetting laws under strict scrutiny because the regulations are both content and viewpoint based. Striking down these regulations would protect the sanctity of the doctor-patient relationship, so physicians feel comfortable informing patients about vital information regarding their health and safety. Furthermore, striking down these laws would uphold decades of Supreme Court precedent invalidating content- and viewpoint-based regulations for unconstitutionally restricting speech.

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²⁶² See El-Bawab, *supra* note 25 (reporting how doctors failed to provide a pregnant patient with abortion counsel out of fear they could face criminal sanctions); Declercq et al., *supra* note 17 (anticipating an increase to the maternal morbidity and mortality rate in states with strict abortion restrictions); Cohen & Bonifield, *supra* note 248 (reporting on how a woman almost died because doctors waited to perform an abortion until she was in sepsis).

²⁶³ See *Wollschlaeger*, 848 F.3d at 1311 (declining to state the level of judicial scrutiny that applied to the case because the content-based regulations violated both intermediate and strict scrutiny).