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NOTE

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I. INTRODUCTION

Does life begin at conception? Do women need to see a sonogram to make an informed decision about whether they want an abortion? Some state legislatures believe so.[1] Laws mandating politically driven doctor-patient dialogue affect one of the hallmarks of the physician-patient relationship: a patient's trust in the physician's expertise. The common law and statutory requirement that a patient provide informed consent for a medical procedure facilitates the development of trust between patient and physician by allowing the patient to understand the procedure and discuss her options with her physician.[2] However, provisions of abortion-specific informed consent statutes that require physicians to communicate to the patient messages with which the physician disagrees undermine this trust. As opined by one reproductive health physician, "[T]he doctor-patient relationship is based on trust – and how does a patient trust us if we're giving them false information because we have to?"[3]

Just as patients have an interest in a clear understanding of the procedure, physicians possess liberty and autonomy interests when discussing their professional beliefs.[4] In an ever-changing field like medicine, "interfer[ence] with physician-patient speech . . . affects the development of new ideas."[5] Additionally, power dynamics inherent in the doctor-patient relationship magnify

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1. *See* Callie Beusman, *A State-by-State List of the Lies Abortion Doctors Are Forced to Tell Women*, VICE (Aug. 18, 2016), https://broadly.vice.com/en_us/article/nz88gx/a-state-by-state-list-of-the-lies-abortion-doctors-are-forced-to-tell-women.

2. Marc D. Ginsberg, *Informed Consent: No Longer Just What the Doctor Ordered? The "Contributions" of Medical Associations and Courts to A More Patient Friendly Doctrine*, 15 MICH. ST. U. J. MED. & L. 17, 18–20, 26 (2010).

3. Beusman, *supra* note 1.

4. Sarah Kramer, *Not Your Mouthpiece: Abortion, Ideology, and Compelled Speech in Physician-Patient Relationships*, 21 U. PA. J. L. & SOC. CHANGE 1, 23–24 (2018).

5. *Id.* at 11.

the importance of the doctor's ability to speak freely because patients rely on the doctor's medical judgment.[6] Indeed, state-mandated messages present "the danger that patients will be coerced and confused by government messages delivered by physicians."[7] However, state legislatures still need the ability to regulate the conduct of professionals, such as physicians. By extending the traditional doctrine of informed consent to its outermost limits, abortion-specific laws tread in the middle of several competing interests, such as a physician's free speech rights, a patient's right to accurate information, and the State's power to regulate the medical profession.

Courts have had difficulty with compelled speech challenges to informed consent statutes because of the intersection between speech and conduct.[8] Requirements that a physician provide a patient with controversial statements regarding the beginning of life represent a perplexing intersection between the freedom of speech protected by the First Amendment and the State's interest in regulating the medical profession. In fact, some have observed that "the regulation of professional speech is theoretically and practically inseparable from the regulation of medicine."[9] This inevitably complicates the determination of the level of scrutiny under which courts should review abortion informed consent statutes.

A balance needs to be struck between permitting state legislatures to regulate abortions like any other medical procedure and preventing legislatures from compelling physicians to make statements with which they fundamentally disagree. This is a difficult conceptual problem, as shown by myriad inconsistencies in rulings amongst the federal circuit courts.[10] Previously, the United States Supreme Court provided little guidance in reviewing potentially objectionable informed consent disclosures in the abortion context.[11] However, the Court's recent decision in *National Institute of Family and Life Advocates v. Becerra*,[12] which involved a statute requiring pro-life pregnancy centers to provide patients with certain information, clarified how courts should determine

6. *Id.* at 12–13.

7. Paula Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice*, 74 B.U. L. REV. 201, 206 (1994).

8. Harrison Blythe, Note, *Physician-Patient Speech: An Analysis of the State of Patients' First Amendment Rights to Receive Accurate Medical Advice*, 65 CASE W. RES. L. REV. 795, 797–98 (2015).

9. Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 951.

10. *Compare* Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 737–38 (8th Cir. 2008) (en banc), *with* Stuart v. Camnitz, 774 F.3d 238, 250 (4th Cir. 2014).

11. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 881–87 (1992).

12. *See* 138 S. Ct. 2361 (2018).

the level of scrutiny when reviewing informed consent disclosures. This decision – initially viewed as a win for pro-life organizations in pro-choice states[13] – may ironically become a win for abortion providers in pro-life states because of the difficult task the courts face in balancing the competing interests of free speech and the regulation of the medical profession.

Part II of this Note discusses the background of the Missouri informed consent statute and compares it with other states' informed consent statutes. Part II further explores how the United States Supreme Court and several federal circuit courts have decided compelled speech challenges to other informed consent statutes. Part III examines the Court's holding in *Becerra* and analyzes how that holding clarified the holding in *Planned Parenthood v. Casey* and its view on "professional speech." Finally, Part IV examines the constitutionality of the compelled speech aspects of Missouri's informed consent statute under existing precedent. Part V then argues that the United States Supreme Court's holding in *Becerra* suggests that the federal circuits have failed to apply the proper level of scrutiny to cases involving informed consent statutes.

II. LEGAL BACKGROUND

This Part discusses the legal history of Missouri's informed consent statute and addresses several portions of Missouri's statute that compel speech. Then, this Part discusses a phrase inserted in Missouri's statutory preamble that faced constitutional challenges at the United States Supreme Court. Next, this Part reviews *Casey*,[14] a landmark case involving compelled speech in informed consent to abortion statutes, and its implications on informed consent statutes. Finally, this Part will consider the current circuit split on professional speech in the context of informed consent for abortion statutes in the wake of *Casey*.

A. Informed Consent Laws Generally

Since the Court recognized abortion as a fundamental liberty protected by the Due Process Clause of the Fourteenth Amendment in *Roe v. Wade*,[15] pro-life lawmakers have used informed consent laws to limit the number of abortions.[16] Informed consent laws place an array of restrictions on access to abortion, such as waiting periods, in-person counseling, viewing ultrasounds, and presenting written materials that inform the patient on the medical procedure.[17]

13. Emma Green, *The Supreme Court Hands a Win to the Pro-Life Movement*, ATLANTIC (June 26, 2018), https://www.theatlantic.com/politics/archive/2018/06/the-supreme-court-hands-a-win-to-the-pro-life-movement/563738/.

14. *Casey*, 505 U.S. 833.

15. 410 U.S. 113 (1973).

16. Post, *supra* note 9, at 940.

17. *See Waiting Periods for Abortions*, GUTTMACHER INST., https://www.guttmacher.org/evidence-you-can-use/waiting-periods-abortion (last visited May 21, 2019).

According to the Guttmacher Institute,[18] every state requires that a patient provide informed consent to receive medical treatment, but thirty-four states have abortion-specific requirements.[19] Of those thirty-four states, thirty states require that written materials be offered or given to the patient.[20] Further, only eleven of those states require the physician to give the materials to the patient.[21] Finally, merely three states' informed consent laws are so stringent as to require the written materials to include a phrase acknowledging the belief that life begins at conception.[22] Missouri's informed consent statute is one of those three.[23]

B. Common Law Informed Consent

Informed consent has long been a staple of American tort law. The common law doctrine of informed consent stems from "two basic principles of law, the fiduciary nature of the physician-patient relationship and the fundamental legal principle that a competent individual has a right to determine what will be done with his or her body."[24] Traditionally, Missouri requires patients to "have a clear understanding of the risks and benefits of the proposed treatment alternatives or nontreatment" before making an informed decision.[25] The longstanding requirement of informed consent is inextricably linked to the medical procedure itself. Avoiding tort liability requires that informed consent to the surgery be given as much as it requires the surgery be performed correctly.[26] This relationship between the medical procedure and informed consent categorizes the requirement that a physician provide a patient with certain information as professional conduct.[27] A physician accomplishes the conduct of providing information by speaking or the First Amendment equivalent of

18. "The Guttmacher Institute is a leading research and policy organization committed to advancing sexual and reproductive health and rights in the United States and globally." *About Us*, GUTTMACHER INST., https://www.guttmacher.org/about (last visited May 31, 2019).

19. *Counseling and Waiting Periods for Abortion*, GUTTMACHER INST., https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion (last updated May 1, 2019).

20. *Id.*

21. *Id.*

22. *Id.* Indiana requires counseling that personhood begins at conception but does not require that such a statement be provided in written materials. *Id.*

23. *See* MO. REV. STAT. § 188.027 (2018).

24. 70 C.J.S. *Physicians and Surgeons* §137, West (database updated Mar. 2019).

25. Cruzan v. Harmon, 760 S.W.2d 408, 417 (Mo. 1988) (en banc) (quoting Sidney H. Wanzer, *The Physician's Responsibility Toward Hopelessly Ill Patients*, 310 NEW ENG. J. MED. 955, 957 (1984)), *aff'd sub nom.* Cruzan *ex rel.* Cruzan v. Dir. Mo. Dep't of Health, 497 U.S. 261 (1990).

26. *See* Richard E. Shugrue & Kathryn Linstromberg, *The Practitioner's Guide to Informed Consent*, 24 CREIGHTON L. REV. 881, 881–82 (1991).

27. *See* Blythe, *supra* note 8, at 803–04.

speaking – such as providing written materials; however, the mere fact that speech provides the only means to accomplish the conduct does not prevent that conduct from being considered as professional conduct for purposes of constitutional review.[28]

C. Missouri's Informed Consent Statute

Many states have abortion-specific informed consent laws, but Missouri's statute presents one of the most stringent requirements in the country because it requires the physician to disclose a statement that many find controversial.[29] Missouri's informed consent statute requires that doctors present the patient seeking the abortion with certain written information contained in a booklet.[30] Some of the information required to be in the booklet includes

> the probable anatomical and physiological characteristics of the unborn child at two-week gestational increments from conception to full term, including color photographs or images of the developing unborn child at two-week gestational increments. Such descriptions shall include information about brain and heart functions, the presence of external members and internal organs during the applicable stages of development and information on when the unborn child is viable.[31]

Most notably, the booklet or printed material must "prominently display the following statement: 'The life of each human being begins at conception. Abortion will terminate the life of a separate, unique, living human being.'"[32] The statute does not include a definition for "life" or "human being" to give further clarity to the meaning of the mandated phrase.[33] However, the meaning of "conception" is understood as "the fertilization of the ovum of a female by a sperm of a male."[34] Additionally, the booklet acknowledges that Missouri law requires the information in the booklet be provided to patients seeking abortions.[35]

While the statute does not define all terms in the phrase, the Missouri General Assembly attempted to further legitimize this statement. In 1986, the General Assembly enacted a statutory preamble, which stated that "[t]he life

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28. *Id.* at 804.

29. *See supra* text accompanying notes 19–24.

30. *See* MO. REV. STAT. § 188.027 (2018); *see also* MO. DEP'T OF HEALTH & SENIOR SERVICES, MISSOURI'S INFORMED CONSENT BOOKLET (2017), https://health.mo.gov/living/families/womenshealth/pregnancyassistance/pdf/InformedConsentBooklet.pdf [hereinafter INFORMED CONSENT].

31. MO. REV. STAT. § 188.027.1(2).

32. *Id.*

33. *Id.* § 188.015.

34. *Id.*

35. INFORMED CONSENT, *supra* note 30, at 1.

of each human being begins at conception."[36] Shortly after becoming effective in 1988, the United States Supreme Court heard a constitutional challenge to the preamble as well as other Missouri provisions regulating abortion.

In *Webster v. Reproductive Health Services*,[37] the plaintiffs – five health professionals – sought injunctive and declarative relief on the basis that Missouri's statutory preamble was unconstitutional because it violated the Establishment Clause, which prevents the government from establishing a religion.[38] The five health professionals who challenged the statutory preamble feared its declaration that life began at conception guided the interpretation of other provisions that regulated abortion.[39] The health professionals sought injunctive relief to prevent the enforcement of the preamble.[40] Both the U.S. District Court for the Western District of Missouri and the U.S. Court of Appeals for the Eighth Circuit found the preamble unconstitutional, relying on dictum from the United States Supreme Court in *Roe v. Wade* that "'a State may not adopt one theory of when life begins to justify its regulation of abortions.'"[41]

However, on review, the United States Supreme Court did not address the constitutionality of the preamble because it was not an abortion regulation.[42] The Court noted that "*Roe v. Wade* 'implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortion.'"[43] Further, the Court acknowledged that the preamble may give rise to standing when it is used to interpret other statutes, but the Court cannot decide on future cases.[44] Therefore, the Court did not rule on the constitutionality of Missouri's statutory preamble because the plaintiffs did not have standing when the preamble did not restrict the activities of the plaintiffs in some concrete way.[45]

D. The First Amendment and Tiered Scrutiny

Not all constitutional challenges brought by a plaintiff against a statute are treated the same. When determining whether a statute violates the Consti-

36. MO. REV. STAT. § 1.205(1) (2018).

37. 492 U.S. 490, 501–02 (1989).

38. *Id.* at 501.

39. *See id.* at 504–05.

40. *Id.* at 501–02.

41. *Id.* at 504 (quoting Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416, 444 (1983) (quoting Roe v. Wade 410 U.S. 113, 159–162 (1973))).

42. *Id.* at 506.

43. *Id.* (quoting Maher v. Roe, 432 U.S. 462, 474 (1977)).

44. *Id.* at 506–07.

45. *Id.* at 507. However, in his dissent, Justice Stevens found standing existed and, when deciding on the merits, he would have held that the statutory preamble violated the Establishment Clause because the preamble "serve[d] no identifiable secular purpose." *Id.* at 566–67 (Stevens, J., dissenting).

tution, the Court applies one of three levels of scrutiny: (1) rational basis review; (2) intermediate scrutiny; or (3) strict scrutiny.[46] In First Amendment cases, the level of scrutiny applied by the court turns on the burden placed on speech rights.[47] For instance, a statute may seek to only regulate conduct and have no burden on speech.[48] If a state regulation of conduct does not burden free speech or another right that has been deemed a "fundamental liberty" so as to be incorporated to the states by the Fourteenth Amendment, then the statute receives rational basis review.[49] Further, some regulations on speech – such as fighting-words, true threats, and incitement – are unprotected as "low value" speech and are sometimes referred to as conduct, also receiving rational basis review.[50] However, content-based regulations on speech, which regulate speech based on what the speaker says, are considered "high-value" speech and receive strict scrutiny.[51] Finally, content-neutral regulations on speech are viewed more leniently under intermediate scrutiny.[52]

Because compelled speech statutes are normally content-based restrictions, courts review them under strict scrutiny.[53] The test for strict scrutiny asks whether the statute is narrowly tailored to achieve a compelling state interest.[54] *Wooley v. Maynard*[55] provides an example of the Court's use of strict scrutiny to a statute that compelled speech. The statute at issue made it a crime to cover up the display of the state's motto – "Live Free or Die" – on a vehicle's license plate.[56] The Court first decided that this was a First Amendment issue because the First Amendment protects "the right to speak freely and the right to refrain from speaking at all."[57] Additionally, the statute required individuals to foster the State's message by using an individual's private property as a "mobile billboard" for the State's ideological message.[58] Applying strict scrutiny, the Court held that the State's interest of identifying passenger vehicles was compelling; however, the statute was not narrowly tailored because there

46. 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, 2026–28 (2015).

47. *Id.* at 2024–30.

48. *Id.* at 2024–25.

49. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938).

50. RONALD J. KROTOSZYNSKI ET AL., THE FIRST AMENDMENT: CASES AND THEORY 95 (3d ed. 2017).

51. *Id.* at 70.

52. *Id.*

53. Riley v. Nat'l Fed. of the Blind of N.C., 487 U.S. 781, 798 (1988).

54. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2231 (2015).

55. 430 U.S. 705 (1977).

56. *Id.* at 706–07.

57. *Id.* at 714.

58. *Id.* at 715.

were less drastic means to achieve the same purpose.[59] Therefore, the Court invalidated the law as a violation of First Amendment freedom of speech.[60]

On the other hand, rational basis review merely requires the government show some rational reason for the legislation.[61] One example of the Court's use of rational basis review to evaluate conduct that did not burden a fundamental liberty comes from *Washington v. Glucksberg*.[62] In *Glucksberg*, the Court heard a challenge to the State of Washington's statute banning assisted suicide.[63] The Court determined that the statute did not involve a fundamental liberty because "our Nation's history, legal traditions, and practices" consistently condemned assisted suicide.[64] Applying rational basis review, the Court decided that Washington's interests in protecting vulnerable patients from coercion, preventing involuntary and voluntary euthanasia, and protecting the integrity and ethics of the medical profession were rationally related to the prohibition on assisted suicide.[65] Therefore, the statute was upheld because it was rationally related to the State's interest and did not involve a fundamental right.[66]

In some instances, the Court has applied "intermediate scrutiny" in cases involving commercial speech where the advertisement was not misleading or untruthful.[67] Intermediate scrutiny asks if the government asserted a "substantial interest and the interference with speech [was] in proportion to the interest served."[68] In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,[69] the Court heard a challenge to a state statute that prohibited electric utilities from promoting the use of electricity in advertisements. When determining the level of scrutiny, the Court acknowledged that misleading commercial speech receives no First Amendment protection, but the Court reasoned that truthful advertisements should receive some First Amendment protection because truthful advertisements serve to inform the public.[70] Therefore, the Court applied intermediate scrutiny.[71] Using intermediate scrutiny, the Court determined the State had a substantial interest in energy conservation; however, the Court held that the interference with speech was not proportionate to the interest served because a ban on all advertisement prevented the ability to promote efficient uses of energy as well as those the State wished to curb.[72]

59. *Id.* at 716–17.
60. *Id.* at 717.
61. United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938)
62. 521 U.S. 702 (1997).
63. *Id.* at 705–06.
64. *Id.* at 721.
65. *Id.* at 730–33.
66. *Id.* at 735–36.
67. *In re* R.M.J., 455 U.S. 191, 203–07 (1982).
68. *Id.* at 203.
69. 447 U.S. 557, 558 (1980).
70. *Id.* at 561–64.
71. *Id.* at 566.
72. *Id.* at 570–71.

Further, there were less restrictive ways for the State to promote its interests.[73] Therefore, the Court held that the statute failed intermediate scrutiny and was unconstitutional.[74]

Occasionally, a regulation of the medical profession – like *Glucksberg* – collides with the First Amendment protection of "high-value" speech – like *Wooley*. This is evident in informed consent statutes where states have the power to regulate the medical profession, leading to rational basis review; however, these regulations may also touch on speech that is protected by the First Amendment, which should be examined under strict scrutiny. Thus, determining whether the statute operates as a regulation of speech – receiving strict scrutiny – or a regulation of conduct – receiving rational basis review – becomes a matter for courts to decide.[75]

E. Planned Parenthood v. Casey *Precedent and Its Application in Subsequent Cases*

The United States Supreme Court has tackled the issue of informed consent laws and their potential to infringe upon First Amendment rights only once – in *Planned Parenthood v. Casey*.[76] This Section examines the Court's decision on the issue of compelled speech in *Casey*. Then, this Section explains the confusion *Casey* created in the federal circuit courts by examining how those courts decided subsequent compelled speech challenges to abortion-specific informed consent statutes.

1. *Planned Parenthood v. Casey* Addresses Compelled Speech in Informed Consent Statutes

In *Casey*, the United States Supreme Court heard a challenge to a Pennsylvania abortion statute that, among other things, required a patient's informed consent before the patient could receive an abortion.[77] Five abortion clinics and a class of physicians brought the suit seeking injunctive relief against enforcement of the statute.[78] The statute provided in part that the physician must orally inform the patient of certain information, including the medical risk associated with the procedure, the probable gestational age of the unborn child, the nature of the procedure, and alternatives to the procedure.[79] Additionally, the statute required the physician to inform the patient about the availability of written material on the procedure.[80]

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73. *Id.*
74. *Id.*
75. Lowe v. SEC, 472 U.S. 181, 231 (1985) (White, J., concurring).
76. 505 U.S. 833 (1992).
77. *Id.* at 844.
78. *Id.* at 845.
79. *Id.* at 844 (citing 18 PA. CONST. STAT. § 3205 (1990)).
80. *Id.* at 881 (citing 18 PA. CONST. STAT. § 3205 (1990)).

The Court decided a number of constitutional claims regarding the statute but only briefly addressed the statute's potential infringement on the freedom of speech.[81] The plurality acknowledged that "the physician's First Amendment rights not to speak [were] implicated."[82] In making this point, the plurality cited *Wooley v. Maynard*,[83] where the Court held that a statute making it a misdemeanor to obscure the state's motto on a license plate violated the First Amendment because the statute forced "individual[s] to participate in the dissemination of an ideological message . . . for the express purpose that it be observed and read by the public."[84] However, the plurality decided the physicians' First Amendment rights were only implicated "as part of the practice of medicine, subject to reasonable licensing and regulation by the State."[85] Therefore, the plurality reasoned that "no constitutional infirmity" occurred because the physicians' rights were subject to reasonable regulation and the disclosure was truthful, nonmisleading, and relevant to receiving an abortion.[86]

In a lengthy opinion, the plurality considered the abortion clinics' and physicians' First Amendment challenge to the speech requirements of the physicians in a single paragraph.[87] This cursory dismissal left unclear the standard used to determine the constitutionality of compelled speech requirements with respect to the regulation of the medical profession.[88] Some read the quick determination in *Casey* to apply rational basis review to the issue of compelled speech in informed consent statues because the statute only implicated speech as part of its regulation of the medical profession.[89] Rodney Smolla, First Amendment scholar and dean of the Widener University Delaware Law School, however, believed *Casey* reviewed the statute under strict scrutiny.[90] Smolla attributed the lack of strict scrutiny analysis in *Casey* to it being an "easy case" because the statute was narrowly tailored to serving the compelling state interest of patient autonomy.[91] Since *Casey*, federal circuit courts have been split on the standard they apply to compelled speech challenges in the

81. *See id.* at 884.

82. *Id.*

83. 430 U.S. 705 (1977).

84. *Id.*

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

86. *Id.*

87. *Id.*

88. Kathryn E. Meyer, Note, *Taking Physicians Out of the Straight Jacket: Defending Physician Free Speech Rights by Defining the "Truthful and Nonmisleading" Standard*, 104 KY. L. J. 353, 353–54 (2015).

89. Scott W. Gaylord & Thomas J. Molony, *Casey and a Woman's Right to Know: Ultrasounds, Informed Consent, and the First Amendment*, 45 CONN. L. REV. 595, 620 (2012).

90. Rodney A. Smolla, *Professional Speech and the First Amendment*, 119 W. VA. L. REV. 67, 81 (2016).

91. *Id.*

context of informed consent laws.[92] The cases discussed in Section C demonstrate the void left by *Casey*'s lack of clarity regarding the appropriate standard of review in compelled speech in informed consent statutes.

2. The Circuit Split

The lack of clarity in *Casey* resulted in confusion among the federal circuit courts in deciding similar informed consent statues. This Section will illustrate two major cases – one from the Eighth Circuit and the other from the Fourth Circuit – that display this confusion. Further, this Section will explain the level of scrutiny applied by each circuit and how they arrived at their different conclusions.

a. The Strange Application of the Truthful, Nonmisleading, and Relevant Test in *Planned Parenthood v. Rounds*

The truthful, nonmisleading, and relevant test applied in *Casey* appeared straight-forward – that is, until *Planned Parenthood v. Rounds* reached the Eighth Circuit.[93] In *Rounds*, Planned Parenthood and its medical director sued to prevent a South Dakota statute that required certain disclosures of information be made to patients to obtain their informed consent before receiving an abortion from taking effect.[94] The statute required the physician to provide the patient, in writing, with information on the abortion procedure, such as the name of the physician performing the abortion, the medical risks of the procedure, and the information "[t]hat the abortion will terminate the life of a whole, separate, unique, living human being."[95] An additional section defined "human being" for purposes of the informed consent statute as "an individual living member of the species of Homo sapiens, including the unborn human being during the entire embryonic and fetal ages from fertilization to full gestation."[96] Among other challenges,[97] Planned Parenthood contended that the disclosure requirements violated the physicians' free speech rights.[98]

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92. *See*, *e.g.*, Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724 (8th Cir. 2008); Stuart v. Camnitz, 774 F.3d 238 (4th Cir. 2014).

93. *Rounds*, 530 F.3d 724.

94. *Id.* at 727.

95. *Id.* at 726 (quoting S.D. CODIFIED LAWS § 34-23A-10.1(1) (2005)).

96. *Id.* at 727 (quoting S.D. CODIFIED LAWS § 34-23A-1(4)).

97. Planned Parenthood set forth a number of challenges not relevant to this Note. Some of those arguments were that the disclosure requirements were unconstitutionally vague; that the disclosures unduly burdened patients' rights to an abortion and violated their own free speech rights; and that the health exception in the statute was inadequate. *Id.*

98. *Id.*

The U.S. District Court for the District of South Dakota originally granted Planned Parenthood's motion for injunction.[99] The District of South Dakota found that a likelihood of success on the merits existed because the information required to be disclosed included an ideological statement that did not pass *Casey*'s test of truthful, non-misleading medical information.[100] On appeal, the Eighth Circuit affirmed the District of South Dakota's ruling.[101] Then, sitting en banc, the Eighth Circuit, with Judge Raymond W. Gruender writing the opinion, vacated and remanded the case back to the district court.[102]

The majority began its analysis by acknowledging that the First Amendment protected the right not to speak.[103] However, the Eighth Circuit refused to give the claim "First Amendment protections" that would require a determination that the statute was "narrowly tailored to serve a compelling interest."[104] In denying strict scrutiny, the Eighth Circuit reasoned that *Casey* did not apply strict scrutiny because the plurality "found no violation of the physician's right not to speak, without need for further analysis of whether the requirements were narrowly tailored to serve a compelling state interest."[105] Further, *Casey* found no violation of the physician's right to speak "where physicians merely were required to give 'truthful, nonmisleading information' relevant to the patient's decision to have an abortion."[106] Therefore, the Eighth Circuit believed strict scrutiny was not available when the information in the required disclosure was truthful, nonmisleading, and relevant.[107]

Next, the majority addressed whether the required disclosures in the statute were truthful, nonmisleading, and relevant.[108] The majority first noted that the phrase "'that abortion will terminate the life of a whole, separate, unique, living human being' certainly may be read to make a point in the debate about the ethics of abortion" when taken in isolation.[109] However, the majority pointed out that the statute additionally defined "human being" as "an individual living member of the species of Homo Sapiens . . . during [its] embryonic [or] fetal age."[110] Further, the Eighth Circuit explained "[w]here [a term] is

99. Planned Parenthood Minn., N.D., S.D. v. Rounds, 375 F. Supp. 2d 881 (D. S.D. 2005), *vacated and remanded by* 530 F.3d 724.

100. *Id.* at 886–87.

101. Planned Parenthood Minn., N.D., S.D. v. Rounds, 467 F.3d 716 (2006).

102. Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 726 (8th Cir. 2008).

103. *Id.* at 733.

104. *Id.*

105. *Id.* at 734.

106. *Id.*

107. *Id.*

108. *Id.* at 735.

109. *Id.*

110. *Id.* at 735–36 (alterations in original).

defined by statute, the statutory definition is controlling."[111] The majority determined that the required disclosures were truthful, nonmisleading, and relevant when read in conjunction with the limiting statutory definition.[112] Therefore, the Eighth Circuit held that plaintiffs could not show a fair chance of prevailing on the merits because the disclosure was truthful, nonmisleading, and relevant to the decision to have an abortion.[113]

Judge Diana E. Murphy dissented from the majority, arguing that the required disclosure was a "metaphysical belief."[114] Further, Judge Murphy noted that the meaning of the term "human being" was a value judgment and that the legislature cannot "establish by fiat that the term 'human being' has only biological connotations."[115] Judge Murphy further noted the judiciary determines what violates the Constitution and the legislature cannot "insulate its own laws from legitimate judicial challenge."[116] Additionally, Judge Murphy argued that there was nothing suggesting that physicians would include the statutory definition of "human being" with the disclosure.[117] Finally, Judge Murphy concluded that even if a physician disclaimed the disclosure, the constitutional defects would not be cured because the patient would likely attribute the views to the speaker due to the face-to-face contact the doctor had with the patient.[118] Therefore, the dissent would have affirmed the district court's injunction because the statute likely violated the First Amendment when it compelled physicians to recite a metaphysical belief and the physicians would not be able to disclaim the belief due to the face-to-face nature of the interaction.[119]

The Eighth Circuit gained support when the U.S. Court of Appeals for the Fifth Circuit also ruled that statutorily mandated informed consent disclosures do not receive strict scrutiny when they provide truthful, nonmisleading, and relevant information.[120] *Texas Medical Providers Performing Abortion Services v. Lakey* concerned a Texas statute that required the taking and displaying of a sonogram before a patient could receive an abortion.[121] Following the Eighth Circuit's interpretation of *Casey*, the Fifth Circuit held that the Texas statute did not violate the physician's First Amendment rights because taking and displaying a sonogram was "the epitome of truthful, non-misleading information" and relevant to a woman's decision-making.[122] While the Fifth Circuit

111. *Id.* at 735 (alterations in original) (citing Bruggeman v. S.D. Chem. Dependency Counselor Certification Bd., 571 N.W.2d 851, 853 (S.D. 1997)).

112. *Id.*

113. *Id.*

114. *Id.* at 742 (Murphy, J., dissenting).

115. *Id.* at 744.

116. *Id.* at 745 (citing Legal Servs. Corp. v. Velasquez, 531 U.S. 533, 548 (2001)).

117. *Id.*

118. *Id.* 746–47.

119. *Id.*

120. Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 576–78 (5th Cir. 2012).

121. *Id.* at 757.

122. *Id.* at 758.

adopted the Eighth Circuit's approach, other circuits expressed disapproval of the decision.

b. *Stuart v. Camnitz* Changes Course and Applies Intermediate Scrutiny Using a Sliding-Scale Test

The U.S. Court of Appeals for the Fourth Circuit took a different approach from the Eighth Circuit when it applied intermediate scrutiny to review an informed consent for abortion statute.[123] In *Stuart v. Camnitz*,[124] the Fourth Circuit heard a challenge to a North Carolina statute requiring physicians "to perform an ultrasound, display the sonogram, and describe the fetus to women seeking abortions." Plaintiffs – physicians and abortion providers – claimed the statute violated their First Amendment free speech rights.[125] The U.S. District Court for the Middle District of North Carolina agreed and granted summary judgment, entering a permanent injunction to prevent enforcement of the requirement to display and describe the sonogram.[126]

On appeal, the majority first reasoned that the display of the sonogram was an expressive act because North Carolina's intent was to discourage abortions and make women reconsider their decisions.[127] The Fourth Circuit noted that the statute required only the disclosure of factual information.[128] However, the Fourth Circuit decided that even though the compelled speech was factual, "that [did] not divorce the speech from its moral or ideological implications."[129]

Having decided that the statute constituted compelled ideological speech, the Fourth Circuit examined the level of scrutiny to apply.[130] The Fourth Circuit first recognized that North Carolina had power to regulate the medical profession, including regulation of speech within the profession; however, "that [did] not mean that individuals simply abandon their First Amendment rights when they commence practicing a profession."[131] The Fourth Circuit then explained that the stringency of review rested on a sliding scale between professional speech and professional conduct.[132] The majority further reasoned that this case had requirements of both speech and conduct.[133] Therefore, because the disclosure requirement fell somewhere in the middle on the sliding scale, the district court's use of intermediate scrutiny was correct.[134]

123. Stuart v. Camnitz, 774 F.3d 238 (4th Cir. 2014).
124. *Id.* at 242.
125. *Id.* at 243.
126. Stuart v. Loomis, 992 F. Supp. 2d 585, 611 (M.D.N.C. 2014).
127. *Camnitz*, 774 F.3d at 245.
128. *Id.*
129. *Id.* at 246.
130. *Id.* at 248.
131. *Id.* at 247.
132. *Id.* at 248.
133. *Id.*
134. *Id.* at 249.

The Fourth Circuit rejected the Eighth Circuit's application of rational basis review to address compelled physician speech in the abortion regulation in *Rounds*, stating that "the plurality [in *Casey*] did not hold sweepingly that all regulation of speech in the medical context merely receives rational basis review."[135] The Fourth Circuit further noted that *Casey* only addressed the issue of compelled physician speech in a single paragraph.[136] Additionally, the Fourth Circuit reasoned that "[t]he fact that a regulation does not impose an undue burden on a woman under the due process clause does not answer the question of whether it imposes an impermissible burden on the physician under the First Amendment."[137] Therefore, the Fourth Circuit concluded that despite a different holding in the Eighth Circuit, intermediate scrutiny was consistent with United States Supreme Court precedent, including the plurality opinion in *Casey*.[138]

Under intermediate scrutiny, the test applied by the Fourth Circuit asked whether "the statute directly advance[d] a substantial government interest and . . . the measure [was] drawn to achieve that interest."[139] The Fourth Circuit recognized a few compelling state interests, such as the protection of fetal life, the protection of a patient's physical and psychological health, and the importance of ensuring a patient's decision is well-informed.[140] The Fourth Circuit, however, concluded that the means exceeded what was proper because "states cannot so compromise physicians' free speech rights, professional judgment, patient autonomy, and other important state interests in the process."[141] Therefore, the Fourth Circuit affirmed the district court's grant of plaintiffs' summary judgment motion because the statute impermissibly compelled speech in order to achieve its interest.[142]

The Fourth Circuit's use of a sliding-scale test to determine the level of scrutiny to apply was not anomalous to tests used by other federal circuit courts when determining the level of protection to grant professional speech. In fact, several federal circuit courts used sliding-scale tests to review regulations of

135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.* at 250 (citing Sorrell v. IMS Health Inc., 564 U.S. 552 (2011)).
140. *Id.*
141. *Id.* at 255.
142. *Id.* at 255–56.

professional speech within the context of the medical profession.[143] Specifically, the Fourth Circuit based its sliding scale off of a test created by the U.S. Court of Appeals for the Ninth Circuit in *Pickup v. Brown*.[144]

In *Pickup*, the Ninth Circuit heard a challenge to a California statute that forbade psychologists from providing therapy that sought to change the sexual orientation of minors.[145] The providers of the treatment argued that the statute violated their First Amendment right to free speech because the statute prohibited psychologists from engaging in talk therapy.[146] The Ninth Circuit upheld the statute because it decided regulation of talk therapy primarily regulated conduct and not First Amendment protected speech even though the conduct consisted of speech.[147]

To aid in its determination of the level of protection to afford speech, the Ninth Circuit created a continuum that balances the First Amendment rights of professionals and the State's ability to regulate professional conduct.[148] At one end of the continuum, professional speech outside of the practice of the profession – known as "public dialogue" – was subject to strict scrutiny.[149] On the other end of the continuum, speech used in the course of treatment – which was ultimately considered conduct – was subject to rational basis review.[150] The Ninth Circuit considered speech between a professional and a client within the context of the professional's occupation but not in the course of treatment to be at the midpoint.[151] Speech between a professional and a client was still within an individual's professional capacity, but it was not within the course of treatment so as to be labeled conduct.[152] The Ninth Circuit only explained that the midpoint of professional speech received "somewhat diminished" First Amendment protection.[153] Further, the Ninth Circuit noted that informed consent for abortion statutes fell at that midpoint.[154] Finally, the Ninth Circuit upheld the California statute under rational basis review because it determined

143. Pickup v. Brown, 740 F.3d 1208, 1227–29 (9th Cir. 2014), *abrogated by* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018); King v. Governor of N.J., 767 F.3d 216, 233 (3d Cir. 2014) ("While the function of this speech does not render it 'conduct' that is wholly outside the scope of the First Amendment, it does place it within a recognized category of speech that is not entitled to full protection of the First Amendment."); Wollschlaeger v. Governor of Fla., 760 F.3d 1195, 1218–26 (11th Cir. 2014), *vacated and superseded on reh'g* 797 F.3d 859 (11th Cir. 2015).

144. *Camnitz*, 774 F.3d at 248; *Pickup*, 740 F.3d at 1227–29.

145. *Pickup*, 740 F.3d at 1215.

146. *Id.* at 1219.

147. *Id.* at 1231.

148. *Id.* at 1227–29.

149. *Id.* at 1227.

150. *Id.* at 1229.

151. *Id.* at 1228.

152. *Id.*

153. *Id.*

154. *Id.*

that talk therapy fell into the category of conduct, receiving the least amount of protection.[155]

Thus, when deciding *Stuart*, the Fourth Circuit placed the display and explanation of the sonogram requirement in the middle of the *Pickup* sliding scale; however, the Fourth Circuit arrived at this conclusion because it believed the statute regulated both conduct – showing the sonogram – and speech – discussing the sonogram.[156] But this was incorrect.[157] The display and explanation of the sonogram requirement fell at the midpoint because it was not a part of the treatment but was still within the confines of the physician-client relationship. Further, the Fourth Circuit applied intermediate scrutiny when the Ninth Circuit's determination on the level of scrutiny was far from conclusive.[158] The United States Supreme Court ultimately rejected the sliding-scale test and the lessened protection for professional speech when it abrogated *Pickup* in its decision of *Becerra*.[159]

III. RECENT DEVELOPMENTS

The Court's recent holding in *National Institute of Family and Life Advocates v. Becerra* changed how courts will examine informed consent statutes in the context of abortion because the Court eliminated the midpoint category for speech between a client and professional.[160] There was confusion amongst the federal circuit courts in distinguishing First Amendment protected speech and professional conduct, and as a result, the federal circuit courts essentially created a separate category for speech within the context of the profession.[161] The Court directly addressed this confusion in *Becerra*.[162] This Part explains the decision in *Becerra* and examines how the Court distinguished First Amendment protected speech from professional conduct.

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155. *Id.* at 1232.

156. Stuart v. Camnitz, 774 F.3d 238, 248 (4th Cir. 2014).

157. *Id.*

158. *Id.* at 250; *Pickup*, 740 F.3d at 1228.

159. Nat'l Inst. of Family and Life Advocates v. Becerra, 138 S. Ct. 2361, 2371 (2018). It should be noted that the Court in *Becerra* abrogated *Pickup v. Brown* – but only as to the sliding-scale test. *Id. Becerra* essentially eliminated the midpoint on the sliding scale test that established a category of protection for "speech within the confines of [the] professional relationship." *Id.* (quoting *Pickup*, 740 F.3d at 1228). It does not stand to reason that *Becerra* invalidated the California statute prohibiting the use of talk therapy to change the sexual orientation of minors because the Ninth Circuit placed that statute on the far end of the spectrum dealing with conduct. Under *Becerra*, the California statute should be upheld as a regulation of conduct, but that will not be discussed any further in this Note.

160. *Id.* at 2371–72.

161. *See Pickup*, 740 F.3d at 1227–28.

162. *Becerra*, 138 S. Ct. at 2371–72.

In *Becerra*,[163] the Court clarified its holding in *Casey* regarding compelled speech when it heard a challenge to a California's "FACT Act" that, ironically,[164] regulated pro-life crisis pregnancy centers. The "FACT Act" required these crisis pregnancy centers to distribute a "government-drafted notice" to all clients that stated the availability of public programs for family planning services, prenatal care, and abortion for eligible women.[165] Plaintiffs, composed of both licensed and unlicensed pregnancy centers, claimed the FACT Act violated their free speech by compelling them to give clients this information.[166] The U.S. District Court for the Southern District of California denied plaintiffs' motion for preliminary injunction, and the Ninth Circuit affirmed, holding that regulations of "professional speech" received a lower level of scrutiny.[167]

The Court first explained that content-based regulations normally receive strict scrutiny.[168] The Court then decided that the FACT Act was a content-based regulation because it "alter[ed] the content" of plaintiffs' speech by requiring them to inform clients of abortion options that plaintiffs strongly opposed.[169] Thus, by requiring plaintiffs to speak when they normally would not, the statute altered the content of their speech.[170]

The Court next rejected an exception for "professional speech" created by some federal circuit courts.[171] This exception allowed the Ninth Circuit to review content-based regulations under a standard lower than strict scrutiny when it regulated a professional's "expert knowledge and judgment" or speech that was "within the confines of [the] professional relationship."[172] The Court held that "professional speech" was not a separate category of speech entitled to less protection, stating that "[s]peech is not unprotected merely because it is uttered by 'professionals.'"[173] However, the Court carved out two exceptions to this general rule where it would apply a lower level of scrutiny.[174]

The first exception arose from a narrow subset of cases regulating "commercial speech."[175] Emanating from *Zaurderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*,[176] the Court determined that this exception

163. *Id.* at 2368.

164. Crisis pregnancy centers are generally run by pro-life organizations with the intent to discourage women from having abortions. *Id.*

165. *Id.* at 2369.

166. *Id.* at 2370.

167. *Id.*

168. *Id.* 2371.

169. *Id.* (alteration in original) (quoting Riley v. Nat'l Fed'n of Blind of N.C., Inc., 487 U.S. 781, 795 (1988)).

170. *Id.*

171. *Id.*

172. *Id.* (citing Pickup v. Brown, 740 F.3d 1208, 1227–29 (9th Cir. 2014)).

173. *Id.* at 2371–72.

174. *Id.* at 2372.

175. *Id.*

176. 471 U.S. 626 (1985).

would occur when the regulation "governed only 'commercial advertising' and required the disclosure of 'purely factual and uncontroversial information . . . .'"[177] In cases meeting the *Zauderer* standard, the Court held that the "requirements should be upheld unless they are 'unjustified or unduly burdensome.'"[178] The Court determined that the *Zauderer* standard did not apply here because abortion is a controversial topic.[179]

The second exception was reserved for "regulations of professional conduct that incidentally burden[ed] speech."[180] The Court noted that *Casey* was an example of this exception because the statute in *Casey* only regulated speech "as part of the *practice* of medicine, subject to reasonable licensing and regulation by the state."[181] The statute in *Casey* regulated the conduct of physicians because it required informed consent before receiving a procedure.[182] Further, the Court explained that informed consent statutes regulate conduct because "the requirement that a doctor obtain informed consent to perform an abortion is 'firmly entrenched in American tort law.'"[183] Therefore, the statute in *Casey* incidentally burdened speech by regulating the process for obtaining a medical procedure, which the Court considered professional conduct.[184]

Here, however, the regulation required distribution of the information to all clients of the crisis pregnancy centers and was not tied to a procedure.[185] Therefore, the FACT Act did not fall within the second exception because it regulated speech – not conduct.[186] Since California's FACT Act did not meet the requirements of either exception, the Court held that strict scrutiny was appropriate.[187] The Court ultimately determined the statute did not survive even intermediate scrutiny because the statute did not sufficiently achieve the State's interest of "providing low-income women with information about state-sponsored services."[188]

IV. COMMENT

In *Becerra*, the Court established a uniform standard for the proper level of scrutiny to apply when considering the doctrine of professional speech and thus resolved the contentious split that had developed between several federal circuit courts.[189] This clarity should change the analysis of informed consent

177. *Becerra*, 138 S. Ct. at 2372 (citing *Zauderer*, 471 U.S. at 651).
178. *Id.* (citing *Zauderer*, 471 U.S. at 651).
179. *Id.*
180. *Id.* at 2373.
181. *Id.* (alteration in original).
182. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992).
183. *Id.* (quoting Cruzan v. Dir. of Mo. Dep't of Health, 497 U.S. 261, 269 (1990)).
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.* at 2374.
188. *Id.* at 2375.
189. *See supra* Part III.

statues, including Missouri's statute. While *Becerra* clearly contemplated the type of speech requirements of the informed consent statute in *Casey*,[190] informed consent statutes – like Missouri's – present a different type of challenge that the Court's decision could address because those informed consent statutes are tied to the medical procedure.

First, this Part analyzes the Missouri informed consent statute using the least stringent test applied – a test that comes from *Rounds*.[191] Specifically, this Part asserts that, even under *Rounds*, the Missouri statute does not pass constitutional muster; however, this Part also argues that *Rounds* improperly interpreted *Casey*. Second, this Part demonstrates that the analysis of professional speech in *Becerra* differed from *Rounds*. This Part contends that Missouri's requirement of displaying an ideological statement on materials handed to patients presents more than an "incidental burden" on speech and therefore deserves strict scrutiny. Further, this Part rejects the use of intermediate scrutiny in *Stuart* and examines how *Becerra* applies to the display and explanation of the sonogram requirements from *Stuart*. Ultimately, this Part argues that required disclosures in the Missouri informed consent statute should be viewed differently based on whether the disclosure extends beyond traditional informed consent disclosures or whether the disclosure is an ideological one.

A. Missouri's Informed Consent Statute According to Rounds

The provision in Missouri's informed consent statute mandating that the physician give the patient material expressing the State's view of when life begins is unlikely to survive if the Eighth Circuit's approach in *Rounds* is applied because the Missouri statute does not contain the same statutory safeguard as the statute analyzed in *Rounds*. The South Dakota statute upheld in *Rounds* was remarkably similar to the Missouri informed consent statute.[192] Most notably, both statutes mandated phrases warning the patient that an abortion terminates the life of a separate human being.[193] However, unlike the phrase mandated by the South Dakota statute, the Missouri statute does not provide a statutory definition for "human being" or "life." In fact, Judge Gruender's majority opinion in *Rounds* acknowledged that the statement could be problematic because "[t]aken in isolation [the statute's] language . . . certainly may be read to make a point in the debate about the ethics of abortion."[194]

190. *Becerra*, 138 S. Ct. at 2373 (citing *Casey*, 505 U.S. at 884).

191. Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724 (8th Cir. 2008).

192. *See* discussion *supra* Sections II.C, II.E.2.a.

193. *See* discussion *supra* Sections II.C, II.E.2.a.

194. *Rounds*, 530 F.3d at 735 (Murphy, J., dissenting) (first alteration in original).

As the dissent, and other courts,[195] suggested, the determination of when life begins is a "metaphysical belief."[196] Because this is a topic rife with debate, no single determination of the beginning of life exists as truthful or nonmisleading. Therefore, the Missouri statute fails the truthful, nonmisleading, and relevant test of *Casey* because it does not possess the statutory safeguard contained in the South Dakota statute. According to *Rounds*, the statute should be examined under strict scrutiny after being found to be non-truthful or misleading.

Under strict scrutiny, Missouri's informed consent statute must be narrowly tailored to serve a compelling state interest.[197] The Court in *Casey* recognized two substantial interests of states in requiring informed consent for abortions: (1) the health of the woman making the decision to have an abortion and (2) the protection of potential life.[198] The State's interest in protecting the health of the woman includes the protection her physical and psychological health, as devastating psychological damage can result if a woman receives an abortion only to discover her decision was not fully informed.[199] The State may protect potential life by ensuring a woman makes an informed decision, which includes knowing the fetal development of the unborn child "even when in doing so the State expresses a preference for childbirth over abortion."[200]

Compelling interests clearly exist for Missouri to regulate abortion through informed consent laws; however, the provision requiring physicians to hand patients a booklet explaining that life begins at conception does not serve any of these interests because the State's compelling interests must rest on the information presented being factual. In contrast, these booklets provide only controversial information that many physicians consider to be incorrect – directly confusing and misinforming the patient. Therefore, disclosure of the statement that life begins at conception serves no compelling state interest because the statement is neither truthful nor nonmisleading.

This straightforward analysis affirms that once one determines that the information is not truthful, the requirement cannot pass strict scrutiny. As noted by the U.S. District Court for the District Court of Nebraska, the Eighth Circuit's application of strict scrutiny once the court determines that the information is not truthful does not logically follow the opinion in *Casey*.[201] The Eighth Circuit's logical framework is flawed because "it is hard to imagine

195. *See, e.g.*, Acuna v. Turkish, 930 A.2d 416, 427 (N.J. 2007) (noting the "deep societal and philosophical divide" concerning "the profound issue of when life begins."); Doe v. Planned Parenthood/Chi. Area, 956 N.E.2d 564, 573 (Ill. App. Ct. 2011) ("[A] difference in scientific, moral, or philosophical viewpoint on the issue of when life begins is virtually guaranteed . . . .").

196. *Rounds*, 530 F.3d at 742 (Murphy, J., dissenting).

197. Reed v. Town of Gilbert 135 S. Ct. 2218, 2231 (2015).

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

199. *Id.*

200. *Id.* at 883.

201. Planned Parenthood of Heartland v. Heineman, 724 F. Supp. 2d 1025, 1048 n.18 (D. Neb. 2010).

how compelling a physician to provide information that is untrue, misleading, or irrelevant could ever survive strict scrutiny."[202] Further, *Casey*'s test requiring the disclosure be truthful, nonmisleading, and relevant is a formulation of rational basis review.[203] Given the tiered nature of the Court's scrutiny, a statute failing rational basis review always fails strict scrutiny. The Eighth Circuit's use of strict scrutiny on a statute failing rational basis review is inconsistent with *Casey* and ultimately superfluous. Therefore, because reviewing the statute under strict scrutiny after it failed rational basis review is superfluous, courts should not test a statute under rational basis review to decide whether to review it under strict scrutiny.

While the Eighth Circuit's decision in *Rounds* likely invalidates the provision of Missouri's informed consent statute requiring a physician to state that life begins at conception, *Rounds* still provides little protection to a physician's speech. The lack of protection stems from the Missouri General Assembly's ability to insulate the Missouri statutory provision by defining words like "life" or "human being." The General Assembly could simply adopt the same definition of human being provided by the South Dakota statute and render the statute constitutional. As identified by the dissent, adding a definition of human being provides little protection of a physician's right not to speak the State's ideological view because use of the statutory definition of human being in the actual disclosure is unlikely.[204]

Additionally, patients bring an array of subjective understandings of the term human being that likely differ from the statutory definition.[205] This decision provides little comfort, however, because the legislature can easily circumvent constitutional protections by establishing an equally controversial definition of human being.

B. Evaluating Stuart*'s Increased Protection of Physician Speech*

On the end of the spectrum, opposite *Rounds*, *Stuart* provides significantly greater protection to physician speech rights because it applies intermediate scrutiny to informed consent statutes. In *Stuart*, the Fourth Circuit adopted the Ninth Circuit's and the Eleventh Circuit's sliding-scale approach to reviewing professional speech.[206] This sliding-scale approach derived from *Pickup v. Brown*.[207]

The Fourth Circuit's analysis of the display and explanation of a sonogram requirement under the sliding-scale approach invalidated a statute that

202. Gaylord & Molony, *supra* note 89, at 626 n.197.

203. *Id.* at 640.

204. Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 745 (8th Cir. 2008) (Murphy, J., dissenting).

205. *Id.*

206. *See* discussion *supra* Section II.E.2.b.

207. *See* Stuart v. Camnitz, 774 F.3d 238, 248 (4th Cir. 2014) (citing Pickup v. Brown, 740 F.3d 1208, 1227, 1229 (9th Cir. 2014), *abrogated by* Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018)).

infringed on the physician's speech less than the Missouri statute.[208] The Missouri statute requires the physician to communicate a message that is clearly ideological, whereas the sonogram display and explanation requirements mandated disclosure of factual information and did not explicitly state an ideological view but had "ideological implications."[209] Since the Missouri statute impinges on the physician's speech rights more significantly than the display and explanation of a sonogram, the Fourth Circuit's approach would almost certainly invalidate the Missouri statute. However, the Fourth Circuit misapplied the Ninth Circuit's sliding-scale. Further, the United States Supreme Court specifically rejected this sliding-scale test.[210] Therefore, the test applied by the Fourth Circuit carries no weight because it misapplied a test that the United States Supreme Court rejected.

C. How Becerra *Clarified the Court's Analysis of Professional Speech*

The Court explained the doctrine of professional speech when it eliminated the midpoint for speech in the context of a profession and asserted that professional speech receives lower scrutiny in only two circumstances. In *Becerra*, the Court dismissed the sliding-scale test used in *Pickup* because the midpoint of the test provided heightened protection for what the Court called "professional speech."[211] As the Court noted, "Speech is not unprotected merely because it is uttered by 'professionals.'"[212] The First Amendment fully protects speech unless it is (1) commercial speech or (2) professional conduct.[213] Further, regulation of professional conduct must only "incidentally burden speech."[214] As previously stated, the Court decided commercial speech applied to a narrow subset of cases governing commercial advertising.[215] Clearly, informed consent statutes do not fall under this exception. The Court, however, contemplated informed consent statutes falling under the second exception: professional conduct.[216]

1. Professional Conduct

The Court recognized speech compelled to provide information in the context of an informed consent law restricted speech "only as part of the practice of medicine, subject to reasonable licensing and regulation by the State."[217]

208. *See* discussion *supra* Section II.E.2.b.
209. *Camnitz*, 774 F.3d at 246.
210. *See* discussion *supra* Section II.E.2.b.
211. *Becerra*, 138 S. Ct. at 2371–72.
212. *Id.*
213. *Id.* at 2371.
214. *Id.* at 2373.
215. *Id.* at 2372.
216. *Id.* at 2373.
217. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992).

The Court further elucidated the distinction between speech and conduct by finding that a law that required emergency pregnancy centers to provide information to patients regarding the availability of abortion clinics violated First Amendment free speech when doing so was not connected to a medical procedure.[218] Therefore, when connected with a medical procedure, a law requiring disclosure of certain information is professional conduct that receives rational basis review.

While informed consent laws are conduct – and not speech – legislatures cannot require the physician to communicate anything the legislature would like under the guise of an informed consent law. As the Fourth Circuit observed, *Casey* "did not hold sweepingly that all regulation of speech in the medical context merely receives rational basis review."[219] The informed consent requirements of the statute in *Casey* followed traditional informed consent disclosures, such as "the nature of the procedure [and] the health risks of the abortion and of childbirth."[220] It can hardly be read that the holding in *Casey* extends well beyond traditional informed consent disclosures. Further, nine years before she co-authored the plurality opinion in *Casey*, along with Justices David H. Souter and Anthony M. Kennedy, Justice Sandra Day O'Connor stated that "[t]his is not to say that the informed consent provisions may not violate the First Amendment rights of the physician if the State requires him or her to communicate its ideology."[221]

Ultimately, the decision in *Becerra* clearly identified the point when disclosures mandated by informed consent laws become a First Amendment violation and not a state's regulation of professional conduct. An informed consent law is a regulation of professional conduct only when it *incidentally* burdens a physician's right to speech.[222] Therefore, when an informed consent law directly burdens speech – as opposed to incidental burdens that occur when providing a patient certain information – the law should be subject to strict scrutiny.

2. Incidental Burdens on Speech v. Regulations of "Speech as Speech"

To determine the level of scrutiny to apply, courts face the difficult task of drawing a line between informed consent laws that present an incidental burden on speech in order to regulate conduct and informed consent laws that directly burden speech by compelling adherence to the State's message. Justice Antonin G. Scalia addressed this critical distinction in the context of requiring

218. *Becerra*, 138 S. Ct. at 2373.

219. Stuart v. Camnitz, 774 F.3d 238, 249 (4th Cir. 2014).

220. *Casey*, 505 U.S. at 881.

221. City of Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416, 472 n.16 (1983) (O'Connor, J., dissenting), *overruled by Casey*, 505 U.S. 833 (1992).

222. *See Becerra*, 138 S. Ct. at 2373.

a publishing company to pay a general tax in order to stay in business.[223] Justice Scalia opined that if the burden placed on printing "is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[224] Alternatively, the Court in *Becerra* applied strict scrutiny because the statute regulated "speech as speech" when the mandated disclosure was not associated with a medical procedure.[225] Therefore, when an informed consent disclosure only attempts to regulate a medical procedure, the legislature regulates conduct while only incidentally burdening speech and rational basis review is appropriate. But when the object of the disclosure is to compel the physician to communicate the State's message, the legislature regulates speech as speech and such disclosures must be subject to strict scrutiny.

Indeed, legislatures aim traditional informed consent disclosures – such as the one involved in *Casey* – at providing the patient information related to the medical procedure. This serves goals other than compelling the physician to communicate the legislature's beliefs, such as the goals of protecting patient autonomy, maintaining medical standards, and safeguarding the patient's physical and psychological health. The only way for the legislature to accomplish its goal of providing information is by requiring the physician to speak. This creates an incidental burden on speech because this regulation of professional conduct also burdens the physician's speech. While the legislature's object is not to compel speech, compelling speech is the means to reaching the legislature's valid aim of regulating conduct. However, when the State's object is to communicate the State's message, then the statute regulates speech as speech and must be analyzed under the First Amendment protection of strict scrutiny.[226] When determining if the legislature's object is to compel speech, courts should consider whether the disclosure falls within traditional informed consent disclosures or whether the disclosure requires a physician to express an ideological view.

a. Traditional Informed Consent Disclosures

Informed consent is a "prerequisite" for a medical procedure, and a physician's failure to obtain informed consent leads to a cause of action for medical malpractice.[227] Traditionally, informed consent disclosures require a physician

223. Emp't Div. v. Smith, 494 U.S. 872, 878 (1990).

224. *Id.*

225. *Becerra*, 138 S. Ct. at 2374.

226. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 406–11 (1989) (rejecting Texas' stated interest in "preserving the flag as a symbol of nationhood and national unity" to justify its criminal sanctions for flag desecration because the interest was not "unconnected to expression"); *see also* NAACP v. Button, 371 U.S. 415, 439 (1963) ("For a state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights.").

227. 70 C.J.S. *Physicians and Surgeons* §136, West (database updated Mar. 2019).

to provide a patient enough information to "give an intelligent, informed consent to [a] proposed medical treatment or . . . procedure."[228] This includes disclosing the nature of the procedure, the risks and benefits, and the probable consequences of the procedure.[229] Additionally, the issue of the fetus' status as appropriate for informed consent is highly contested, and one court rejected the idea that a physician needed to advise a patient seeking an abortion that a human fetus is an existing human being because there is no consensus in the medical profession or in the public that life begins at conception.[230]

As previously noted, courts considered informed consent disclosures to be professional conduct because the long history of tort actions for failure to provide informed consent intertwined the disclosures with the underlying surgery.[231] Naturally, reviewing the disclosures that tort law understood to properly produce informed consent provides an idea of which disclosures are properly classified as conduct. Indeed, as reasoning for upholding the statute in *Casey*, the plurality noted that the Pennsylvania statute was "no different from a requirement that a doctor give certain specific information about any medical procedure."[232] Traditional informed consent disclosures have long been regarded as accomplishing the goals of protecting patient autonomy, maintaining standards of the medical profession, and safeguarding the physical and psychological health of the patient.[233] Required disclosures beyond traditional informed consent disclosures should be viewed suspiciously because traditional informed consent disclosures already accomplish the legitimate interests of the State in regulating the medical practice. Because traditional informed consent disclosures already accomplish the State's objectives in its informed consent laws, the presence of additional mandated disclosures suggests that the State has other objectives, and those objectives may involve regulating speech as speech.

This, however, is not to say that all disclosures exceeding traditional informed consent disclosures seek to regulate speech as speech. For example, the Court in *Casey* held that states may require physicians to provide information regarding the development of the fetus even though the consequences do not relate to the patient directly and doing so allows states to express a preference for childbirth over abortion.[234] The Court likened this type of disclosure to providing a patient seeking a kidney transplant with information of the risks to the kidney donor.[235] The unique circumstances of an abortion may allow for some extension of traditional informed consent disclosures – like providing a

228. *Id.* § 141.
229. *Id.*
230. Acuna v. Turkish, 930 A.2d 416, 427 (N.J. 2007).
231. *See* discussion *supra* Section II.B.
232. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992).
233. *See* discussion *supra* Section II.B.
234. *Casey*, 505 U.S. at 882.
235. *Id.* at 882–83.

booklet consisting of illustrations of the development of the fetus – but it does not allow states to mandate a physician to say whatever the state would like.

The statutes in both *Rounds* and *Stuart* presented examples of disclosures that extended well beyond traditional informed consent disclosures. The requirement that a physician display and explain a sonogram in *Stuart* ventured so far beyond traditional informed consent disclosures as to require the patient to undergo an additional medical procedure.[236] Further, forcing a patient to undergo a sonogram can hardly be considered to advance the goal of patient autonomy that traditional informed consent disclosures championed.[237] Likewise, the mandated disclosure in *Rounds* that a life begins at conception extends beyond the disclosure of risks and benefits associated with the procedure, albeit more subtly than the requirement to display and explain a sonogram to the patient.[238] As the Supreme Court of New Jersey concluded, informed consent disclosures do not traditionally include statements lacking consensus in the medical field or public in general.[239] Therefore, because the disclosures in both *Stuart* and *Rounds* extend beyond traditional informed consent disclosures, the statutes likely move beyond regulating professional conduct and may actually regulate speech as speech. Examining the extent to which a mandated disclosure exceeds traditional informed consent helps show when the State's object is likely to ensure the compelled disclosure communicates its ideological message – as opposed to merely ensuring the patient is informed of the procedure.

b. Ideological Disclosures

When a legislature compels ideological speech, the government likely does not advance an interest in regulation of professional conduct because the government primarily seeks dissemination of its ideological view. The Court has long been wary of government regulations that require affirmance of its ideologies or beliefs.[240] The Court has observed that laws compelling ideological speech "pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or

236. *See* Stuart v. Camnitz, 774 F.3d 238, 242 (4th Cir. 2014).

237. *See id.* at 255 ("This provision, however, finds the patient half-naked or disrobed on her back on an examination table, with an ultrasound probe either on her belly or inserted into her vagina.").

238. *See* Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 726 (8th Cir. 2008) (en banc).

239. Acuna v. Turkish, 930 A.2d 416, 425–26 (N.J. 2007).

240. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 717 (1977) (rejecting the State's interest in communicating an appreciation of history, state pride, and individualism because the interest was not "ideologically neutral"); *see also* W.V. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding a requirement that students in public schools salute the flag with the pledge of allegiance violated the first amendment because it compelled "students to declare a belief"); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994).

manipulate the public debate through coercion rather than persuasion."[241] By mandating the disclosure of a belief or ideological statement, the legislature signals that its aim is to promote a certain ideology by compelling speech, thereby regulating speech as speech.

While ideological disclosures indicate that an informed consent law regulates speech as speech, the difficulty lies in determining if the disclosure is in fact ideological. For example, the Eighth Circuit in *Rounds* held a disclosure was not ideological because it communicated factual information,[242] but the Fourth Circuit in *Stuart* held that factual statements "d[id] not divorce the speech from its moral or ideological implications."[243] The Court has often found an ideological message to exist when the speaker disagrees with the viewpoint or finds it unacceptable.[244] Still, "[i]t is possible to convey information about ideologically charged subjects without communicating another's ideology."[245] However, merely looking to see if the disclosure provides any factual information is insufficient because, as the Fourth Circuit noted, "[t]hough the information conveyed may be strictly factual, the context surrounding the delivery of it promotes the viewpoint the State wishes to encourage."[246] Thus, while informed consent laws may facially appear to only provide information, they may actually assert the State's ideological view.

In the United States Supreme Court's line of cases regarding labor unions, the Court prohibited compelling adherence to views that had "ideological coloration" and were not "germane" to the State's justification.[247] A similar evaluation is appropriate for informed consent disclosures. Courts should decide whether the disclosure promotes the State's ideological view and whether the disclosure is germane to obtaining the patient's informed consent. Information germane to obtaining a patient's informed consent is information that would help her decision to receive an abortion.

When considering the statutory definitions of abortion and human being in the South Dakota statute at issue in *Rounds*, the mandatory disclosure reads "[t]hat the [use of any means . . . to cause the death of a fetus] will terminate the life of a whole, separate, unique, living"[248] "member of the species of Homo Sapien . . . during the entire embryonic and fetal ages . . . ."[249] That causing the death of a fetus terminates the life of a fetus seems obvious to the average adult and provides little information to aid the patient seeking an abortion. When read without the statutory definitions, the disclosure is plainly an ideological statement because it hits at the heart of the abortion debate, which is

241. *Turner Broad. Sys., Inc*., 512 U.S. at 641.
242. *Rounds*, 530 F.3d at 748.
243. Stuart v. Camnitz, 774 F.3d 238, 246 (4th Cir. 2014).
244. *See Wooley*, 430 U.S. at 717; *see also Barnette*, 319 U.S. at 624.
245. Eubanks v. Schmidt, 126 F. Supp. 2d 451, 458 n.11 (W.D. Ky. 2000).
246. *Camnitz*, 774 F.3d at 253.
247. *See, e.g.*, Keller v. State Bar of Cal., 496 U.S. 1, 15 (1990).
248. S.D. CODIFIED LAWS § 34-23A-10.1(1)(b) (2005).
249. *Id.* § 34-23A-1(4).

determining when life begins. A disclosure that facially appears to make controversial comments regarding the beginning of life certainly promotes the State's ideological view. Therefore, because the disclosure provides the patient little information to help her decision to receive an abortion when read with its limiting definitions and because the disclosure is ideological when read without the limiting definitions, the informed consent statute constitutes an ideological disclosure.

Similarly, the sonogram display and explanation requirements at issue in *Stuart* provide the patient information but also promote the State's ideological view on abortion. Even though the Fourth Circuit believed the underlying purpose of the sonogram display and explanation requirement was to promote the State's ideology,[250] the requirement also provided the patients with information as to the development of the patient's fetus at the time the patient sought the abortion. However, the North Carolina statute required display and explanation of a sonogram even when the patient refused to listen and covered her ears and eyes.[251] The requirement that the physician display and explain the patient's sonogram provided the patient minimal information to help her decision when the patient shielded herself from the message, thus "it [could not] inform her decision."[252] Simply requiring physicians to offer patients the opportunity to have a sonogram and listen to the physician's explanation of it would not be considered an ideological disclosure because the patient would receive information germane to her decision to receive an abortion. However, statutes that require a physician to display and explain a patient's sonogram, even when the patient does not want the sonogram and refuses to watch and listen, should be considered ideological disclosures because, in the context of a patient that is an unwilling participant, doing so provides little information and yet promotes the State's ideological viewpoint. Ideally, statutes would require physicians to offer the woman the option to view a sonogram but not force the woman to receive one.

Following the decision in *Becerra*, courts must sort informed consent disclosures that act as regulations of conduct and have an incidental burden on speech from disclosures that regulate speech as speech. Regulations of professional conduct should receive rational basis review, while regulations of speech as speech should receive strict scrutiny. The point at which an informed consent disclosure regulates speech as speech rather than professional conduct is not always clear. Informed consent statutes that extend well beyond traditional informed consent disclosures – like the sonogram display and explanation requirements in *Stuart* – indicate that the state seeks to regulate speech as speech. Further, when a State compels ideological disclosures, the object of the State is to regulate speech as speech because it substantially seeks dissemination of its ideological view. A disclosure is ideological when it makes a statement on

250. *Camnitz*, 774 F.3d at 253.
251. *Id.*
252. *Id.*

a controversial subject but provides minimal information to aid the patient in her decision to receive an abortion – like the mandated disclosure in *Rounds*.

Under the analysis for professional speech and conduct explained in *Becerra*, the Missouri statute should be subject to strict scrutiny because the State's objective is to regulate speech as speech and compel dissemination of the State's ideological view that life begins at conception – and abortion is, therefore, morally wrong. Further, the Missouri General Assembly could not insulate the statute by providing statutory definitions, like in *Rounds*, because the disclosure would still only provide the patient with minimal information, making the disclosure ideological. An ideological disclosure must be subject to strict scrutiny because the State only aims to compel speech, thereby directly burdening speech. Finally, the statute would likely fail to withstand strict scrutiny because of strict scrutiny's reputation as "strict in theory and fatal in fact"[253] and because of the importance of protecting the physician's ability to choose what to discuss with his or her patients.

V. CONCLUSION

The doctor-patient relationship is of great importance in making health decisions. While the State maintains an important interest in regulation of the medical profession, this interest must also be balanced with physicians' free speech rights so that the State does not infect the doctor-patient relationship with ideas and views with which the physician does not agree. A healthy balance between physicians' free speech rights and the State's ability to regulate the medical profession has proven difficult for federal circuit courts to establish. The difficulty was due in part to the United States Supreme Court's cursory discussion of the issue in *Casey* and to confusion of the doctrine of professional speech. However, in *Becerra*, the Court recently addressed professional speech and *Casey*'s ruling on compelled speech.

The decision in *Becerra* clarified that there is no separate category for professional speech.[254] Therefore, the Court grants full First Amendment protection of strict scrutiny to professional speech unless the speech falls into one of two exceptions. The first exception is for "commercial speech" and does not apply to informed consent laws in the abortion context.[255] The second exception consists of regulations of professional conduct that *incidentally* burden speech.[256] As indicated in *Casey*, informed consent laws regulate professional

253. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

254. Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2371 (2018).

255. *Id.* at 2372 (citing Zauderer v. Off. of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 651 (1985)).

256. *Id.* at 2373.

conduct because the giving of information is intertwined with the medical procedure through common law tradition.[257] However, some mandated disclosures in informed consent laws do not fall under this exception because they regulate speech as speech.[258] To determine what regulates speech as speech, courts should consider if the disclosure falls within traditional informed consent disclosures or if it is an ideological disclosure. A disclosure is ideological if it promotes the State's ideological view and is not germane to providing the woman information to aid her decision.[259] Disclosures like the one mandated by the Missouri informed consent statute regulate speech as speech and deserve strict scrutiny review because they are ideological disclosures.

257. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992).
258. *Becerra*, 138 S. Ct. at 2374.
259. *See* discussion *supra* Section IV.C.2.b.