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ABORTION REGULATION AS COMPELLED SPEECH

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ABSTRACT

This Article outlines a novel First Amendment compelled speech claim against a growing body of abortion restrictions, including fetal demise and fetal burial laws, premised on a state interest in expressing respect for potential life. It weaves limitations imposed by the Supreme Court's abortion jurisprudence together with developments set out in *NIFLA v. Becerra* to demonstrate that the Court's expanding First Amendment jurisprudence has made such laws uniquely vulnerable to a compelled expressive conduct challenge. This vulnerability results from the fact that the Court's Fourteenth Amendment abortion jurisprudence requires all previability fetal-protective abortion regulations to be expressive, whether or not they require abortion providers to speak. Due in large part to these Fourteenth Amendment limitations, where life-protective abortion regulations compel conduct, they compel expressive conduct under the First Amendment. These laws are thus subject to heightened scrutiny under the newly rigorous compelled speech framework set out in *NIFLA*. Laws intended to communicate respect for potential life to people not seeking abortions receive strict scrutiny. Laws targeting women actively seeking abortions, as part of informed consent, are subject to intermediate scrutiny. Many new fetal-protective laws diverge from traditional mediums of informed consent and therefore fail First Amendment scrutiny.

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INTRODUCTION

In 2018 the Supreme Court struck down an abortion-related regulation because it violated a fundamental right, but not the right to abortion. In *National Institute of Family and Life Advocates v. Becerra* (*NIFLA*),[1] the Court invalidated a California law requiring certain licensed healthcare providers, including some that described themselves as prolife, to post signs disclosing the availability of state-funded reproductive healthcare services, including abortion. The Court held that the law violated the First Amendment by improperly compelling the speech of professionals. *NIFLA* and two other cases decided in the same term demonstrated the Court's increasing embrace of broad First Amendment protections. In *Janus v. American Federation of State, County, and Municipal Employees, Council 31*,[2] the Court overruled a forty-year-old precedent to find a compelled speech violation where states authorized unions to collect fees from nonmembers. And in *Masterpiece Cakeshop v. Colorado Civil Rights Commission, Ltd.*, [3] the Court suggested—without ultimately deciding—that a state antidiscrimination law applied to a baker who refused to serve a same-sex couple might compel expression in violation of the First Amendment.

Although the Court's decision in *NIFLA* followed a recent trend of expanding First Amendment protections,[4] it imposed some limitations

1. 138 S. Ct. 2361, 2375 (2018).
2. 138 S. Ct. 2448, 2459–60 (2018).
3. 138 S. Ct. 1719, 1727 (2018) (explaining that same-sex couples are entitled to constitutional protection, but noting that "[a]t the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression").
4. Many have decried these opinions as part of a conservative deregulatory agenda masquerading as First Amendment liberty. In *Janus*, for example, Justice Kagan accused the majority of "weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy." *Janus*, 138 S. Ct. at 2501 (Kagan, J., dissenting). Justice Breyer described *NIFLA* as "threaten[ing] . . . the constitutional validity of much, perhaps most, government regulation." *NIFLA*, 138 S. Ct. at 2380 (Breyer, J., dissenting). As many scholars have noted, this phenomenon of First Amendment "Lochnerism" threatens to undermine regulations essential to protecting other civil liberties, and even the administrative state as a whole. For scholarship concerning the threat to many liberal objectives posed by First Amendment "Lochnerism," *see generally*, Samuel R. Bagenstos, *The Unrelenting Libertarian Challenge to Public Accommodations Law*, 66 STAN. L. REV. 1205, 1228–40 (2014); Julie E. Cohen, *The Zombie First Amendment*, 56 WM. & MARY L. REV. 1119 (2015); Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016); Tamara R. Piety, *Citizens United and*

on the newly ascendant compelled speech doctrine. The Court, for example, carved out an exception to strict scrutiny for regulations of professional conduct that incidentally burden speech. Informed consent laws, the Court reasoned, were a quintessential example of such incidental burdens, and hence not subject to strict scrutiny.[5] The Court cited *Planned Parenthood of Southeastern Pa. v. Casey*,[6] which validated certain informed consent to abortion requirements, as its primary support for this point.[7] Despite the Court's use of some informed consent to abortion regulations as an example of an exception to strict scrutiny, *NIFLA*'s generally expansive view of the compelled speech doctrine should apply to other kinds of abortion restrictions.[8] Indeed, *NIFLA* reasoned that the controversial nature of all kinds of abortion regulations means they are more deserving of strict scrutiny,[9] and the

the Threat to the Regulatory State, 109 MICH. L. REV. FIRST IMPRESSIONS 16 (2010); Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165 (2014–2015).

5. *NIFLA*, 138 S. Ct. at 2373. The choice led many to criticize the Court's line drawing as ideologically motivated, or at least inconsistent. Justice Breyer hinted at this point in his dissent to *NIFLA*, suggesting that "it is particularly important to interpret the First Amendment so that it applies evenhandedly as between those who disagree so strongly," and urged that the Court's attempt to distinguish abortion informed consent laws "lack[ed] moral, practical, and legal force." 138 S. Ct. at 2388, 2385 (Breyer, J., dissenting). Justice Kagan, in her dissent to *Janus*, even identified *NIFLA* as part of a broader pattern of the Court "wield[ing] the First Amendment" to "cho[ose] the winners" in "an energetic policy debate." *Janus*, 138 S. Ct. at 2501–02 (Kagan, J., dissenting) (citing *NIFLA*, 138 S. Ct. 2361 (2018)). *See also First Amendment—Freedom of Speech—Compelled Speech*—National Institute of Family & Life Advocates v. Becerra, 132 HARV. L. REV. 347, 355–56 (2018) (arguing that the decision in *NIFLA* incorporated viewpoint discrimination against prochoice views into First Amendment doctrine because "the rationales underlying the decision seem intended to justify differential treatment of abortion opponents and reproductive rights supporters"); David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100, 138 n.180 (2018) (describing *NIFLA*'s distaste for certain disclosures, but willingness to uphold abortion informed consent laws, as part of the Court's ideologically motivated drift towards libertarian or neoliberal transparency laws).

6. 505 U.S. 833, 884 (1992).

7. *NIFLA*, 138 S. Ct. at 2373.

8. As Justice Breyer noted in his dissent to *NIFLA*, which was also signed by Justices Ginsburg, Sotomayor, and Kagan, "the need for evenhandedness, should prove particularly weighty in a case involving abortion rights." *Id*. at 2388 (Breyer, J., dissenting).

9. *Id*. at 2372 (explaining that the lower level of scrutiny applicable to the "uncontroversial" commercial disclosure context does not apply to abortion regulations because abortion is not "uncontroversial").

NIFLA Court saw no reason to exempt the abortion-related regulation before it from such scrutiny.[10]

While the First Amendment protected prolife interests in *NIFLA*, the case's robust compelled speech doctrine uniquely threatens a growing body of abortion restrictions. These laws—which are premised on a state interest in expressing respect for potential life—compel physicians' expression explicitly to disseminate the state's prolife message. In doing so, they run headlong into limitations on the state's power to compel speech first articulated in *West Virginia State Board of Education v. Barnette*[11] and *Wooley v. Maynard*,[12] and expanded in *NIFLA*. While such laws often compel conduct, rather than classic speech, they are vulnerable to challenge under a compelled expressive conduct theory—more so than other kinds of conduct regulation following *NIFLA*.[13] The Fourteenth Amendment imposes unique restrictions on regulations of abortion-related conduct, limiting the form they can take, the interests they can serve, and, significantly, the arguments states may use to defend them. Such limitations foreclose escape routes states might otherwise employ to undercut the success of a compelled expressive conduct claim.

10. *See id.* at 2375.
11. 319 U.S. 624, 642 (1943) (holding that a mandatory flag salute compelled speech because the state intended, through this compelled conduct, to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion").
12. 430 U.S. 705, 707, 717 (1977) (invalidating as compelled speech a law that required individuals to display a "Live Free or Die" license plate because the state intended that carrying the license plate would "communicate to others an official view as to proper appreciation of history, state pride, and individualism" and thus "disseminate an ideology").
13. This includes the antidiscrimination laws challenged in *Masterpiece Cakeshop* and other compelled speech cases working their way up to the Court. *See* Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1743–48 (2018) (Thomas, J., concurring in part and concurring in the judgment) (arguing that a cake baker should succeed on a compelled speech challenge to an antidiscrimination law requiring him to serve a same-sex couple); State v. Arlene's Flowers, Inc., 389 P.3d 543, 556–57 (Wash. 2017), *cert. granted, judgment vacated*, 138 S. Ct. 2671 (2018) (finding that a Washington antidiscrimination law requiring a florist to provide custom arranged flowers for a same-sex wedding did not compel speech); Telescope Media Grp. v. Lindsey, 271 F. Supp. 3d 1090, 1118–20 (D. Minn. 2017) (finding that the Minnesota Human Rights Act, which forbids discrimination against same-sex couples, did not compel wedding videographers' speech), *aff'd in part, rev'd in part and remanded sub nom*. Telescope Media Grp. V. Lucero, 936 F.3d 740 (8th Cir. 2019); Gifford v. McCarthy, 23 N.Y.S.3d 422, 432 (N.Y. App. Div. 2016) (finding venue rental owners could not refuse to rent space for a same-sex wedding under a compelled speech theory).

Counterintuitively, then, *NIFLA* is a new resource to challenge abortion restrictions that require doctors to serve as state messengers. Although it does not mean that all laws that compel physicians' expression to protect potential life are unconstitutional, the intersection of *NIFLA*'s compelled speech doctrine and Fourteenth Amendment jurisprudence requires judges to evaluate them under heightened First Amendment scrutiny. In some cases, these laws must be subject to strict scrutiny; in others, state litigants may be able to demonstrate that intermediate scrutiny is appropriate. In both cases, however, the First Amendment will pose a meaningful obstacle to the continued validity of laws that compel physicians' expression of respect for potential life. Where courts apply strict scrutiny, such laws will be presumptively invalid. Even where courts apply intermediate scrutiny, a compelled speech claim winnows permissible state interests in a manner that will channel judges' analysis and limit their discretion to uphold many fetal-protective laws. In either case, a compelled speech challenge will provide an opportunity to vindicate an important and often overlooked set of constitutional interests at stake in abortion regulation.

Relying on *NIFLA* and other recent First Amendment jurisprudence, this Article outlines a compelled speech claim against certain fetal-protective abortion regulations, including fetal demise and fetal burial laws, that express respect for potential life. Part I will explain why states often regulate in the name of expressing respect for potential life. It will demonstrate how the Court's abortion jurisprudence has developed to require all previability fetal-protective abortion regulations to be expressive, whether or not they require abortion providers to speak. Initially, the Court forbade regulations intended to protect potential life prior to viability. Later, however, the Court validated expressive abortion regulations as a means of vindicating the state's interest in protecting potential life while still respecting individuals' right to choose abortion prior to viability. While it is now clear that states may regulate previability abortions in the name of expressing respect for potential life, there is some ambiguity about who their intended audience may be. It is particularly unclear whether states must always target abortion seekers with their expressions of respect for potential life, or whether they may also target society as a whole, and as an end itself. States have recently relied on this ambiguity to pass an increasing number of abortion regulations, such as fetal demise and burial laws, primarily designed to message society as a whole.

Part II will address the First Amendment implications of the fact that all previability life-protective abortion regulations must be expressive. Because the state intends such regulations to express respect for potential life, where they compel conduct, they necessarily compel expressive conduct and trigger First Amendment coverage. Although many state regulations compel conduct, fetal-protective abortion regulations are uniquely likely to qualify as compelled expressive conduct regulations under the First Amendment's two-part expressive conduct test. First, because of the Court's idiosyncratic abortion jurisprudence, states passing such regulations must argue that their laws are intended to express a message—respect for potential life. Second, states must concede that this message is likely to be understood; otherwise their laws are invalid under the Fourteenth Amendment's undue burden standard.

After establishing that many fetal-protective laws are covered by the First Amendment, Part III will apply *NIFLA*'s compelled speech framework to determine the level of scrutiny that applies to them. The level of scrutiny varies depending on whether states intend to communicate respect for potential life to society as a whole—all individuals regardless of whether they are actively seeking abortions—or active abortion seekers alone. Where such laws aim to inform society as an end itself, they are subject to strict scrutiny and almost certainly unconstitutional. Where they aim to inform abortion seekers alone, even if only indirectly, they may be subject to a lower level of scrutiny under *NIFLA*'s exception for informed consent laws.

Part IV will examine the consequences of recognizing that heightened, and sometimes strict, First Amendment scrutiny applies to abortion regulations that express respect for potential life. First, it will explain that by imposing a lower level of scrutiny on informed consent laws, *NIFLA* incentivizes state litigants to frame their fetal-protective laws as informed consent laws even where they are most obviously society-focused. While states may successfully do so in some circumstances, however, where their laws fail to meet the legal definition of informed consent they should not escape strict scrutiny. Second, assuming that these laws meet the definition of informed consent, this Part will demonstrate how intermediate scrutiny will apply to laws that use society-facing communication to inform abortion seekers' choices. States' need to characterize their laws as serving the narrow purpose of informing abortion seekers' consent allows a straightforward

intermediate scrutiny analysis likely to cabin judicial discretion and protect providers' rights. The further a law strays from traditional, *Casey*-like informed consent provisions—which require direct doctor-patient discourse about the procedure at hand—the less likely it will be appropriately tailored to its ends such that it can survive intermediate scrutiny.

I. THE EXPRESSIVE NATURE OF FETAL-PROTECTIVE ABORTION REGULATIONS

First Amendment scrutiny of abortion restrictions is a consequence of the limited reasons for which—and means by which—a state can restrict access to abortion. The Court has identified two primary interests under which states may regulate abortion: "protecting potential life" and protecting women's[14] health.[15] Prior to 2016, states seeking to regulate abortion often relied on the women's health interest to justify abortion-restricting legislation, even where procedures presented little or no threat to women's health.[16] After the Court applied the undue burden standard to strike down a health-protective law in *Whole Woman's Health v. Hellerstedt* in 2016,[17] however, many states refocused their legislative efforts on potential life justified abortion regulations. Although this strategy may change again if current litigation attempting to narrow *Whole Woman's Health* succeeds,[18] states have already passed

14. As a matter of accuracy, this Article uses the term "woman" and "women" to refer to pregnant people and abortion seekers when the case or source it discusses uses such language. Because abortion regulations impact many pregnant people regardless of gender, however, this article uses gender neutral language wherever possible.
15. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) ("[T]he State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child."); *see also* Roe v. Wade, 410 U.S. 113, 154 (1973) ("[A] State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life.").
16. They did so in part because of the greater popular and political appeal of such interests. *See* Reva B. Siegel, *The Right's Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641 (2008) (describing the right's shift to women-protective arguments as Americans became less receptive to fetal-protective arguments).
17. 136 S. Ct. 2292, 2298 (2016).
18. In *June Medical Services v. Gee*, the Fifth Circuit—reversing the opinion below—upheld a Louisiana admitting privileges law substantially similar to that struck down in *Whole Woman's Health*. June Med. Servs. L.L.C. v. Gee, 905 F.3d 787, 815 (5th Cir. 2018), *cert. granted*, No. 18-1460, 2019 WL 4889928 (U.S. Oct. 4, 2019),

a large body of laws based on this fetal-protective interest.[19] Even though laws are increasingly premised on the interest in fetal protection, the contours of that interest are ill defined. The Court has never described the nature of the interest in protecting potential life with clarity.[20] The fetal-protective interest might represent any number of more specific goals, whether probirth, moral, expressive, lifesaving, or otherwise.[21]

While the content of the interest in protecting potential life is not clear, the means by which the state may advance it is. The line of cases from *Roe v. Wade* to *Gonzales v. Carhart* illustrates that, prior to viability, the state may only protect potential life through expressive means. A state may attempt to protect potential life by "express[ing] a preference for childbirth over abortion"[22] and "us[ing] its voice and its regulatory authority to show its profound respect for the life within the woman."[23]

and cert. granted, No. 18-1323, 2019 WL 4889929 (U.S. Oct. 4, 2019). In doing so, the Fifth Circuit essentially limited *Whole Woman's Health* to its facts and threw into question whether lower courts will abide by its more rigorous undue burden standard. The Supreme Court granted certiorari in this case on October 4, 2019, and has stayed the law pending its decision. June Medical Services v. Gee, 139 S. Ct. 663 (Mem) (2019).

19. In 2016, for example, Alabama, Louisiana, Mississippi, and West Virginia all enacted fetal-protective bans on standard D&Es. Arkansas and Texas passed similar bans in 2017, and Kentucky passed one in 2018. *See Dilation and Evacuation Bans*, REWIRE.NEWS (last updated Jan. 2, 2019), https://rewire.news/legislative-tracker/law-topic/dilation-and-evacuation-bans [https://perma.cc/5YMT-N7KH].

20. The Court affirmed an interest in "protecting potential life" in *Roe*, 410 U.S. at 154, "protecting . . . the life of the fetus that may become a child" or "promoting fetal life" in *Casey*, 505 U.S. at 846, 872, and "protecting the life of the fetus that may become a child" in *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007).

21. Justice Stevens made this point in his *Casey* concurrence, in which he argued that "States rarely articulate [the interest in protecting potential life] with any precision" and that it might be "an indirect interest supported by both humanitarian and pragmatic concerns," "a legitimate interest in minimizing . . . offense" to those who oppose abortion, or a state's "broader interest in expanding the population, believing society would benefit from the services of additional productive citizens—or that the potential human lives might include the occasional Mozart or Curie." *Casey*, 505 U.S. at 914–15 (Stevens, J. concurring). *See also* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1746–47 (2008) ("Conceivably, this regulatory interest might be (1) pronatalist (an interest in increasing population), (2) eugenic (an interest in improving the population), (3) life-saving (an interest in protecting particular potential lives), (4) moral and expressive (an interest in promoting the values and role morality associated with family or medical relationships), or (5) political (an interest in promoting social cohesion and government authority under conditions of social conflict)." (citations omitted)).

22. *Casey*, 505 U.S. at 883.

23. *Gonzales*, 550 U.S. at 157.

The Court has not identified any nonexpressive means of protecting potential life in the previability abortion context.

The Court's focus on expressive means of protecting potential life is an idiosyncratic product of its abortion jurisprudence. Since *Roe*, the Court has held that, because abortion regulations implicate both the liberty interests of pregnant women and the state's interest in protecting potential life, a state's ability to regulate abortion varies with the stage of pregnancy.[24] Women's liberty interest in obtaining an abortion is fundamental and exists throughout pregnancy.[25] At a certain point, however, the state may limit this interest because the state's interest in protecting potential life "grows in substantiality as the woman approaches term and . . . becomes 'compelling'" at a certain point.[26] *Roe* established that the threshold was viability, after which the state could "go so far as to proscribe abortion."[27] Prior to that point, women and their doctors were entitled to make decisions about abortion, free from the state's concerns about potential life. Thus, prior to viability, states could only regulate abortion to vindicate their interest in protecting women's health.[28]

In *Casey*, however, the Court modified how states could balance the abortion right and the state's interest in protecting potential life. First, the Court unambiguously confirmed that "the woman has a right to choose to terminate her pregnancy" before viability.[29] Second, however, it rejected the "rigid" framework of *Roe* as "undervalu[ing] the State's

24. *See Roe*, 410 U.S. at 154 ("We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.").
25. *See id.* at 153.
26. *Id.* at 162–63.
27. *Id.* at 163.
28. As a result, the Supreme Court and lower courts generally applied strict scrutiny to previability fetal-protective abortion regulations after *Roe*. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 871 (1992) ("[T]he Court in its subsequent cases . . . decided that any regulation touching upon the abortion decision must survive strict scrutiny, to be sustained only if drawn in narrow terms to further a compelling state interest.") (citing City of Akron v. Akron Ctr. For Reprod. Health, Inc. 462 U.S. 416, 427 (1983)).
29. *Casey*, 505 U.S. at 870. Indeed, it invoked a stronger version of the constitutional interests at stake in abortion than even *Roe* did, linking abortion to sex stereotyping: "[A pregnant woman's] suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society." *Id.* at 852.

interest in potential life"[30] and held that the state should be able to protect potential life "[e]ven in the earliest stages of pregnancy."[31] Facially, these two propositions are in tension. On the one hand, a woman possesses the fundamental right to choose an abortion before viability. On the other, the state possesses an interest in legislating to protect potential life—ostensibly by attempting to prevent women from exercising this right to choose abortion—at the same time.

The *Casey* Court presented a solution: expressive regulations. Faced with the competing interests of a woman's right to abortion prior to viability and the state's interest in protecting potential life prior to viability, the Court held that both interests are served when the state protects life by "express[ing] a preference for childbirth over abortion."[32] According to the Court, "Measures aimed at ensuring that a woman's choice contemplates the consequences for the fetus do not necessarily interfere with the right recognized in *Roe* . . . ."[33] In other words, regulations that merely communicate to women that there are "philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy"[34] do not actually limit the right to abortion. The state does not coerce when it merely persuades—"[w]hat is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so."[35]

The undue burden test set out in *Casey*, which remains the standard for judging previability abortion regulations, confirms these laws must be expressive to be constitutional:

> A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion

30. *Id.* at 837, 873.
31. *Id.* at 872; *see also id.* at 873 ("A logical reading of the central holding in *Roe* itself, and a necessary reconciliation of the liberty of the woman and the interest of the State in promoting prenatal life, require, in our view, that we abandon the trimester framework as a rigid prohibition on all previability regulation aimed at the protection of fetal life.").
32. *Id.* at 883.
33. *Id.* at 873.
34. *Id.* at 872.
35. *Id.* at 877; *see also* Reva Siegel, *Dignity and the Politics of Protection*, *supra* note 21, at 1752 ("The undue burden framework thus allows modes of vindicating the state's interest in potential life that create meaning, promote values, or communicate with a pregnant woman and her community—that may deter abortion, rather than prohibit it.").

> of a nonviable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it.[36]

If there is any doubt that informing women involves expression, the *Casey* Court confirmed this point when it highlighted the "guiding principles" that emerge from the undue burden standard.[37] It summarized the undue burden standard to mean that regulations "which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose."[38] In doing so, the Court equated informing women with expressing respect for potential life to them.

Casey thus established that the state may regulate to protect potential life prior to viability, but it also established that the state must do so through expressive means.[39] The case helps explain why states attempting to regulate previability abortions in the name of protecting potential life do not frame their laws as direct abortion restrictions, but instead as indirect attempts to protect potential life by expressing respect for it. States have passed numerous laws under this rubric of

36. *Casey*, 505 U.S. at 877.
37. *Id.*
38. *Id.* at 877–78.
39. The only nonexpressive previability regulations the Court approved were those intended to protect women's health, an interest not addressed in this Article.

persuasion, including traditional informed consent,[40] waiting period,[41] and ultrasound requirements.[42]

Gonzales v. Carhart,[43] the Court's most recent case addressing a previability fetal-protective law, both confirmed such laws' expressive nature and expanded the audience that these laws could address. In *Gonzales*, the Court addressed the federal Partial-Birth Abortion Act (PBAA),[44] which outlawed intact dilation and extraction (D&X), an uncommon second trimester abortion procedure. The law was overtly

40. Thirty-two states, for example, require that doctors disclose the gestational age of the fetus to a woman seeking an abortion on top of the informed consent requirements required for other medical procedures in the state. *Counseling and Waiting Periods for Abortion*, GUTTMACHER INST. (Oct. 1, 2019), https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion [https://perma.cc/Y7KV-5RY4]. Twenty-eight states require doctors to share information about fetal development and six require that patients be told that personhood begins at conception. *Id.* These laws, including in *Casey* itself, are often justified by an interest in protecting potential life. *See Casey*, 505 U.S. at 882 ("To the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus, those cases go too far, are inconsistent with *Roe*'s acknowledgment of an important interest in potential life, and are overruled.").

41. Twenty-seven states require those seeking abortions to wait a specified period of time, usually 24 hours but up to 72, between receiving counseling and getting an abortion. *An Overview of Abortion Laws*, GUTTMACHER INST. (July 1, 2019), https://www.guttmacher.org/state-policy/explore/overview-abortion-laws [https://perma.cc/K978-EGME]. These laws, including those in *Casey* itself, are often justified by an interest in protecting potential life. *See Casey*, 505 U.S. at 885 ("In theory, at least, the waiting period is a reasonable measure to implement the State's interest in protecting the life of the unborn, a measure that does not amount to an undue burden.").

42. Eleven states mandate that abortion providers perform ultrasounds on people seeking abortions. *Requirements for Ultrasound*, GUTTMACHER INST. (July 1, 2019), https://www.guttmacher.org/state-policy/explore/requirements-ultrasound [https://perma.cc/A4LW-2XN4]. Three require doctors to show and describe the image to patients. *Id.* Nine require providers to offer patients the opportunity to views these images. *Id.* These laws are often justified by an interest in protecting potential life. *See, e.g.*, Texas Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570 (5th Cir. 2012) (upholding a fetal-life justified ultrasound requirement that also required doctors to show and describe the ultrasound images to patients and play the sound of the fetal heartbeat); Planned Parenthood Minn., N. Dakota, S. Dakota v. Rounds, 530 F.3d 724, 726 (8th Cir. 2008) (upholding a fetal-life justified ultrasound requirement that also required doctors to disclose that the abortion "will terminate the life of a whole, separate, unique, living human being" with whom "the pregnant woman has an existing relationship").

43. 550 U.S. 124 (2007).

44. 18 U.S.C. § 1531 (2000).

fetal-protective,[45] and the Court recognized it as such. According to the Court the law protected potential life in two ways: first by "express[ing] respect for the dignity of human life" and second by "regulating the medical profession in order to promote respect for life, including the life of the unborn."[46] Writing for the Court, Justice Kennedy approved both methods as falling within the government's power to "use its voice and its regulatory authority to show its profound respect for the life within the woman."[47] That is, both means were expressive.

While the expressive laws at issue in *Casey* focused on informing abortion seekers alone, the law in *Gonzales* focused on informing all members of the society, regardless of whether they were seeking an abortion. According to Justice Kennedy, the PBAA protected life by ensuring Congress's prolife message was clear: It showed that legislators did not "implicitly approv[e]" a procedure that "had a 'disturbing similarity to the killing of a newborn infant.'"[48] Through this declaration, Congress could avoid "coarsen[ing] society to the humanity of not only newborns, but all vulnerable and innocent human life" and "express[] respect for the dignity of human life."[49] The law also regulated doctors' behavior to communicate that life is worthy of respect.[50] Congress, according to Justice Kennedy, worried that D&X procedures "undermine[d] the public's perception of the appropriate role of a physician."[51] This threatened potential life, as Justice Kennedy wrote in his dissent to a related case, because it "might cause . . . society as a whole to become insensitive, even disdainful, to life, including life in the human fetus."[52] By "drawing boundaries to prevent certain practices that

45. According to Congress, "Implicitly approving such a brutal and inhumane procedure by choosing not to prohibit it w[ould] further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life, making it increasingly difficult to protect such life." *Id.* at 157.
46. *Id.* at 157, 158.
47. *Id.* at 157.
48. *Id.* at 157–58.
49. *Id.* at 157.
50. Justice Kennedy's dissent in *Stenberg v. Carhart*, which would have upheld a similar ban on D&E procedures, confirms this: "A State may take measures to ensure the medical profession and its members are viewed as healers, sustained by a compassionate and rigorous ethic and cognizant of the dignity and value of human life, even life which cannot survive without the assistance of others." 530 U.S. 914, 962 (2000) (Kennedy, J., dissenting).
51. Gonzales v. Carhart, 550 U.S. 124, 160 (2007).
52. *Stenberg*, 530 U.S. at 961.

extinguish life and are close to actions that are condemned,"[53] Congress ensured society did not follow doctors' poor example and feel empowered to disrespect potential life.

Justice Kennedy's description of the overall effect of the PBAA confirms that it protected potential life through expression aimed at society as a whole. Justice Kennedy explicitly described the law's primary life-protective power as dialogic: "The State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion."[54] Much as in *Casey*, the law did not function by banning previability abortions; *Gonzales* explicitly hinged on the continued existence of alternative second trimester abortion procedures.[55] Rather, the law functioned by injecting the state's prolife view into societal discourse in the hopes that society as a whole might become less comfortable with "the consequences that follow from a decision to elect a late-term abortion."[56] All of this clear communication served Congress's ultimate goal: making it easier, rather than "increasingly difficult to protect such life," by fostering a society that values life.[57]

Gonzales thus affirmed the expressive nature of fetal-protective previability regulations and expanded their audience to include not only those seeking abortion, but all members of society. It is unclear, however, whether *Gonzales* validated a freestanding interest in expressing respect for life to society as a whole, or whether such expressions must ultimately be aimed at informing active abortion seekers, as they were in *Casey*. A freestanding interest in expressing respect for life to society as a whole might protect life by making communities more friendly to potential life, leading them to elect leaders who might restrict abortion or pressure their existing lawmakers to pass fetal-protective policies. A society-facing interest in expressing respect for life that is vindicated through informing abortion seekers alone would look different. It would involve an attempt to make society prolife only so that it might influence abortion seekers within it, espousing ethical views, facts about the fetus,

53. *Gonzales*, 550 U.S. at 158.
54. *Gonzales*, 550 U.S. at 160.
55. *Gonzales*, 550 U.S. at 164 ("The conclusion that the Act does not impose an undue burden is supported by other considerations. Alternatives are available to the prohibited procedure. As we have noted, the Act does not proscribe D&E.").
56. *Id.* at 160.
57. *Gonzales*, 550 U.S. at 157.

or facts about abortion that might make abortion unthinkable. In this latter case, the state would speak to broader society only as a means of speaking to those contemplating abortion—an attenuated form of persuasion—and *Gonzales* would have validated only a variation of the kind of law approved by *Casey*.

Gonzales is amenable to either interpretation. On the one hand, Justice Kennedy wrote that a valid purpose of the PBAA was to prevent the "coarsen[ing] [of] society" by banning a "brutal and inhumane procedure" in order to make it easier, rather than "increasingly difficult to protect such life."[58] This language suggests that messaging society may be permissible as an end itself. On the other, Justice Kennedy closed his discussion of the objectives promoted by the PBAA by linking them to informed consent laws aimed at women. Justice Kennedy explained that the law was intended to remedy a potential "lack of information" that women undergoing D&X procedures face, and thus served the *Casey* interest in "ensuring [the abortion] choice is well informed."[59] This suggests that the state may only express respect for potential life to society as a means of ultimately messaging abortion seekers.

States have recently attempted to resolve this ambiguity in favor of an interest in messaging society as an end itself. They have done so by passing expressive fetal-protective laws that seem entirely society-facing. These laws generally come in the form of method substitutions or fetal burial requirements. Method substitutions, most commonly fetal demise laws, ban one procedure and mandate an alternative. These laws, which have been passed in nine states,[60] require abortion providers to cause fetal demise before performing dilation and evacuation (D&E) abortions, the standard of care for abortion procedures starting at about fourteen or fifteen weeks. Fetal disposition or fetal burial laws require medical facilities that provide abortions to dispose of fetal tissue resulting from abortions in the same manner as human remains, rather than treating them as they would other medical tissue.

58. *Id.*

59. *Id.* at 159. He even explained that its "necessary effect . . . and the knowledge it conveys will be to encourage some women to carry the infant to full term," further identifying the law's ultimate purpose as informing abortion seekers. *Id.* at 160.

60. Only two are currently in effect. *Bans on Specific Abortion Methods Used After the First Trimester*, GUTTMACHER INST. (July 1, 2019), https://www.guttmacher.org/state-policy/explore/bans-specific-abortion-methods-used-after-first-trimester [https://perma.cc/NA4P-NGCB].

Regardless of their form, states often pass such laws in the name of a society-focused expressive interest that is not clearly linked to informing abortion seekers. For example, in defending its fetal demise law in 2017, Texas argued it served a freestanding purpose of "increasing general knowledge about abortion" separate from an interest in informing women.[61] Indeed, some states seem to have abandoned the pretense of targeting abortion seekers at all. Both Oklahoma and Alabama recently asserted that their demise laws advanced a freestanding "interest in promoting a respect for life, compassion, and humanity in society at large" without mentioning any interest in informing abortion seekers specifically.[62] Arkansas and Kansas took similar routes with their demise laws.[63] These exclusively society-focused interests also appear in the fetal burial context. For example, in 2018, Texas overtly disclaimed the need for its fetal burial law to inform women.[64] Indiana failed to mention any interest in persuading abortion seekers in support of its fetal disposition law, and instead focused on "promot[ing] respect for life by requiring that fetal remains are disposed of" in a "dignified manner."[65]

61. Appellant's Brief at 20, Whole Woman's Health v. Paxton, No. 17-51060 (5th Cir. Feb. 26, 2018).

62. Appellant's Brief at 47, W. Ala. Women's Ctr. v. Miller, 2018 WL 621203 (No. 17-15208-F); Defendant's Response to Plaintiff's Motion for A Temporary Injunction at 12, Nova Health Sys. v. Pruitt, 2015 OK Dist. Ct. Motions LEXIS 852 (W.D. Okla. 2015) (No. CV-2015-1838). Notably, Oklahoma did assert an interest in informing women to defend a different law in the same brief. *Id.* at 18–21.

63. In 2015, for example, Kansas argued that its fetal demise law advanced "an important interest in enacting laws that speak to its profound interest in promoting human dignity and protecting human life" without mentioning informing abortion seekers. Defendant's Response Opposing Plaintiffs' Motion for Temporary Restraining Order and/or Temporary Injunction at 7, Hodes & Nauser v. Schmidt, 368 P.3d 667 (Kan. Dist. Ct. 2015), *aff'd*, 368 P.3d 667 (Kan. Ct. App. 2016) (No. 2015CV000490). *See also* Brief in Support of Motion to Dismiss at 20–22, Hopkins v. Jegley, 267 F.Supp.3d 1024 (E.D. Ark. 2017) (No. 4:17-CV-00404-KGB).

64. Texas argued that "the Court [should] reject[] Plaintiffs' argument that laws respecting fetal life are permissible only if they 'inform' or attempt to 'persuade' a woman to give birth" because "[t]he law in *Gonzales* required respect by banning partial-birth abortion—it did not inform or persuade." Defendant's Amended Proposed Findings of Fact & Conclusions of Law at 33, Whole Woman's Health v. Smith, 2018 U.S. Dist. LEXIS 99275 (W.D. Tex. 2018) (No. 1:16-cv-01300-DAE); *see also* TEX. HEALTH & SAFETY CODE ANN. § 697.001 (West 2018) (stating that one of the goals of a fetal burial law is to "express . . . profound respect for the life of the unborn by providing for a dignified disposition of embryonic and fetal tissue remains").

65. Brief and Required Short Appendix of Appellants at 40, Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, 888 F.3d 300 (7th Cir. 2018) (No. 17-3163).

This Article argues that the ultimate intended target of a state's expressions of respect for potential life matters enormously for their constitutional validity, not under the Fourteenth Amendment, but rather under the First Amendment. When a state regulates to express an idea, such as respect for potential life, it raises the specter of First Amendment limitations on state power, especially limitations on the state's power to compel speech. How, and to whom, the state wishes to express an idea determines whether the First Amendment is triggered, as well as what level of scrutiny should apply.

II. COMPELLING EXPRESSIONS OF RESPECT FOR POTENTIAL LIFE

Gonzales clarified that, prior to viability, a state may express respect for potential life in two ways. First, the state may "use its voice," and second, it may use "its regulatory authority to show its profound respect for the life within the woman."[66] Where a law purely uses the state's "voice" to express respect for potential life, it will not be subject to First Amendment scrutiny. This is because, under the "governmental speech" doctrine, a government may freely choose the content of its own message where it speaks directly.[67] Thus, for example, a state could offer a "Choose Life" license plate without also printing a "Trust Women" license plate.[68] On the other hand, where a state "seeks to compel private persons to convey the government's speech" through its regulatory authority, "the Free Speech Clause . . . may constrain" it.[69] This is why a state might print "Choose Life" license plates, but could not require all

66. 550 U.S. 124, 157 (2007).
67. The Court recently affirmed this in *Walker v. Texas Division, Sons of Confederate Veterans*, 135 S. Ct. 2239, 2245–46 (2015) ("When government speaks, it is not barred by the Free Speech Clause from determining the content of what it says. That freedom in part reflects the fact that it is the democratic electoral process that first and foremost provides a check on government speech. Thus, government statements (and government actions and programs that take the form of speech) do not normally trigger the First Amendment rules designed to protect the marketplace of ideas." (internal citations omitted)).
68. *Cf. Walker*, 135 S. Ct. at 2249 ("Texas offers plates celebrating the many educational institutions attended by its citizens. But it need not issue plates deriding schooling. Texas offers plates that pay tribute to the Texas citrus industry. But it need not issue plates praising Florida's oranges as far better. And Texas offers plates that say 'Fight Terrorism.' But it need not issue plates promoting al Qaeda.") (citations omitted).
69. *Id.* at 2246.

citizens to display them.[70] Laws that "compel private persons to convey"[71] the state's point of view in this manner trigger First Amendment scrutiny because "freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'"[72] As a result, the First Amendment "prohibits the government from telling people what they must say"—that is, compelling speech.[73] This principle extends to both classic speech as well as compelled expressive conduct,[74] because expressive conduct qualifies as a form of speech.[75]

This does not, however, mean that all conduct regulations implicate the First Amendment. Rather, a compelled expressive conduct violation occurs when a law has two distinct features. First, the regulation must actually compel conduct. Second, it must be sufficiently expressive to constitute speech under the First Amendment. This Part and the next demonstrate that, due to constraints on abortion regulation imposed by the Fourteenth Amendment, many fetal-protective abortion regulations meet these requirements.

A. Many Fetal-Protective Abortion Regulations Compel Conduct

There are instances in which the Court has suggested that abortion regulations do not compel conduct at all. For example, in *Webster v. Reproductive Health Services*,[76] the Court approved a preamble to an

70. *Cf.* Wooley v. Maynard, 430 U.S. 705, 717 (1977) (holding that a state may not require an individual to display a state motto, in this case "Live Free or Die," on the license plate of his car).
71. *Walker*, 135 S. Ct. at 2246.
72. Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2463 (2018) (citing Wooley v. Maynard, 430 U.S. 705, 714 (1977).
73. Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 61 (2006).
74. Indeed, the landmark 1943 case which established the compelled speech doctrine, *W. Va. State Bd. of Educ. v. Barnette*, vindicated both a compelled classic speech and compelled expressive conduct claim. It struck down both a mandatory pledge of allegiance and mandatory flag salute requirement because, the Court explained, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe 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." 319 U.S. 624, 642 (1943) (emphasis added).
75. *See* Texas v. Johnson, 491 U.S. 397, 404 (1989) ("The First Amendment literally forbids the abridgment only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word . . . . [W]e have acknowledged that conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'") (citing Spence v. Wash., 418 U.S. 405, 409 (1974).
76. *See, e.g.*, Webster v. Reprod. Health Servs,, 492 U.S. 490, 504 (1989).

abortion regulation which read "[t]he life of each human being begins at conception," and "[u]nborn children have protectable interests in life, health, and well-being."[77] It upheld the preamble because it "d[id] not by its terms regulate abortion."[78] Similarly, the Court treated the PBAA at issue in *Gonzales* as forbidding conduct, rather than compelling it. The Court reasoned that the law expressed respect for potential life by prohibiting conduct that resembled infanticide and reducing doctors' "unfettered choice" by eliminating one among a number of "reasonable alternative procedures."[79] So long as a court finds that fetal-protective laws such as the PBAA do not require individuals to engage in abortion-related conduct they would otherwise avoid,[80] the laws should be

77. *Id.* (citing Mo. Rev. Stat. §§ 1.205.1(1), (2) (1986)).

78. *Id.* at 506. The Court has made similar holdings in the abortion funding context. For example, according to the Court, when states refuse public funding for abortion care they should not "attempt to impose [their] will by force of law," but instead merely "encourage actions deemed to be in the public interest," such as childbirth. Maher v. Roe, 432 U.S. 464, 476 (1997). Although these holdings ignore the plainly coercive effects of such funding restrictions, especially on poor women and women of color, the Court nonetheless has viewed these laws as merely expressing a value judgment without compelling any conduct. *See, e.g.*, IBIS REPROD. HEALTH, U.S. FUNDING FOR ABORTION: HOW THE HELMS AND HYDE AMENDMENTS HARM WOMEN AND PROVIDERS 21–22 (2015), https://ibisreproductivehealth.org/sites/default/files/files/publications/Ibis%20Ipas%20Helms%20Hyde%20Report%202016.pdf (describing how "[t]he Hyde Amendment . . . forces one in four women who qualify for Medicaid to continue unwanted pregnancies" and that such negative impacts of funding restrictions are more likely to face poor women and women of color); Terri-Ann Thompson, Opinion, *Restricting Medicaid Abortion Coverage Forces Some Women To Carry Unwanted Pregnancies*, HILL (Oct. 2, 2018), https://thehill.com/opinion/healthcare/409438-restricting-medicaid-abortion-coverage-forces-some-women-to-carry-unwanted (explaining that abortion funding restrictions "force[] some women seeking an abortion to carry an unwanted pregnancy to term," leading to an increased likelihood of other negative outcomes such as poverty, intimate partner violence, and more).

79. Gonzales v. Carhart, 550 U.S. 124, 163 (2007).

80. In defending their fetal demise laws, states sometimes emphasize language from *Gonzales* which suggested that the Act also compelled alternative conduct. *See, e.g.*, Defs. Response Opposing Plaintiffs' Motion for Temporary Restraining Order and/or Temporary Injunction at 10, Hodes & Nauser v. Schmidt, 368 P.3d 667 (D. Kan. 2015) (No. 2015CV490) (quoting language from *Gonzales*, 550 U.S. at 158, 163, which explained that "[p]hysicians are not entitled to ignore regulations that direct them to use reasonable alternative procedures" and that states could "bar certain procedures and substitute others"). They do so in order to suggest that fetal demise laws, which they characterize as compelling conduct, are in line with *Gonzales*. While suggesting the Partial-Birth Abortion Act compelled conduct is plausible, states will be unlikely to press this point if faced with a First Amendment challenge to their demise laws. Characterizing *Gonzales* as compelling conduct would make the Partial-Birth Abortion Act itself vulnerable to the compelled speech claim

immune from the compelled expressive conduct claim outlined in this Article.

Other forms of abortion regulation, however, cannot escape First Amendment scrutiny because they do compel conduct. Fetal disposition laws, for example, direct doctors to "treat fetal remains with respect—through interment or scattering of ashes"[81] in order to communicate the state's "view of unborn human life."[82] Informed consent laws similarly accomplish their goal by requiring doctors to deliver state-determined information under the Court's recent holding in *NIFLA*.[83]

Because the state's asserted goal may never be to simply interfere with access to previability abortions, states themselves frame their laws as compelling conduct, rather than forbidding it.[84] For example, states defending fetal demise laws claim that these laws do not ban D&E, but instead compel doctors to induce fetal demise before performing D&E. Arkansas argued that its demise law was "emphatically not a D&E abortion ban."[85] Texas characterized its law as "merely requir[ing] abortion doctors to kill fetuses in a more humane way" before

outlined in this Article and throw *Gonzales*—a case favorable to states wishing to regulate abortion—into doubt.

81. Brief for Defendant-Appellee Charles Smith at 1, Whole Woman's Health v. Smith, 338 F.Supp.3d 606 (W.D. Tex. 2018) (No. 18-50484).

82. Brief in Support of Motion to Dismiss at 59, Hopkins v. Jegley, 267 F.Supp.3d 1024 (E.D. Ark. 2017) (No. 4:17-CV-00404-KGB).

83. Nat'l Inst. of Family and Life Advocates v. Becerra, 138 S. Ct. 2361, 2373 (2018).

84. This Article defers to state litigants' positions on whether their laws compel conduct for three reasons. First, developing a holistic theory of when a law bans conduct and when a law compels it—especially one that squares with existing abortion jurisprudence—is beyond the scope of this Article. Second, by accepting states' premises, this Article demonstrates that many abortion restrictions are unconstitutional *by states' own terms*. Third, adopting states' positions does not award them any great strategic advantage. Due to Fourteenth Amendment limitations, states will be limited in their ability to avoid First Amendment scrutiny by merely claiming that their laws only ban conduct. Where a state claims to merely ban conduct and disclaims intent to compel alternative means of accessing abortion, its laws are more likely to "ha[ve] the effect of placing a substantial obstacle in the path of a woman's choice . . . " Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992). For example, if a state, defending against the kind of First Amendment claim presented in this Article, argued that its fetal demise law merely banned standard D&E, it would run headlong into *Stenberg v. Carhart*, which held that simple D&E bans impose an undue burden. *See generally* Stenberg v. Carhart, 530 U.S. 914 (2000).

85. *See* Brief in Support of Motion to Dismiss at 22, Hopkins v. Jegley, 267 F.Supp.3d 1024 (E.D. Ark. 2017) (No. 4:17-CV-00404-KGB).

performing a D&E.[86] Indeed, states regularly specify three potential demise procedures that doctors may use to comply with the law—umbilical cord transection, potassium chloride injection, or digoxin injection.[87] States argue that their laws do not ban D&E—despite evidence that they do so in practice[88]—because *Stenberg v. Carhart* established that explicit bans on D&E are unconstitutional.[89] States concede, as they must, that their fetal-protective laws compel conduct, satisfying the first prong of the compelled expressive conduct doctrine.

B. The Conduct is Expressive for Purposes of the First Amendment

Not every regulation that compels conduct compels expressive conduct. In *United States v. O'Brien*,[90] the Court rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[91] This reticence makes sense; if every government regulation of conduct generated a compelled speech claim, the government could accomplish

86. Appellant's Brief at 1, Whole Woman's Health v. Paxton, No. 17-51060 (5th Cir. Feb. 26, 2018).

87. *See, e.g.*, W. Ala. Women's Ctr. v. Miller, 299 F.Supp.3d 1244, 1267–68 (M.D. Ala. 2017), *aff'd sub nom.* W. Ala. Women's Ctr. v. Williamson, 900 F.3d 1310 (11th Cir. 2018), ("The plaintiffs assert that the fetal-demise law makes the safest and most common method of second-trimester abortions, standard D & E, essentially unavailable, therefore imposing an undue burden on Alabama women's right to pre-viability abortions. The State responds that fetal demise can be safely achieved before standard D & E with one of three procedures: umbilical-cord transection, potassium-chloride injection, and digoxin injection."); *see also* Hopkins v. Jegley, 267 F.Supp.3d 1024, 1058 (E.D. Ark. 2017) (outlining the same proposals by Arkansas); *see also* Whole Woman's Health v. Paxton, 280 F. Supp. 3d 938, 947 (W.D. Tex. 2017) (outlining the same proposals by Texas).

88. Doctors argue—and some courts have agreed—that fetal demise laws effectively ban D&E due to the infeasibility, experimental nature, and dangerousness of the proposed demise procedures. *See, e.g.*, W. Ala. Women's Ctr. v. Miller, 299 F.Supp.3d at 1270–79 (finding that none of the state's proposed fetal demise procedures were feasible). They also explain that states' claims that their laws do not ban D&E are dubious, given these laws, by their text, simply forbid doctors from performing standard D&E procedures. *See, e.g.*, Kansas Unborn Child Protection from Dismemberment Abortion Act, Kan. Stat. Ann. § 65-6743 (2015) ("No person shall perform, or attempt to perform, a dismemberment abortion on an unborn child . . . .").

89. *Stenberg*, 530 U.S. 914.

90. 391 U.S. 367 (1968).

91. *Id.* at 376.

very little.[92] As a result, persuading courts that certain conduct, such as baking a cake, constitutes speech has posed a significant challenge for litigants asserting compelled speech claims based on compelled expressive conduct.[93]

In non-abortion cases, the Supreme Court has laid out a two-part test to determine whether conduct is protected as speech.[94] First, a court must determine whether "[a]n intent to convey a particularized message was present."[95] Second, it must determine whether "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[96] This Part shows that the conduct compelled by previability fetal-protective abortion regulations meets this test for reasons unique to abortion jurisprudence. First, states overtly claim that previability fetal-protective regulations are intended to express respect for potential life. Second, states cannot claim any purpose for these laws beyond expressing respect for potential life, a

92. This was the thrust of Justice Breyer's dissent to *NIFLA*'s expansion of the scope of strict scrutiny for regulations of professionals: "Because much, perhaps most, human behavior takes place through speech and because much, perhaps most, law regulates that speech in terms of its content, the majority's approach at the least threatens considerable litigation over the constitutional validity of much, perhaps most, government regulation." Nat'l Inst. of Family and Life Advocates v. Becerra, 138 S. Ct. 2361, 2380 (2018) (Breyer, J., dissenting).

93. In *Masterpiece*, for example, the lower court held that baking a cake failed the "threshold question" in compelled expressive conduct cases of "whether the compelled conduct is sufficiently expressive to trigger First Amendment protections." Craig v. Masterpiece Cakeshop, Inc., 370 P.3d 272, 285–88 (Colo. App. 2015). *See also*, Jacobs v. Clark Cty. Sch. Dist., 526 F.3d 419, 438 (9th Cir. 2008) (rejecting the argument that a school uniform compelled expressive conduct because wearing a uniform was not expressive); State v. Arlene's Flowers, Inc., 389 P.3d 543, 557 (Wash. 2017), *cert. granted, judgment vacated*, 138 S. Ct. 2671 (2018) (rejecting a flower shop's compelled speech arguments because the sale of flower arrangements constituted conduct but not speech).

94. This test arose from the suppressed expressive conduct context, but courts have applied it in the compelled expression context as well. *See*, *e.g.*, Troster v. Pa. Dep't of Corr., 65 F.3d 1086, 1090 (3d Cir. 1995). Justice Thomas used this test to evaluate whether the baker's conduct in *Masterpiece* was expressive. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719, 1742–43 (2018) (Thomas, J., concurring in part and concurring in the judgment).

95. *See* Spence v. Wash., 418 U.S. 405, 410–11 (1974) (per curiam) (finding that hanging an American flag upside down with a peace sign on it constituted expressive conduct under this test). The Court later eliminated the need for a "particularized message," allowing a less specific communicative intent to suffice. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 569 (1995).

96. *Spence*, 418 U.S. at 411.

limitation that—as discussed above—the Court has baked into its abortion jurisprudence.

1. Intent to Convey a Particular Message

The first step in proving that conduct is expressive is demonstrating expressive intent. Whose intent matters depends on the kind of compelled speech claim asserted. In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.* (*FAIR*),[97] the Court clarified that there are two kinds of compelled speech claims. The first covers "the situation in which an individual must personally speak the government's message."[98] When a plaintiff asserts a compelled expressive conduct violation under this theory, the government's intent determines whether the conduct is expressive. In *West Virginia State Board of Education v. Barnette*,[99] for example, the Court held that a mandatory flag salute compelled speech because the state intended, through this compelled conduct, to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[100] In *Wooley v. Maynard*,[101] the Court similarly focused on the state's intent when it invalidated a law requiring drivers to display the state motto, "Live Free or Die," on their license plates.[102] Relying on *Barnette*'s reasoning about "the affirmative act of a flag salute," the Court held that requiring "the passive act of carrying the state motto" compelled expressive conduct.[103] As in *Barnette*, the state's intent converted "act" to expression. The state intended that carrying the license plate would "communicate to others an official view as to proper appreciation of history, state pride, and individualism" and thus

97. 547 U.S. 47 (2006).
98. *Id.* at 63.
99. 319 U.S. 624 (1943).
100. *Id.* at 642.
101. 430 U.S. 705 (1977).
102. *Id.*
103. Although the law required the display of words, the Court framed it as a conduct requirement: "Compelling the affirmative act of a flag salute involved a more serious infringement upon personal liberties than the passive act of carrying the state motto on a license plate, but the difference is essentially one of degree." *Id.* at 715.

"disseminate an ideology."[104] As a result of its intent, the state compelled not merely conduct, but also expression.[105]

Doctors challenging fetal-protective abortion legislation under the First Amendment could most forcefully bring cases under this government intent focused theory.[106] Like the laws at issue in *Barnette* and *Wooley*, fetal-protective abortion regulations are designed to "communicate to others an official view."[107] These laws' explicit purpose is to "express" the state's "profound respect for the life of the unborn" through conduct regulation.[108] Whether mandating demise or the burial of fetal tissue, they compel doctors' conduct to "disseminate an ideology,"[109] specifically the state's view that potential life is worthy of respect. Where aimed at society, rather than abortion seekers, they profess to prevent the "coarsen[ing of] society to the humanity of . . . innocent human life," mandating doctors' conduct and, in turn, social norms.[110] Like the flag salute in *Barnette*, these laws "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion" by requiring doctors to "confess by . . . act their faith therein."[111] Thus, under the first form of compelled speech claim, which focuses on the government's intent, when a state intends to compel conduct in order to express respect for life, there is requisite "intent to convey a particularized message"[112] for purposes of a compelled expressive conduct claim.

The state's avowed expressive intent distinguishes previability fetal-protective laws from other conduct regulations, such as antidiscrimination laws, which have increasingly been the subject of

104. *Id.* at 717.
105. *Id.* ("[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.").
106. Furthermore, the second claim is not appropriate. Where doctors perform abortion procedures, they generally do not intend to communicate a particular message, but rather to provide appropriate medical care.
107. *Wooley*, 430 U.S. at 717.
108. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992).
109. *Wooley*, 430 U.S. at 717.
110. *Gonzales*, 550 U.S. at 157.
111. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
112. Spence v. Wash., 418 U.S. 405, 410–11 (1974) (per curiam) (finding that hanging an American flag upside down with a peace sign on it constituted expressive conduct under this test). The Court later eliminated the need for a "particularized message." Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos., Inc., 515 U.S. 557, 569 (1995).

compelled expressive conduct challenges. Litigants challenging such conduct regulations often assert a second style of compelled expressive conduct claim, also discussed in *FAIR*, that focuses on the compelled actor's expressive intent, rather than the government's.[113] In these cases, the government compels speech by "forc[ing a] speaker to host or accommodate another speaker's message."[114] This violates speakers' rights by requiring them to "alter the expressive content" of their existing speech.[115] In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,[116] for example, the Court found that an antidiscrimination law compelled expressive conduct when it required an unwilling parade organizer to include an LGBT group in his parade.[117]

The compelled speech violation in cases such as *Hurley* does not result from an imposed government message, but instead "result[s] from the fact that the complaining speaker's own message [i]s affected by the speech it [i]s forced to accommodate."[118] A threshold question is thus whether complainants themselves intended to convey a message in the first instance. Otherwise, there is no underlying speech for the

113. *See, e.g.*, State v. Arlene's Flowers, Inc., 389 P.3d 543, 833–34 (Wash. 2017), *cert. granted, judgment vacated*, 138 S. Ct. 2671 (2018) ("[Plaintiff] claims *Hurley* recognizes her First Amendment right 'to exclude a message [she] did not like from the communication [she] chose to make.'"); Brief for Petitioners at 19, Masterpiece Cakeshop v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (No. 16-111) ("Phillips's custom wedding cakes are his artistic expression because *he* intends to, and does in fact, communicate through them." (emphasis added)); Appellant Reply Brief, Telescope Media Grp. v. Lindsey, 271 F. Supp. 3d 1090 (D. Minn. 2017) ("The Larsens convey their own message through their wedding films.").

114. *FAIR*, 547 U.S. at 63.

115. *Id.* (citing *Hurley*, 515 U.S. at 572). For other examples of this claim which deal with classic speech rather than compelled expressive conduct, see Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 795 (1988) (holding that a requirement that professional fundraisers make certain disclosures before soliciting funds constituted a compelled speech violation because it "alter[ed] the content of [fundraiser's] speech"); Pac. Gas & Elec. Co. v. Pub. Util. Comm'n of Cal., 475 U.S. 1, 16–18 (1986) (finding that a state agency could not require a utility company to include a third-party newsletter in its billing envelope because it interfered with the utility's own message); and Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 256–58 (1974) (holding that a right-of-reply statute violated editors' right to determine the content of their newspapers and thus alter[ed] the message the paper wished to express).

116. 515 U.S. 557 (1995).

117. *Hurley*, 515 U.S. 557 (1995); *see also Pac. Gas & Elec. Co.*, 475 U.S. at 1 (plurality opinion) (finding a compelled speech violation where a state law required a utility to include the newsletter of a third party in its billing envelopes).

118. *FAIR*, 547 U.S. at 63.

government to alter or affect. Thus, the complainant's, not the government's, intent matters.

It makes sense that litigants challenging conduct regulations often assert this second, *Hurley*-style claim. Asserting government intent based claim is usually difficult because, outside of the abortion context, the government seldom overtly claims expressive intent when regulating conduct. The government only does so in the abortion context, as explained in Part I,[119] due to limitations on direct regulation imposed by the Fourteenth Amendment. For example, the antidiscrimination law at issue in *Hurley* was not explicitly designed to promote any particular government message or motto, but instead to forbid discriminatory conduct.[120] Similarly, in *Masterpiece*,[121] Colorado disclaimed any intent beyond regulating conduct in its antidiscrimination law.[122] While all laws—including antidiscrimination laws—have some expressive function,[123] previablity abortion regulations represent an unusual case in which a state seeking to defend against a First Amendment claim cannot disavow this expressive function. Those challenging previability abortion conduct regulations may thus proceed on a *Barnette* and *Wooley*-style compelled expressive conduct claim in a manner that litigants in other contexts may not.

2. Likelihood That the Message Will Be Understood

Even if the government intends doctors' conduct to express respect for potential life, satisfying the first prong for a *Barnette* and *Wooley*-style compelled expressive conduct claim, the conduct is not expressive for First Amendment purposes unless "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[124] Although many forms of conduct have met this second

119. *See supra* text accompanying notes 24–42.
120. "[T]his statute . . . does not, on its face, target speech or discriminate on the basis of its content, the focal point of its prohibition being rather on the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds." *Hurley*, 515 U.S. at 572.
121. 138 S.Ct. 1719 (2018).
122. *See* Brief for Respondent at 20–26, Masterpiece Cakeshop v. Colo. Civil Rights Comm'n, 138 S.Ct. 1719 (2018) (arguing that Colorado's antidiscrimination law merely regulated commercial conduct and was aimed in no way at expression).
123. *See* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. Pa. L. Rev. 2021 (1996).
124. Spence v. Washington, 418 U.S. 405, 411 (1974) (per curiam).

requirement in the past,[125] it can serve as a gatekeeper to *Hurley*-style compelled expressive conduct claims in particular. While it is easy for a litigant to argue that she intended her own conduct to be expressive, it is much harder to prove that others are likely to comprehend the message. In *FAIR*, for example, the Court rejected law schools' claim that excluding military recruiters from interviewing at their schools was expressive because the point of such exclusion was "not 'overwhelmingly apparent.'"[126] Indeed, *FAIR* appears to have raised the bar to meeting this second criterion, explaining that the conduct must be "inherently expressive."[127] Given this criterion's gatekeeping function, courts might be hesitant to recognize new forms of "inherently expressive" conduct, lest they open the floodgates to substantial First Amendment litigation.[128]

Unlike in the case of a *Hurley*-style compelled expressive conduct claim, *Barnette* and *Wooley*-style compelled expressive conduct claims can more easily meet this requirement that the "likelihood that the message would be understood is great." This is because the defending government has explicitly asserted that its conduct regulations serve an expressive purpose and thus has an interest in conceding this point. This is particularly true in the abortion context, where laws are subject to the Fourteenth Amendment's undue burden test. As confirmed most recently by *Whole Woman's Health v. Hellerstedt*,[129] the undue burden test requires the weighing of a law's "asserted benefits against the

125. *See* Barnes v. Glen Theatre, Inc., 501 U.S. 560, 565–66 (1991) (erotic dancing); Texas v. Johnson, 491 U.S. 397, 405–06 (1989) (flag burning); Spence v. Wash., 418 U.S. 405, 406, 409–11 (1974) (flying a flag upside down with a peace sign taped to it); Schacht v. United States, 398 U.S. 58, 62–63 (1970) (wearing a military uniform); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505–06 (1969) (wearing a black armband); Brown v. La., 383 U.S. 131, 141–42 (1966) (Fortas, J., plurality opinion) (silent sit-ins); Stromberg v. Cal., 283 U.S. 359, 369–70. (1931) (flying a plain red flag).

126. *FAIR*, 547 U.S. at 66 (citing *Texas v. Johnson*, 491 U.S. 397 (1989), which found flag burning to be inherently expressive, to support this proposition).

127. *Id.*

128. Justice Kagan has raised such slippery slope concerns to oppose the Court's expanding First Amendment jurisprudence. Janus, 138 S. Ct. 2448, 2502 (2018) (Kagan, J. dissenting) ("Speech is everywhere—a part of every human activity (employment, health care, securities trading, you name it). For that reason, almost all economic and regulatory policy affects or touches speech. So the majority's road runs long.").

129. 136 S. Ct. 2292, 2310 (2016).

burdens."[130] Where a law provides few or no benefits, it cannot sustain a substantial obstacle to abortion.[131] Further, the Court will not accept a hypothetical benefit as weighing in favor of a law's validity.[132]

Thus, where an abortion law's purported benefit is generated by expressing respect for potential life, the state must argue that the regulation successfully communicates this message to its target audience. Otherwise its law provides no benefit. A state arguing that its message of respect is not likely to be understood in order to defend against a First Amendment claim would leave its law vulnerable to a Fourteenth Amendment claim that its law imposes an undue burden. Thus, states are unlikely to dispute that their previablity abortion regulations intended to express respect for life are likely to be understood, satisfying the second prong of the expressive conduct test.

In short, whether they compel doctors to perform demise procedures, bury fetal tissue, conduct ultrasounds, or recite informed consent scripts, previability fetal-protective laws compel doctors to engage in expressive conduct. When the state regulates to protect potential life by expressing respect for it, it intends that any conduct it compels in the process express this message. Further, in order for their laws to survive the undue burden test, states must concede that the message behind the compelled conduct is likely to be understood. As a

130. *Id.* at 2310. Although the Fifth Circuit recently upheld a law very similar to that struck down in in *Whole Woman's Health* as not imposing an undue burden, it did not seem to question the undue burden test it outlined. Rather, it distinguished the law on its facts. June Med. Servs., L.L.C. v. Gee, 905 F.3d 787, 791 (5th Cir. 2018) ("[T]he facts in the instant case are remarkably different from those that occasioned the invalidation of the Texas statute in *WWH*. Here, unlike in Texas, the Act does not impose a substantial burden on a large fraction of women under *WWH* and other controlling Supreme Court authority."). While the continuing rigor of the undue burden test remains to be seen—the Court has stayed the Fifth Circuit's holding pending a cert petition—the cases that *Whole Woman's Health* relied on are not in official question. June Med. Servs., L.L.C. v. Gee, 2019 WL 488298 (Feb. 7, 2019). As such, the undue burden test remains a meaningfully heightened form of scrutiny.

131. Whole Woman's Health, 136 S. Ct. at 2318 (holding that certain women's health–justified abortion regulations "provide[] few, if any, health benefits for women, pose[] a substantial obstacle to women seeking abortions, and constitute[] an 'undue burden' on their constitutional right to do so.").

132. *Id.* at 2311 (finding that a Texas abortion restriction provided little or no benefit to women's health where Texas admitted that it was unaware "of a single instance in which the new requirement would have helped even one woman obtain better treatment.").

result, these laws compel expressive conduct and trigger First Amendment scrutiny.

III. *NIFLA* REQUIRES HEIGHTENED SCRUTINY WHERE LAWS COMPEL EXPRESSIONS OF RESPECT FOR POTENTIAL LIFE

Demonstrating that laws that express respect for potential life compel expressive conduct does not automatically mean that these regulations are invalid. Courts apply a range of levels of scrutiny to laws that trigger First Amendment protections.[133] Although the Court, in a series of decisions culminating in *NIFLA*, appears to have decided that strict scrutiny is the default level of scrutiny for many compelled speech claims,[134] the Court continues to recognize broad exceptions to this rule. This Part will use *NIFLA*'s compelled speech framework to illustrate the level of scrutiny that applies to abortion regulations intended to express respect for potential life through doctors' conduct. The level of scrutiny turns on a regulation's intended audience. Laws aimed at informing abortion seekers are subject to intermediate scrutiny. Where laws profess to express respect for potential life to society as an end itself, however, they are subject to strict scrutiny.

A. *NIFLA*'s Compelled Speech Framework

When the Court in *NIFLA* struck down California's signposting requirement under a compelled speech theory, it also clarified how compelled speech claims function in the context of professional regulations. The majority explained that regulations that compel speech are ordinarily subject to strict scrutiny because they are content-

133. Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1620–21 & n. 38–40 (2015) (describing the broad categories of scrutiny applied to regulations which trigger the First Amendment, as well as ambiguities and potential subcategories within these levels of scrutiny).

134. In *Riley v. National Fed'n of the Blind of N. C., Inc.*, 487 U.S. 781, 795 (1988), the Court held that regulations which compel speech are inherently content-based because they "alter[] the content of [a speaker's] speech." In *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015), the Court explained that all content-based laws are "presumptively unconstitutional" and subject to strict scrutiny. In *NIFLA*, 138 S. Ct. 2361, 2371 (2018), the Court explicitly combined these two propositions to hold that when a regulation compels speech, it is content-based, and falls under the general "rule that content-based regulations of speech are subject to strict scrutiny."

based.[135] Second, the Court explained that it saw "no persuasive reason for treating professional speech as . . . exempt from ordinary First Amendment principles."[136] In doing so the Court seemed to maintain that, absent good reason, courts should apply strict scrutiny to laws that compel professionals' speech. The Court, however, clarified that there are two categories of regulation exempted from this presumption of strict scrutiny: first, laws that mandate "disclosures under *Zauderer*" and second, "regulations of professional conduct that incidentally burden speech."[137] Whether abortion laws that compel doctors' expressive conduct are subject to strict or some lower form of scrutiny thus turns on whether they fall into one of these two exceptions.

B. The Abortion Exception to the *Zauderer* Exception

Compelled expressive conduct can be exempted from strict scrutiny under the exception first articulated in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*,[138] where the Court held that a deferential standard of First Amendment review applies to some forms of commercial speech.[139] However, by *NIFLA*'s own terms this exception does not apply to previability fetal-protective regulations. According to the Court, the *Zauderer* exception applies only to disclosures of "purely factual and uncontroversial information about the terms under which . . . services will be available."[140] Although what qualifies as controversial is not clearly defined,[141] *NIFLA* made it clear that abortion is "anything but an 'uncontroversial' topic."[142] Even a sign that disclosed the mere fact that free or low-cost abortions were available in California was controversial.[143] Under *NIFLA*'s definition of controversy, laws that

135. *NIFLA*, 138 S. Ct. at 2371 (holding that when regulations "compel[] individuals to speak a particular message," they are "content-based" and subject to the general rule that "content-based regulations of speech are subject to strict scrutiny").
136. The Court, however, did "not foreclose the possibility that some such reason exists." *Id.* at 2375.
137. *Id.* at 2373–74.
138. 471 U.S. 626 (1985).
139. *NIFLA*, 138 S. Ct. at 2372.
140. *Id.* (quoting Zauderer, 471 U.S. at 651).
141. Justice Breyer, in his dissent to *NIFLA*, argued that this vagueness "would seem more likely to invite litigation than to provide needed limitation and clarification." *Id.* at 2381 (Breyer, J. dissenting).
142. *Id.* at 2372.
143. Justice Breyer, in his dissent to *NIFLA*, contested this characterization: "Abortion is a controversial topic and a source of normative debate, but the availability of state

compel doctors to express respect for potential life are controversial. They do not merely list abortion as one among many services funded by the state, but touch on a question at the heart of the abortion controversy—the moral significance of the potential life at issue.[144] Accordingly, as in *NIFLA*, "*Zauderer* has no application"[145] to previability fetal-protective compelled conduct regulations.

C. When Expressing Respect for Life Does, and Does Not, Incidentally Burden Speech

Acknowledging a second exception to the presumption of strict scrutiny for compelled speech, *NIFLA* held "the First Amendment does not prevent restrictions directed at . . . [professional] conduct from imposing incidental burdens on speech."[146] The majority placed some abortion restrictions in this category. Indeed, it used the informed consent provision at issue in *Casey* as the quintessential example of such a professional regulation that only incidentally burdens speech.[147] *NIFLA* should not, however, be read as condoning all regulations of professional conduct that express respect for potential life, especially where such laws are intended to message society as an end itself, rather than abortion seekers alone.

Recall that there are two audiences to whom a state can convey its message of respect for potential life: abortion seekers alone or society as a whole. Where laws aim at informing abortion seekers and hew closely to traditional legal notions of informed consent, laws expressing respect for potential life fall into the incidental burden exception to strict

resources is not a normative statement or a fact of debatable truth. The disclosure includes information about resources available should a woman seek to continue her pregnancy or terminate it, and it expresses no official preference for one choice over the other." *Id.* at 2388 (Breyer, J., dissenting).

144. According to *Casey*, the Constitution shields individual beliefs about the moral status of fetuses from interference by the State because they are so very controversial and driven by personal values. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under the compulsion of the State."); *id.* at 852 (stating that the consequences of abortion "depend[] on one's beliefs, for the life or potential life that is aborted").

145. *NIFLA*, 138 S. Ct. at 2372.

146. *Id.* (quoting Sorrell v. IMS Health Inc., 564 U.S. 552, 567 (2011)).

147. *Id.* at 2373.

scrutiny. As the Court pointed out in *NIFLA*, the *Casey* Court rejected a compelled speech challenge to an informed consent law for this reason.[148] Although the *Casey* Court cited to *Wooley* to acknowledge that "the physician's rights not to speak are implicated"[149] by informed consent laws, it did not apply the strict scrutiny that such a citation would suggest. Because the law compelled speech only "as part of the practice of medicine, subject to reasonable licensing and regulation by the state," the Court "s[aw] no constitutional infirmity."[150] *NIFLA* interpreted this language to mean informed consent laws are primarily regulations of nonexpressive conduct that incidentally burden speech.[151] Thus, at least where "aimed at ensuring a decision that is mature and informed," previability abortion regulations that "express[] a preference for childbirth over abortion" are not subject to strict scrutiny, so long as they legitimately resemble informed consent.[152]

This reasoning does not apply where a doctor's compelled conduct is intended to inform individuals not seeking abortions. Many states, in the wake of *Gonzales*, have asserted interests in expressing respect for potential life to all members of society, regardless of whether they are seeking abortions.[153] Laws premised on this interest do not aim to protect potential life by informing patients contemplating abortion, but instead by preventing the "coarsen[ing of] society to the humanity of . . . innocent human life," shaping social norms by mandating doctors' conduct.[154] A natural reading of *NIFLA*, as well as First Amendment law more broadly, suggests that such society-facing laws do not merely incidentally burden professional speech pursuant to informed consent, but instead specifically target providers' conduct to send an expressive message. In doing so, these regulations resemble those to which the Court has applied its highest form of scrutiny.

The Court has been most likely to apply strict scrutiny to an expressive conduct regulation where the government's explicit purpose is to "promot[e] an approved message."[155] This was *Barnette*'s central

148. *Id.*
149. *Casey*, 505 U.S. at 884.
150. *Id.*
151. *NIFLA*, 138 S. Ct. at 2373.
152. *Casey*, 505 U.S. at 883.
153. *See supra* notes 55–60 and accompanying text.
154. Gonzales v. Carhart, 550 U.S. 124, 157 (2007).
155. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 579 (1995).

holding: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe 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."[156] The mandatory flag salute received strict scrutiny not simply because it compelled expressive conduct, but because the intent behind the compulsion was to turn citizens into messengers for the state. The license plate display requirement in *Wooley* was constitutionally suspect for the same reason: "[W]here the State's interest is to disseminate an ideology . . . such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."[157] Because the state was "seeking to communicate to others an official view," it did not merely regulate nonexpressive conduct and incidentally burden speech, but improperly compelled expression.[158]

Where previability abortion regulations that protect potential life are aimed at informing society as an end itself, rather than abortion seekers, they fall into this highly suspect category of regulation. Whether laws require demise procedures or ritual burial, states passing such laws compel conduct exclusively—and explicitly—because the conduct expresses a state-approved message, namely, the state's "profound respect for the life within the woman"[159] or "preference for childbirth over abortion."[160] As in *Barnette* or *Wooley*, the state compels conduct "to disseminate an ideology"[161] and "proscribe what shall be orthodox."[162] Given their focus on messaging to all members of society as an end itself, states cannot claim that they compel expression merely as an incidental effect of the nonexpressive goal of ensuring patients' informed consent. The central aim of these regulations is to spread and inculcate community-level norms about the value of life. As such, these laws do not fall into the informed consent exception, and merit strict scrutiny.

One might object that society-focused abortion regulations do, in some sense, aim to inform active abortion seekers, and that the informed

156. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
157. Wooley v. Maynard, 430 U.S. 705, 717 (1977).
158. *See Id.*
159. *Gonzales*, 550 U.S. at 157.
160. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 883 (1992).
161. *Wooley*, 430 U.S. at 717.
162. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

consent exception might still be appropriate. Abortion seekers, after all, are members of society, and any society-focused messaging is bound to reach them. Although active abortion seekers are a small fraction of a society-facing law's intended audience, their presence in this audience might mean that these laws are intended to inform their choice. Further, society-focused laws also reach an audience of potential abortion seekers. Many members of society, especially women of reproductive age, are at risk of unwanted pregnancy. The state's preemptive message of respect for potential life may persuade individuals who will become pregnant in the future, and who are thus potential abortion patients, to forgo the procedure. Thus, even though society-facing laws message to vast swaths of people who will never contemplate an abortion, they also partially intend to inform a subset of society that is actively or potentially seeking abortion.

The Court's understanding of informed consent in *NIFLA*, however, forecloses the possibility that society-facing laws qualify as informed consent provisions simply because some active and potential abortion seekers are members of society, and thus a part of the state's audience. According to the *NIFLA* Court, California's signage requirement did "not facilitate informed consent" because "it applie[d] to all interactions between a covered facility and its clients, regardless of whether a medical procedure is ever sought, offered, or performed."[163] *NIFLA*'s conception of an informed consent law is thus limited. It can occur only when "a medical procedure is . . . sought, offered, or performed." Thus, even though California's disclosures targeted people visiting clinics with the "primary purpose" of "providing family planning or pregnancy-related services,"[164] they cast too broad a net to qualify as informed consent. Under this logic, compelled professional speech requirements do not qualify as informed consent laws simply because they inform some individuals actively seeking an abortion within a larger audience of individuals not actively or merely potentially seeking abortion.

In short, society-focused abortion regulations do not qualify as conduct regulations that, in the name of informing abortion-seekers' choice, impose incidental burdens on physicians' speech. Insofar as these laws inform any individuals about a procedure, they do so in the same way the *NIFLA* disclosures did: regardless of whether they are seeking

163. NIFLA v. Becerra, 138 S. Ct. 2361, 2373 (2018).
164. *Id.* at 2375.

that procedure. As such, they do not fall into the informed consent exception, and merit strict scrutiny.

D. Theoretical Support for First Amendment Scrutiny

First Amendment theory bolsters the case for applying strict scrutiny to abortion-related conduct regulations that seek to compel expressions of respect for potential life to society as an end itself. There are a number of classic justifications for First Amendment protections, including the need to protect individuals' freedom of mind and autonomy,[165] the marketplace of ideas,[166] and political speech.[167] Unlike Justice Kennedy's *NIFLA* concurrence, which focused on freedom of conscience,[168] the majority opinion focused on the latter two as underpinning First Amendment claims in the context of professional regulation. Both of these concerns undercut the validity of abortion regulations that compel doctors' conduct to express respect for life to society at large.

In *NIFLA*, the Court first held that "regulating the content of professionals' speech" implicates political speech because it "pose[s] the

165. *See, e.g.*, Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 880 (1963) (explaining that the First Amendment protects "the right of the individual to access to knowledge; to shape his own views; to communicate his needs, preferences and judgments; in short, to participate in formulating the aims and achievements of his society and his state").

166. *See, e.g.*, Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 973–74 (2007) ("There are . . . many who argue that First Amendment value arises whenever the state regulates communication in a way that restricts the 'marketplace of ideas.' The Court has often announced that '[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.'" (quoting Turner Broad. Sys., Inc. v. FCC, 507 U.S. 1301, 1304 (1993))).

167. *See, e.g.*, ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 63 (1975) ("[T]he First Amendment should protect and indeed encourage speech so long as it serves to make the political process work, seeking to achieve objectives through the political process by persuading a majority of voters; but not when it amounts to an effort to supplant, disrupt, or coerce the process . . . ; and also not when it constitutes a breach of an otherwise valid law, a violation of majority decisions embodied in law."); Alexander Meiklejohn, *What Does the First Amendment Mean?*, 20 U. CHI. L. REV. 461, 474 ("[T]he First Amendment does not talk about 'all uses of language.' Its purpose is much narrower—as well as wider—than that. It provides a guaranty for the political freedom of the sovereign people of the United States.").

168. *See* NIFLA v. Becerra, 138 S. Ct. 2361, 2379 (2018) (Kennedy, J., concurring) ("Governments must not be allowed to force persons to express a message contrary to their deepest convictions. Freedom of speech secures freedom of thought and belief. This law imperils those liberties.").

inherent risk that the Government seeks . . . to suppress unpopular ideas or information."[169] This threat is particularly salient in the context of medical regulation where "candor is crucial" and states are particularly tempted to interfere to "increase state power and suppress minorities."[170] Indeed, the majority invoked a history of medical speech manipulation in Nazi Germany, Cultural Revolution China, and the Soviet Union to emphasize the importance of free medical discourse to free political discourse.[171]

Laws that express respect for potential life to society at large are paradigmatic of such a state-sponsored attempt to control ideas by controlling doctors' expression. As the Court has recognized, access to abortion is one of the most persistent political controversies of our time.[172] Lawmakers often use their views on abortion as a means of building political capital.[173] Abortion laws that broadcast a state-sponsored message therefore run the risk of being mere tools to gain political power. Thus, while we may not be concerned when lawmakers

169. *Id.* at 2374 (majority opinion) (quoting *Turner Broad.*, 512 U.S. at 641).

170. *Id.* at 2374 (quoting Wollschlaeger v. Governor of Fla., 848 F.3d 1293, 1328 (11th Cir. 2017) (en banc) (W. Pryor, J. concurring)).

171. *Id.*

172. Indeed, Justice Kennedy refused, in part, to overrule *Roe* because it would undermine the Court's legitimacy to overrule a case touching such an "intensely divisive controversy." Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 866–67 (1992). Abortion has been a "wedge issue" since the end of the 1970s, when Republican strategists began using *Roe* as a means of bringing Catholics and social conservatives into the party. *See* Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. CIV.RTS.-CIV.LIBERTIES. L. REV. 373, 420–23 (2007).

173. Political candidates often appeal to constituents' views of potential life as a means of winning their votes. For example, leading up to the 2016 election, then-candidate Donald Trump's public views on abortion shifted substantially, apparently in an attempt to win the support of prolife voters. Philip Bump, *Donald Trump Took 5 Different Positions on Abortion in 3 Days*, WASH. POST (Apr. 3, 2016), http://www.washingtonpost.com/news/the-fix/wp/2016/04/03/donald-trumps-ever-shifting-positions-on-abortion. Former President George H.W. Bush shifted his position on abortion in a similar way as a political candidate. Sarah McCammon, *Looking Back on George H.W. Bush's Legacy on Abortion*, NPR (Dec. 4, 2018), https://www.npr.org/2018/12/04/673398023/looking-back-on-president-george-h-w-bushs-legacy-on-abortion. Politicians' official and campaign websites frequently promote candidates' views on abortion as an important feature of their platforms. *See, e.g.*, *Advocating for the Sanctity of Life*, RAND PAUL U.S. SENATOR FOR KENTUCKY, https://www.paul.senate.gov/issues/advocating-sanctity-life; *Defending Life and Protecting the Unborn*, CINDY HYDE-SMITH FOR U.S. SENATE, https://cindyhydesmith.com/issue/defending-life-and-protecting-the-unborn; *Pro-Life*, KEVIN KRAMER FOR U.S. SENATE, https://www.kevincramer.org/issues/Prolife.

try to inform patients' choices about abortion, we may be much more so when they try to mold constituents' political choices.

Society-facing expressions of respect for potential life are especially concerning from a First Amendment perspective because they use abortion policy to achieve a preferred electoral outcome. They do not compel expressive conduct to obtain informed consent, a traditional means of preserving patient autonomy, but instead to "foster[] public adherence to an ideological point of view."[174] They seek to discourage the "coarsen[ing of] society to the humanity of" potential life,[175] and infuse society with the state's "preference for childbirth over abortion." In doing so, these laws threaten political freedom by violating *Barnette*'s foundational principle that "[a]uthority . . . is to be controlled by public opinion, not public opinion by authority."[176]

This danger is exacerbated by the fact that the public may not realize the state is manipulating political discourse in this way. The Court has been more likely to find a compelled speech violation where a speaker is not "free to disassociate himself from" the views the state requires him to express.[177] Far from allowing doctors to establish independence from the state's views, fetal-protective compelled conduct regulations often rely on such views being attributed to the doctors whose behavior is compelled. For example, Arkansas argued that its fetal demise law ensured doctors would be "viewed as healers, sustained by compassionate and rigorous ethic and cognizant of the dignity and value of human life."[178] Whether doctors find the state's message contraindicated, "morally objectionable," or simply unnecessary, they are compelled to serve as "'billboard[s]' for the State's ideological message,"[179] using the weight of their medical authority to express support for a view they do not hold, therefore warping and muddying political discourse.[180]

174. Wooley v. Maynard, 430 U.S. 705, 715 (1977).
175. Gonzales v. Carhart, 550 U.S. 124, 159 (2007).
176. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943).
177. Rumsfeld v. Forum for Acad. and Institutional Rights, 547 U.S. 47, 65 (2006); *see also* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 86–88 (1980).
178. Brief of Appellants at 30, Hopkins v. Jegley, 267 F. Supp. 3d 1024 (E.D. Ark. 2017) (No. 17-2879).
179. *Wooley*, 430 U.S. at 715.
180. Caroline Mala Corbin calls this state abuse of the "defer-to-trusted-expert" heuristic, wherein "[b]y compelling an authority figure to speak its message, the government can 'add a patina of trustworthiness and expertise to its message'" and

These laws also threaten the "uninhibited marketplace of ideas in which truth will ultimately prevail."[181] According to the *NIFLA* Court, this concern is implicated by professional regulations because professionals often "have a host of good-faith disagreements . . . and the people lose when the government is the one deciding which ideas should prevail."[182] Many circuits, prior to *NIFLA*, held that First Amendment protections for professionals are greatest when they speak to the public, rather than patients, partially because of this concern about ideological pluralism.[183] In *Gonzales*, Justice Kennedy articulated the particular need to maintain this marketplace of ideas in the abortion context: "The State's interest in respect for life is advanced by the dialogue that better informs the political and legal systems, the medical profession, expectant mothers, and society as a whole of the consequences that fellow from a decision to elect a late-term abortion."[184] Where a state compels doctors to express the state's view on abortion, rather than their own, it eliminates doctors' perspectives and reduces this dialogue to a state-sponsored monologue.

Further, laws requiring doctors to express respect for potential life obscure doctors' own, nuanced views on abortion. For example, many doctors who perform D&E procedures do not view them as unethical or disrespectful. Rather, they believe they comport with their own view—and many major medical associations' views—of medical ethics and scientific fact.[185] In fact, doctors have argued that demise laws violate

thereby manipulate public discourse. Caroline Mala Corbin, *Compelled Disclosures*, 65 ALA. L. REV. 1277, 1297 (2014).

181. NIFLA v. Becerra, 138 S. Ct. 2361, 2374 (2018).

182. *Id.* at 2374–75.

183. *See* King v. Governor of New Jersey, 767 F.3d 216, 232 (3d Cir. 2014) ("[W]e believe a professional's speech warrants lesser protection only when it is used to provide personalized services to a client based on the professional's expert knowledge and judgment . . . . By contrast, when a professional is speaking to the public at large or offering her personal opinion to a client, her speech remains entitled to the full scope of protection afforded by the First Amendment." (citations omitted)); *see also* Pickup v. Brown, 740 F.3d 1208, 1227 (9th Cir. 2014) (holding that First Amendment protection is "at its greatest" when a professional is "engaged in public dialogue"); *see also* Moore-King v. Cty. of Chesterfield, 708 F.3d 560, 569 (4th Cir. 2013) ("[T]he relevant inquiry to determine whether to apply the professional speech doctrine is whether the speaker is providing personalized advice in a private setting to a paying client or instead engages in public discussion and commentary.").

184. Gonzales v. Carhart, 550 U.S. 124, 160 (2007).

185. For example, the American Medical Association and American College of Obstetricians and Gynecologists have explained that fetal demise laws "make[] it illegal for physicians to act in accordance with their ethical obligations to patients" and rely on "cherry-picked excerpts from the medical literature [that] are at odds

medical ethics by requiring them to experiment on patients and disregard their patients' autonomy.[186] Regardless of what doctors' viewpoints are, mandatory demise laws aimed at forcing doctors to express the state's view of life leave no room for nuance. Alabama, for example, explained that demise requires "abortion providers to . . . demonstrate[] respect for the unborn child—an interest that Plaintiffs and their expert testified they do not consider in choosing between abortion procedures."[187] In doing so, Alabama ensures doctors' beliefs about the ethics of "consider[ing]" the fetus when providing care to patients do not emerge, and that only lawmakers' do. Like other society-focused expressions of respect for life, these laws thus interfere with open ethical debates about abortion and threaten the possibility that "truth will prevail."

Fetal-protective laws that compel speech to message society as a whole, rather than women specifically, thus run headlong into two primary First Amendment justifications for limiting state power. These laws both skew political discourse in the state's preferred direction and undermine the marketplace of ideas by turning physicians into unwilling messengers of the state's view of potential life. First Amendment theory, in addition to *NIFLA* itself, thus supports the application of strict scrutiny to such society-focused laws.

IV. THE CONSEQUENCES OF FIRST AMENDMENT SCRUTINY FOR CERTAIN ABORTION REGULATIONS

Recognizing that strict scrutiny applies where states compel speech to express respect for potential life to society as an end itself does not mean that all fetal demise, burial, or similarly society-facing laws are presumptively unconstitutional. In fact, such society-facing laws will often be susceptible of a less suspect construction. These laws may avoid

with the scientific community's consensus." *See* Brief of the American College of Obstetricians and Gynecologists and the American Medical Association as Amici Curiae Supporting Plaintiffs-Appellees and Affirmance, Whole Woman's Health v. Paxton, No. 17-51060 (5th Cir. Apr. 18, 2018).

186. Brief for Appellees at 37, Whole Woman's Health v. Paxton, No. 17-51060 (5th Cir. Apr. 11, 2018) (arguing that, if they were required to comply with a fetal demise law, "[a]ll providers in Texas would face an untenable choice between providing care while violating two central tenets of medical ethics—beneficence and patient autonomy—or being unable to continue providing much-needed care").

187. Appellant's Brief at 31, West Alabama Women's Center v. Miller, 2018 WL 621203 (11th Cir. 2018) (No. 17–15208).

strict scrutiny if they are not intended to message society as an end itself, but instead as a means of informing abortion seekers. These laws, in other words, may be subject to lower scrutiny if framed as indirect informed consent laws.[188] Recognizing this point, savvy states faced with a compelled speech challenge to their society-facing abortion regulations can be expected to argue that their laws were only ever intended as a means of informing abortion seekers' choice, albeit indirectly. A narrow—and better—reading of *Gonzales v. Carhart*[189] allows states to do so.

Although recasting society-facing laws as intended to inform abortion seekers' choice may allow some such laws to escape strict scrutiny, the First Amendment will still pose a meaningful obstacle to many of them. First, while states may claim that their society-facing laws are fundamentally aimed at informing abortion seekers, this does not mean that their laws are properly characterized as informed consent provisions. Where a state's claim that its law facilitates informed consent is merely pretextual, its laws will remain subject to strict scrutiny. Second, even laws that resemble traditional informed consent provisions will be subject to First Amendment intermediate scrutiny, a fairly searching form of review. States' need to characterize their laws as serving the narrow purpose of informing abortion seekers' consent will channel judges' application of the intermediate scrutiny standard in a manner likely to endanger many society-facing laws. As this Part demonstrates, the further emergent legislation that expresses respect for life by compelling doctors' conduct strays from conventional mechanisms of ensuring informed consent, the less likely it will be to survive this scrutiny.

A. Avoiding Strict Scrutiny by Reading *Gonzales* Narrowly

As outlined in Part III, laws that compel doctors' expressive conduct based on a freestanding interest in expressing respect for life to society as an end itself are subject to strict scrutiny. As commentators have noted, strict scrutiny often proves "fatal in fact,"[190] and this is true in the

188. *See supra* Part III.C.
189. 550 U.S. 124 (2007).

190. Fullilove v. Klutznick, 448 U.S. 448, 507 (1980) (Powell, J. concurring) (quoting Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving*

First Amendment context.[191] Thus, the expanding body of abortion restrictions that appear to rely on an interest in informing society as an end itself, and which interpret *Gonzales* as having validated this kind of interest, are vulnerable to invalidation on First Amendment grounds. For example, when it overtly disclaimed the need for its fetal burial law to inform women in 2018, Texas tread into forbidden constitutional territory.[192] Similarly, Oklahoma and Alabama's "interest in promoting a respect for life, compassion, and humanity in society at large," which is plausibly read as divorced from an interest in informing women, is constitutionally suspect.[193]

These laws, as well as *Gonzales* itself, however, are amenable to an interpretation that does not require all society-facing expressions of respect for life to trigger strict scrutiny. *Gonzales* did not clarify whether it validated an interest in expressing respect for life to society as an end itself, or whether this interest must always tie back to informing abortion seekers.[194] Reading *Gonzales* as merely expanding the scope of informed consent laws to include society-facing laws that indirectly inform abortion seekers avoids reading the case as validating an interest that would almost never withstand constitutional scrutiny. While it is not clear that the First Amendment was on the Court's mind when deciding

Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 HARV. L. REV. 1, 8 (1972)).

191. Content-based restrictions on speech, for example, receive strict scrutiny because they are "presumptively unconstitutional." *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015) (striking down a town sign code based on strict scrutiny). Other laws subject to strict scrutiny are also unlikely to survive, even if not presumptively unconstitutional. *See, e.g.*, Citizens United v. Federal Election Com'n, 558 U.S. 310 (2010) (striking down a requirement that political funding sources disclose their identities under strict scrutiny).

192. It argued that "the Court [should] reject[] Plaintiffs' argument that laws respecting fetal life are permissible only if they "inform" or attempt to "persuade" a woman to give birth" because "[t]he law in Gonzales required respect by banning partial-birth abortion—it did not inform or persuade." Defendant's Amended Proposed Findings of Fact & Conclusions of Law, Conclusions of Law ¶ 49, Whole Woman's Health v. Smith (W.D. Tex. 2018) (No. 1:16-cv-01300-DAE); *see also* Tex. Health & Safety Code § 697.001 (2018) (stating that one of the goals of a fetal burial law is to "express profound respect for the life of the unborn by providing for a dignified disposition of embryonic and fetal tissue remains").

193. Appellant's Brief at 47, West Alabama Women's Center v. Miller, 2018 WL 621203 (11th Cir. 2018) (No. 17–15208); Defendants' Response to Plaintiff's Motion for a Temporary Injunction, Nova Health Sys. v. Pruitt, 2015 OK Dist. Ct. Motions LEXIS 852 (D. Okla. 2015) (No. CV-2015-1838). Notably, Oklahoma did assert an interest in informing women to defend a different law in the same brief. *Id.* at 18–21.

194. *See supra* Part I.

the case—the litigants did not assert a First Amendment claim—some awareness of this point may explain why the majority opinion repeatedly shoehorns Congress's asserted society-facing interests into an interest in informing women.[195]

States attempting to avoid the application of strict scrutiny to their society-facing laws may rely on this reading of *Gonzales* to argue that their laws permissibly message society because they only do so as a means of informing abortion seekers. States may be able to characterize society-facing laws as indirect informed consent laws, allowing them to fall into *NIFLA*'s exception to strict scrutiny for informed consent laws.

However, a state's assertion that its law is meant as an indirect informed consent regulation does not necessarily inoculate the law from strict scrutiny. While states may argue their laws are intended to inform abortion seekers, these laws should not be spared strict scrutiny where this argument is merely pretextual. *NIFLA* clarified that courts must not simply defer to states' claims that their laws are informed consent provisions—the laws must actually resemble informed consent.[196] While the Court has not offered a comprehensive definition of informed consent, it has provided some guideposts. As described in Part III.C, *NIFLA* held that to qualify as informed consent, a compelled disclosure must relate to a procedure that someone is actually, not merely potentially, receiving.[197] Further, it should provide "information about the risks or benefits of those procedures."[198] In *Casey*, the Court also offered some guidance, implying that a compelled disclosure must be

195. Although the state's asserted interests in preventing social coarsening and protecting the reputation of the medical profession seem most clearly aimed at society as a whole, Justice Kennedy nonetheless grouped them under *Casey*'s preexisting interest in informing women: "it [wa]s . . . precisely [a] lack of information concerning the way in which the fetus will be killed that [wa]s of legitimate concern to the State." Gonzales v. Carhart, 550 U.S. 124, 159 (2007). Justice Kennedy, in cabining the interest this way, may have been remembering his concern in *Casey* that "the physician's rights not to speak are implicated" when states regulate abortion in a manner that compels expression. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 884 (1992).

196. NIFLA v. Becerra, 138 S. Ct. 2361, 2373 (2018) ("The licensed notice at issue here is not an informed-consent requirement or any other regulation of professional conduct. The notice does not facilitate informed consent to a medical procedure.").

197. *See supra* text accompanying notes 159–164.

198. *NIFLA*, 138 S. Ct. at 2373.

relevant, truthful, and not misleading to qualify as an informed consent provision.[199]

Some medical organizations[200] and courts[201] have offered additional limits on the bounds of informed consent. The American Medical Association, for example, describes informed consent as a process of "shared decision making" that requires physicians to assess, among other things, patients' ability to understand information, preferences for receiving medical information, and their particularized medical condition and history.[202] Some courts have relied on such external guidance in their First Amendment jurisprudence. The Fourth Circuit, for example, held that an ultrasound law did not qualify as an informed consent provision because it clearly violated the AMA's definition of the practice.[203] The law—which contemplated women covering their ears and shutting their eyes as doctors were required to describe details about the fetus to them—thus did not qualify for lower First Amendment scrutiny.[204] In any case, the mere fact that a state says its law is aimed at

199. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 882 (1992). Although the Court did not directly hold that these qualities must be present in an informed consent law, it held that an informed consent law will not pass the undue burden test if it does not possess these qualities.

200. *See, e.g.*, *Committee Opinion on Informed Consent*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS (Aug. 2009), https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Ethics/Informed-Consent?IsMobileSet=false ("The ethical concept of "informed consent" contains two major elements: 1) comprehension (or understanding) and 2) free consent. Both of these elements together constitute an important part of a patient's "self-determination" (the taking hold of her own life and action, determining the meaning and the possibility of what she undergoes as well as what she does).").

201. *See, e.g.*, Canterbury v. Spence, 464 F.2d 772, 780, 782 n.27 (D.C. Cir. 1972) (explaining that the informed consent doctrine is premised on "the concept, fundamental in American jurisprudence, that '[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body . . . .'" and that it requires, at least, a physician to explain to a "patient in nontechnical terms . . . what is at stake: the therapy alternatives open to him, the goals expectably to be achieved, and the risks that may ensue from particular treatment and no treatment."); *see also* Bryan Murray, *Informed Consent: What Must a Physician Disclose to a Patient?*, 14 AMA J. OF ETHICS 563 (Jul. 2012), https://journalofethics.ama-assn.org/article/informed-consent-what-must-physician-disclose-patient/2012-07 (summarizing various legal standards for informed consent laid out by courts).

202. *Code of Medical Ethics Opinion 2.1.1*, AM. MED. ASS'N, https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/code-of-medical-ethics-chapter-2.pdf.

203. Stuart v. Camnitz, 774 F.3d 238, 251–55 (4th Cir. 2014).

204. *Id.*

informed consent does not give it carte blanche to compel expression. Before applying a lower level of scrutiny to abortion regulations that states claim qualify as informed consent laws, judges should thus ensure that such laws comport with existing legal and professional understandings of informed consent.

Absent thorough guidance from the Supreme Court on what constitutes informed consent, or space to develop a comprehensive theory of it, this Article proceeds under the assumption that where states assert that their laws are informed consent provisions, these assertions are not pretextual. In doing so, however, it also assumes that states are conceding that a very specific form of intent animates their laws. Because *NIFLA* requires that informed consent laws target actual abortion patients, not merely potential ones, society-facing abortion regulations must have the very narrow purpose of informing the choice of the very patients whose procedures they regulate. Recognizing this narrow purpose is important because even though these laws will be exempt from strict scrutiny, they will not be exempt from all scrutiny. As the next Part explains, even society-facing compelled expressive conduct laws that are informed consent provisions are subject to intermediate scrutiny. Cabining these laws' purpose will channel judges' application of such scrutiny in a manner likely to undermine the validity of many of these laws.

B. The Standard of Scrutiny for Informed Consent Laws

As multiple courts have held,[205] *NIFLA* did not clearly articulate what level of scrutiny applies to regulations of professional conduct that incidentally burden speech, such as informed consent laws. The Court tersely wrote that "this Court has upheld regulations of professional conduct that incidentally burden speech," without explaining what level of scrutiny it applied in doing so.[206] Further, it cited to *Casey*, a case that upheld an informed consent law under an equally unclear level of First

205. *See* Capital Associated Indus., Inc. v. Stein, 922 F.3d 198, 208 (4th Cir. 2019) ("[T]he *NIFLA* Court chose not to decide whether strict or intermediate scrutiny applied to the law at issue."); Otto v. City of Boca Raton, Fla., 353 F. Supp. 3d 1237, 1254 (S.D. Fla. 2019) ("The Court did not determine what level of scrutiny should be applied to the [licensed notice]."); Am. Med. Ass'n v. Stenehjem, No. 1:19-CV-125, 2019 WL 4280584, at *10 (D.N.D. Sept. 10, 2019) ("The *NIFLA* Court did not decide the level of scrutiny.").

206. NIFLA v. Beverra, 138 S. Ct. 2361, 2373 (2018).

Amendment scrutiny, as an example.[207] Despite *NIFLA*'s failure to identify what level of scrutiny applies to informed consent regulations, reasons internal and external to the opinion suggest intermediate scrutiny is appropriate.

First, throughout *NIFLA* itself, the Court erred on the side of greater scrutiny for professional regulations that burden speech, especially those related to abortion.[208] Tellingly, the Court applied intermediate scrutiny to the requirement that licensed medical facilities give notice about abortion services. Although the Court reasoned that strict scrutiny was most appropriate where professional regulations compel speech, it left open the possibility that there might be some reason not to apply strict scrutiny to the licensed notice requirement.[209] As a result—and because it would not change the outcome—the Court applied intermediate scrutiny.[210] It did not mention rational basis review as an option, suggesting that the Court erred in favor of a higher level of review for professional regulations that burden speech. The Court's treatment of the unlicensed facilities notice provides a further example. Although the Court referred to the *Zauderer*-like scrutiny it applied to the notice as "deferential," its application of it was anything but. It struck down the unlicensed facilities notice requirement because "[e]ven under *Zauderer*, a disclosure requirement cannot be 'unjustified or unduly burdensome,'" must be designed to "remedy a harm that is 'potentially real not purely hypothetical,'" and cannot "extend '[any] broader than reasonably necessary.'"[211] Again, the Court appeared to err on the side of more thorough review for a speech regulation. This suggests that employing a heightened level of scrutiny for regulations of conduct that incidentally burden speech is appropriate.

Based on this evidence from *NIFLA*, courts have begun to recognize that "intermediate scrutiny is the appropriate standard for reviewing conduct regulations that incidentally impact speech,"[212] including in the

207. *Id.*
208. The Court held that the licensed notice did not fall into the *Zauderer* exception because abortion is a controversial subject meriting higher levels of First Amendment scrutiny. *Id.* at 2372.
209. *Id.* at 2375.
210. *Id.* at 2375–76 (applying intermediate scrutiny).
211. *Id.* at 2376–77 (citations omitted).
212. *Capital Associated Indus.*, 922 F.3d at 209.

context of informed consent to abortion regulations.[213] Other courts and early commentators, however, have suggested that *NIFLA* requires bare rational basis review. The Sixth Circuit, for example, in upholding an informed consent to abortion provision after *NIFLA*, held that "[i]n *NIFLA* the Court clarified that no heightened First Amendment scrutiny should apply to informed-consent statutes."[214] It explained that *NIFLA* imported *Casey*'s First Amendment analysis which "applied no heightened scrutiny" to informed consent requirements.[215] This, however, is a significant overreading of *Casey*. As multiple circuits have held, *Casey* "did not hold sweepingly that all regulation of speech in the medical context merely receives rational basis review."[216]

Casey is better read as leaving the level of scrutiny applicable to informed consent laws undecided. *Casey*'s First Amendment analysis demonstrates that it left the question of the appropriate level of scrutiny unsettled:

> All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, see *Wooley v. Maynard*, 430 U.S. 705 (1977), but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, cf. *Whalen v. Roe*, 429 U.S. 589, 603 (1977). We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.[217]

The text above alone cannot support the proposition that *Casey* applied no heightened scrutiny to the informed consent law—it simply says nothing about what level of scrutiny the Court applied to uphold the law.

213. *Stenehjem*, No. 1:19-CV-125, 2019 WL 4280584, at *10 (applying intermediate scrutiny to a regulation requiring abortion providers to falsely inform patients that their abortions may be reversible).
214. EMW Women's Surgical Ctr., P.S.C. v. Beshear, 920 F.3d 421, 424 (6th Cir. 2019).
215. *Id.* at 435.
216. *Stuart*, 774 F.3d at 249; Wollschlaeger v. Governor, 848 F.3d 1293, 1311 (11th Cir. 2017) (quoting and approving of this language). The Ninth Circuit decision below in *NIFLA* agreed that *Casey* "did not announce a rule regarding the level of scrutiny to apply in abortion-related disclosure cases," and the Supreme Court did not address this component of the opinion in either an approving or disapproving manner in its own opinion. 839 F.3d 823, 834 (9th Cir. 2016).
217. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992).

To bolster its assumption that rational basis review was at play, the Sixth Circuit relied on other courts' erroneous or misleading interpretations of *Casey*. For example, the Sixth Circuit quoted the Fifth Circuit's decision in *Texas Medical Providers Performing Abortion Services v. Lakey*,[218] which, prior to *NIFLA*, applied rational basis review to an informed consent to abortion requirement because *Casey* applied "the antithesis of strict scrutiny" to informed consent laws.[219] In a passage quoted by the Sixth Circuit, the Fifth Circuit defended this claim by saying that *Casey* "references *Whalen v. Roe*, in which the Court had upheld a regulation of medical practice against a right to privacy challenge."[220] This passage fails to note that the Supreme Court also quoted *Wooley v. Maynard* in the same sentence, a case that applied strict scrutiny. Furthermore, the citation to *Whalen* is a "*cf.*" citation. This suggests that the Supreme Court was laying out competing principles about what level of scrutiny should apply to informed consent laws without resolving the question.

A more plausible reading of *Casey* is that the Court did not need to reach the question of the exact level of scrutiny would apply because the informed consent provision at issue was "no different from a requirement that a doctor give certain specific information about any medical procedure" and would thus likely have survived intermediate scrutiny or rational basis review.[221] This failure to articulate a standard of scrutiny cannot justify applying rational basis review to informed consent provisions, particularly in light of *NIFLA*'s conspicuous preference for applying more rigorous forms of scrutiny to compelled speech regulations.

In addition to *NIFLA*'s text, judicial politics support the application of intermediate scrutiny to informed consent to abortion provisions. Some commentators have suggested that *NIFLA* means the Court will now apply a deferential level of review to informed consent to abortion provisions,[222] not because they misread *Casey*, but because they suspect

218. 667 F.3d 570 (5th Cir. 2012).
219. *Id.* at 575.
220. *Id.*
221. *Casey*, 505 U.S. at 884.
222. *See, e.g.*, Leading Case, *National Institute of Family & Life Advocates v. Becerra*, 132 HAR. L. REV. 347, 355 (2019) ("[T]o the NIFLA Court, 'informed consent' laws compelling doctors' speech on abortion regulate a procedure and appear to require only a rational basis . . . ."); Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering Against Abortion Rights:* NIFLA v. Becerra, 94 NYU L. REV. 61, 111

the Court will not apply *NIFLA* evenhandedly to challenges to antiabortion regulation in the future.[223] Such commentary, in addition to ignoring the spirit of *NIFLA*, unnecessarily reads bias in favor of antiabortion regulation into the case. Reading *NIFLA* as instead requiring intermediate scrutiny maintains parity between informed consent to abortion regulations and other kinds of compelled speech requirements. Given the Court's conservative justices' announced opposition to singling out abortion regulations for differential treatment,[224] this latter reading avoids impugning *NIFLA*'s legitimacy in a manner unlikely to benefit advocates challenging fetal-protective legislation in court. By constructing *NIFLA* as requiring intermediate scrutiny, litigants can instead offer courts a way around accusations that judges "wield[] the Constitution to "cho[ose] the winners" in "energetic policy debate[s],"[225] behavior the Court's conservatives have disavowed.[226] Reading *NIFLA* to

(2019) ("[T]he Court is saying that a state may compel speech intended to discourage abortions, but it may not require speech designed to provide women information concerning the availability of contraception and abortions.").

223. These pieces suspect little scrutiny will apply to informed consent laws because *NIFLA* was a case of "constitutional gerrymandering against abortion rights," Chemerinsky & Goodwin, *supra* note 222, at 66, which wrote antiabortion viewpoint discrimination into "the First Amendment itself." *Leading Case*, *supra* note 222, at 356. This suspicion echoes Justice Breyer's dissent in *NIFLA*, which argued that the majority's attempt to distinguish abortion informed consent laws "lack[ed] moral, practical, and legal force" and violated the notion that "what is sauce for the goose is normally sauce for the gander." *NIFLA*, 138 S. Ct. at 2385 (Breyer, J., dissenting) (quoting Heffernan v. City of Paterson, 136 S. Ct. 1412, 1418 (2016)).

224. In their dissent to the denial of certiorari in a recent case touching Medicaid funding for Planned Parenthood, for example, Justices Thomas, Alito, and Gorsuch objected to the Court's denial on this ground: "So what explains the Court's refusal to do its job here? I suspect it has something to do with the fact that some respondents in these cases are named 'Planned Parenthood.' . . . Some tenuous connection to a politically fraught issue does not justify abdicating our judicial duty. If anything, neutrally applying the law is all the more important when political issues are in the background." Gee v. Planned Parenthood of Gulf Coast, Inc., 139 S. Ct. 408, 410 (2018) (dissenting from denial of certiorari).

225. Janus v. Am. Fed'n of State, Cty., & Mun. Emp., Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) (citing *NIFLA*, 138 S. Ct. at 2361).

226. In his dissent to *Obergefell v. Hodges*, for example, Justice Roberts (joined by Justices Thomas and Scalia) critiqued the majority for violating its judicial role by "deciding th[e] question [of gay marriage] under the Constitution," thereby "remov[ing] it from the realm of democratic decision" and impermissibly "shutting down the political process on an issue of such profound public significance." 135 S. Ct. 2584, 2625 (2015) (Roberts, J., dissenting). In a separate dissent, Justice Alito (also joined by Justices Thomas and Scalia) similarly critiqued the Court for stopping vigorous public debates about same-sex marriage and thereby "usurp[ing] the constitutional

require intermediate scrutiny for informed consent laws is therefore superior for reasons both external and internal to the opinion itself.

This Article will assume, then, that in order to survive a First Amendment challenge, informed consent laws that express respect for potential life must withstand a fairly searching form of review. Under intermediate scrutiny,[227] "the State must show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest."[228] Courts examining this question will ask whether there is a proper "'fit' between the government's ends and the means chosen to accomplish those ends."[229] Given the undisputed importance of a state's interest in ensuring informed consent, the higher hurdle for laws that express respect for potential life in order to inform abortion seekers will be the latter question of "fit." Demonstrating alignment between ends and means will be especially challenging for states to satisfy where their laws, such as fetal demise or burial laws, are aimed at informing abortion seekers only indirectly through the societies around them. Hence, even if previability fetal-protective laws sidestep strict scrutiny, they will often be unconstitutional under a lower standard of review.

Channeling review of challenges of previability fetal protective laws into intermediate scrutiny has practical benefits as well. Although intermediate scrutiny tailoring inquiries allow for substantial judicial discretion, in this case, intermediate scrutiny should provide a consistent

right of the people to decide whether to keep or alter the traditional understanding of marriage." *Obergefell*, 135 S. Ct. at 2642 (Alito, J., dissenting).

227. This Part employs the intermediate scrutiny standard applied in certain commercial speech cases. This is the version of intermediate scrutiny that Justice Thomas used to invalidate the licensed notice requirement. It does not use the *O'Brien* test, which applies to some regulations of conduct that incidentally burden speech. U.S. v. O'Brien, 391 U.S. 367, 376–77 (1968). *O'Brien* is not suitable to compelled speech claims because it applies only to content-neutral regulations. *Id.* at 376 (explaining that the test only applies to laws which are "unrelated to the suppression of free expression," and thus content-neutral); *see also* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1204 (1996) (explaining that "by definition" the test applies only to content-neutral laws). As *NIFLA* explained, laws which compel speech are inherently content-based because they "compel[] individuals to speak a particular message" and thus "alte[r] the content of [their] speech." *NIFLA*, 138 S. Ct. at 2371 (quoting Riley v. Nat'l Fed'n of Blind of N.C., Inc., 487 U.S. 781, 795 (1988)). This probably explains why Justice Thomas did not cite *O'Brien* in *NIFLA*.

228. Sorrell v. IMS Health, Inc., 564 U.S. 552, 572 (2011); *see also* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

229. Bd. of Tr. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989).

means of assessing the constitutionality of society facing–fetal protective legislation. As described above, society-facing compelled expressions of respect for potential life must target a very specific audience in order to avoid strict scrutiny. They must aim to inform the very patients whose abortion procedures are regulated. This means that judges cannot examine how well-tailored a medical regulation is to expressing respect for life to society in general—a nebulous inquiry that invites judicial value judgments. Instead, judges must examine how well-tailored this regulation is to communicating with a very specific group of people, abortion seekers, during a very specific timeframe—while they are pregnant and contemplating an abortion procedure. Challenges will turn on specific, measurable factual predicates that are susceptible to clear proof, not undifferentiated assertions of state interest. Applying First Amendment intermediate scrutiny will thus cabin judicial discretion and lead to more principled, and meaningful, review of fetal-protective laws which burden speech. The next Part demonstrates how.

C. Applying Intermediate Scrutiny

This Part elaborates how the First Amendment intermediate scrutiny is likely to apply to fetal-protective abortion regulations that compel physicians' speech. To facilitate this intermediate scrutiny analysis, this Part uses the informed consent law approved in *Casey* as a model of an informed consent provision that is adequately tailored under the First Amendment. This law, which survived a compelled speech challenge, "required physicians to inform their patients of 'the nature of the procedure, the health risks of the abortion and childbirth, and the "probable gestational age of the unborn child,"'" as well as "the availability of printed materials from the State . . . provid[ing] information about the child and various forms of assistance."[230] As mentioned above, the state interest in promoting respect for potential life and informed choice are established, legitimate ends. Therefore, the crux of the intermediate scrutiny analysis is whether the state chooses permissible means to achieve it. In practice, that entails hewing closely to traditional understandings of informed consent. Using the law at issue

230. *NIFLA*, 138 S. Ct. at 2373 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 881 (1992)). The Court held that these laws were "no different from a requirement that a doctor give certain specific information about any medical procedure." *Id.*

in *Casey* as a model, it is clear that the further a law strays from this traditional form of informed consent—direct doctor-patient discourse about the procedure at hand—the more likely it will be to fail intermediate scrutiny.

1. Directness

Courts evaluate a number of factors to determine "fit" for purposes of intermediate scrutiny. One common factor is determining how "direct[ly]" a law advances its goal.[231] Fetal demise and other society-facing laws will generally do poorly under this test, while those resembling the informed consent provisions at issue in *Casey* will fare better. Regulating abortion methods, according to *Gonzales*, works by preventing the "coarse[ning of] society to the humanity of not only newborns, but all vulnerable and innocent human life" and "express[ing] respect for the dignity of human life."[232] This indirectly informs abortion seekers by advancing a "dialogue that better informs . . . expectant mothers, and society as a whole of the consequences that follow from a decision to elect a late-term abortion."[233] Fetal burial laws work in a similarly indirect fashion, "promot[ing] respect for life" in the broader community "by requiring that fetal remains are disposed of" in a "dignified manner."[234]

These society-facing methods of informing abortion seekers do not stand up to intermediate scrutiny because they "cannot be said to be direct."[235] Under this "directness" inquiry, a "regulation may not be sustained if it provides only ineffective or remote support for the government's purpose."[236] First, society-facing laws inform abortion seekers through "remote" means. Rather than requiring doctors to directly tell patients about the nature of their abortion procedures, they indirectly broadcast prolife messages to society at large in the hopes that they might reach some people actively seeking abortions or foster a

231. *Sorrell*, 564 U.S. at 577 (holding that a pharmaceutical marketing regulation did not pass intermediate scrutiny because "the state's own explanation of how [the law] advances its interest cannot be said to be direct" (citations omitted)).
232. Gonzales v. Carhart, 550 U.S. 124, 157 (2007).
233. *Id.* at 160.
234. Brief and Required Short Appendix of Appellants at 40, Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, 888 F.3d 300 (7th Cir. 2018) (No. 17-3163).
235. *Sorrell*, 564 U.S. at 577.
236. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980).

society where pregnant people are discouraged from getting abortions. Contrast these laws with *Casey*-like informed consent laws which require doctors to inform patients firsthand of the state's message, very close to the time and place at which they are considering an abortion procedure. A message in close spatial and temporal proximity to the procedure more directly informs abortion seekers than scattershot, society-facing expressions of respect for life. A straightforward understanding of the method of transmission shows that these society-facing laws are insufficiently direct to pass intermediate scrutiny.

Second, even if one assumes that successfully expressing respect for potential life to society as a whole is a sufficiently direct means of informing abortion seekers, these society-facing laws usually "ineffectively"[237] message society in the first place. Fetal demise laws illustrate this point. Requiring a medical procedure that happens behind closed doors and under a legally mandated regime of confidentiality is a poor method of conveying a message to the public. Even if—in spite of medical privacy protections—word got out that a doctor used a demise procedure before performing a D&E, it is not clear this choice would convey a message as clearly as the state hopes. As the Eleventh Circuit has held, for example, demise procedures "could be considered experimental," a fact that might lead some to view the substitution as itself disrespectful.[238] Further, the demise procedures mandated by states are not clearly more respectful means of causing demise than traditional D&E procedures.[239] This danger of ineffective communication is also apparent in the fetal burial context. As a federal district court in Texas explained, "treatment and disposition methods in general are not themselves inherently respectful or dignified. Instead, dignity and respect are conferred based on one's personal opinion of a given treatment or disposition option."[240] Fetal burial laws run the risk

237. *Id.*
238. W. Ala. Women's Ctr. v. Williamson, 900 F.3d 1310, 1324 (11th Cir. 2018).
239. For example, potassium chloride injections require piercing a woman's abdomen and the fetus's heart with a long needle, a procedure state experts testify would be painful were a fetus capable of feeling pain. Transcript of Trial Record (Dkt. 165) at 99, Whole Woman's Health v. Paxton, 280 F. Supp. 3d 938 (W.D. Tex. 2017) (No. 17 Civ. 690). Similarly, digoxin injections slowly—and unreliably—kill a fetus over the course of 24 hours, rather than quickly, as a traditional D&E would. *See* Brief of the American College of Obstetricians and Gynecologists and the American Medical Association as Amici Curiae Supporting Plaintiffs-Appellees and Affirmance at 9-10, Whole Woman's Health v. Paxton, No. 17-51060 (5th Cir. Apr. 18, 2018).
240. Whole Women's Health v. Smith, 338 F.Supp.3d 606, 628 (W.D. Tex. 2018).

of ineffectively communicating the state's respect for potential life because is unclear whether the public—let alone people contemplating abortion—will interpret the state's message correctly.

Where the state messages its respect for potential life to abortion seekers through their communities, these laws are likely too indirect to be properly tailored. Society-focused compelled speech communicates with abortion seekers only remotely. Further, it is unclear whether this communication is effective at all. As a result, such society-facing laws are far more likely to fail intermediate scrutiny than informed consent provisions which, by directly targeting abortion seekers with a clear message, hew more closely to those approved in *Casey*.[241]

2. Coherence and Underinclusiveness

Courts applying intermediate scrutiny will also consider whether the state is advancing its policy in a "coherent" manner.[242] *NIFLA* confirmed that part of this analysis includes examining whether the state's proposed policy to advance its underlying interest is "underinclusive."[243] That is, if the law selectively communicates the state's message, it fails to advance that message in a coherent way. The closer a law is to traditional, *Casey*-like informed consent, the more likely it is to pass muster under this inquiry. As *Casey* held, "a requirement that

241. Even some abortion regulations which appear to hew more closely to *Casey*-like informed consent requirements will not survive intermediate scrutiny under this "effectiveness" inquiry. For example, the Fourth Circuit invalidated a North Carolina ultrasound law under intermediate scrutiny in part because the law allowed patients to "avert [their] eyes" and "refuse to hear" the state's message. Stuart v. Camnitz, 774 F.3d 238, 243 (4th Cir. 2014) (quoting N.C. Gen. Stat. § 90-21.85(b)). According to Judge Wilkinson III, who wrote the majority opinion, the ultrasound requirement worked "in a manner antithetical to the very communication that lies at the heart of the informed consent process." *Id.* at 253. While informed consent laws do not necessarily survive intermediate scrutiny simply because they take the form of a direct doctor-patient communication, however, as a general rule informed consent laws taking the more *Casey*-like form of a conversation between doctor and patient should fare better than society-facing laws.

242. Sorrell v. IMS Health, Inc., 564 U.S. 552, 573 (2011) (quoting Greater New Orleans Broad. Ass'n v. U.S., 527 U.S. 173, 195 (1999)).

243. NIFLA v. Becerra, 138 S. Ct. 2361, 2375–76 (2018) (explaining that "[i]f California's goal is to educate low-income women about the services it provides, then the licensed notice is 'wildly underinclusive,'" and that such "[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint") (quoting Brown v. Entm't Merch. Ass'n, 564 U.S. 786, 802 (2011)).

a doctor give a woman certain information as part of obtaining her consent to an abortion," even where this requirement expressed respect for potential life, "for constitutional purposes, [was] no different from a requirement that a doctor give certain specific information about any medical procedure."[244] Where they take the traditional form of dialogue between patient and doctor prior to a procedure, in other words, laws intended to inform abortion seekers form part of a broader, coherent state project of ensuring informed consent through doctors' words.

Where laws aim to inform abortion seekers by broadcasting a prolife message to society as a whole, however, singling out doctors' expression makes less sense. If a state's goal is to express respect for potential life to society in general, rather than those actively pursuing abortions, states have many options to accomplish this goal.[245] As Reva Siegel has pointed out, states might achieve this goal by providing generous prenatal healthcare programs, strong pregnancy discrimination protections, comprehensive sex education, and other measures that could effectively communicate respect for existing pregnancies[246] and commitment to preventing pregnancy terminations.[247] Yet, studies show that states that have the most robust abortion regulations tend to also have the fewest alternative life-protective policies in place.[248] For example, as a federal judge noted in an opinion permanently enjoining Mississippi's fifteen-week abortion ban, Mississippi "'ranks as the state with the most [medical] challenges for women, infants, and children' but is silent on expanding Medicaid . . . . Its leaders are proud to challenge *Roe* but choose not to lift a finger to address the tragedies lurking on the other side of the delivery

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

245. *See generally* Reva B. Siegel, *ProChoiceLife: Asking Who Protects Life and How—and Why it Matters in Law and Politics*, 93 IND. L.J. 207 (2018).

246. *Id.* at 216–21 (explaining that states that restrict abortion often do not "help women who want to be mothers maintain their pregnancies" through robust maternal healthcare or pregnancy discrimination laws).

247. *Id.* at 206–10 (explaining that states that restrict abortion often do not "help women avoid unwanted pregnancy" through adequate sex education or contraception access).

248. *See generally* Terri-Ann Thompson & Jane Seymour, *Evaluating Priorities: Measuring Women's and Children's Health and Well-Being Against Abortion Restrictions in the States*, IBIS REPROD. HEALTH (June 2017), https://perma.cc/MEZ5-D57D (providing extensive evidence to support the proposition that "the more abortion restrictions a state has passed, the fewer evidence-based supportive policies exist, and the poorer the health and well-being outcomes for women and children").

room: our alarming infant and maternal mortality rates."[249] Where states target only abortion providers' conduct to express respect for potential life, in other words, they advance their goal in a narrow, underinclusive, and incoherent manner. It would be incumbent upon states arguing that their laws satisfy intermediate scrutiny to prove that their preferred method of voicing the state's message was justifiable in light of other potential vehicles. As *NIFLA* held, these laws' underinclusiveness can "demonstrate[] [a] disconnect between [their] stated purpose and [their] actual scope," and undermine their ability to succeed under intermediate scrutiny.[250]

3. Availability of Less Burdensome Alternatives

Courts will also examine whether there are alternative ways to advance the state's interest that would impose lesser First Amendment burdens. As the Supreme Court explained in *NIFLA*, courts must ask whether the state could "inform . . . women"[251] "without burdening a speaker with unwanted speech."[252] One example of an alternative would be the state "inform[ing] the women itself with a public-information campaign" rather than "co-opt[ing] [providers] to deliver its message for it."[253] The fact that an alternative method of messaging might generate only a "'tepid response' does not prove that . . . [it] is not a sufficient alternative."[254] As the Court has noted, "the state may not burden the speech of others in order to tilt public debate in its preferred direction."[255]

Where a state attempts to inform abortion seekers by requiring doctors to express respect for potential life to society at large, it imposes substantially greater burdens on First Amendment rights than necessary to accomplish its purpose. It attempts to use doctors as a means of transmitting public-facing expressions of respect—even if it is unclear

249. Jackson Women's Health Organization v. Currier, 349 F.Supp.3d 536, 540 n.22 (S.D. Miss. 2018).
250. NIFLA v. Becerra, 138 S. Ct. 2361, 2376 (2018).
251. *Id.*
252. *Id.* (quoting Riley v. Nat'l Fed'n of Blind of N.C., 487 U.S. 781, 800 (1988)).
253. *Id.*
254. *Id.* (quoting U.S. v. Playboy Entertm't Grp, Inc., 529 U.S. 803, 816 (2000)).
255. Sorrell v. IMS Health, Inc., 564 U.S. 552, 578–79 (2011) ("[A] State's failure to persuade does not allow it to hamstring the opposition. The State may not burden the speech of others in order to tilt public debate in a preferred direction.").

how effective these transmissions are. As a number of appellate courts[256] and commentators[257] have explained, requiring public-facing expressions more gravely implicates physicians' First Amendment rights than requiring communication with patients alone. Intuitively, disclosing a message to one person is less burdensome than disclosing the same message to the entire population. As argued above, such attempts to use doctors as a conduit of public-facing expression are also of questionable efficacy. While doctors are in a better position than the state to interface with patients contemplating medical treatment, they are not in a better position to apprise society at large of information about the state's value preferences. It therefore makes little sense to place such a heavy burden on doctors with only a marginal return. As in *NIFLA*, the state could likely better achieve its goal through the alternative means of a public information or advertising campaign. Conscripting doctors as messengers is a misguided way to achieve the state's end.

In addition to considering burdens on physicians, as the Fourth Circuit noted when applying intermediate scrutiny to an informed consent law, courts may also take into account "the effect of the regulation on the intended recipient of the compelled speech."[258] This appears to be an extension of the commercial speech doctrine, which focuses on "the value to consumers of the information . . . speech

256. *See* King v. Governor of N.J., 767 F.3d 216, 232 (3d Cir. 2014) ("[W]e believe a professional's speech warrants lesser protection only when it is used to provide personalized services to a client based on the professional's expert knowledge and judgment . . . . By contrast, when a professional is speaking to the public at large or offering her personal opinion to a client, her speech remains entitled to the full scope of protection afforded by the First Amendment." (citations omitted)); Pickup v. Brown, 740 F.3d 1208, 1227 (9th Cir. 2014) (holding that First Amendment protection is "at its greatest" when a professional is "engaged in a public dialogue"); Moore-King v. Cty of Chesterfield, 708 F.3d 560, 569 (4th Cir. 2013) ("[T]he relevant inquiry to determine whether to apply the professional speech doctrine is whether the speaker is providing personalized advice in a private setting to a paying client or instead engages in public discussion and commentary.").

257. *See, e.g.*, Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 948–52 (explaining that many First Amendment scholars have drawn an important distinction between a doctor's speech in the context of providing treatment and a doctor's speech directed at the public spherefe and defending this distinction).

258. Stuart v. Camnitz, 774 F.3d 238, 250 (4th Cir. 2014) (citing to Hill v. Colorado, 530 U.S. 703, 716–18 (2000) and Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 756–57 (1976) to support this proposition).

provides."[259] *NIFLA*, by focusing on professional speech's importance to the "marketplace of ideas," implicitly imports this value into the professional speech context.[260] There is no doubt that society-facing informed consent laws trench on the public's right to the free flow of information more than *Casey*-like informed consent laws. Unlike the *Casey*-like informed consent laws, which target patients alone with information about abortion, the society-facing informed consent laws targets all of society, informing abortion seekers by "tilt[ing] public debate in a preferred direction."[261]

While it is possible to argue that more information—in the form of compelled expressions of respect for life—is always better in the marketplace of ideas, this argument is not persuasive if the public will "have difficulty discerning that the message is the state's, not the speaker's."[262] Instead of informing the public, compelled expressive conduct laws might instead confuse the public about the views of the medical profession. Indeed, as discussed in Part III, fetal demise and burial laws often explicitly rely on the state's view of life being attributed to the medical profession to accomplish their purpose. For example, Arkansas argued that its fetal demise law ensured doctors would be "viewed as healers, sustained by compassionate and rigorous ethic and cognizant of the dignity and value of human life."[263] Such laws are just as likely to obfuscate as they are to educate: patients who receive distorted or contradictory guidance from their physicians are prone to more confusion about a fraught moral issue, not less. As such, these laws burden the First Amendment rights of members of patients and the public by confusing their understanding of doctors' position on abortion, making these laws even less likely to survive intermediate scrutiny.

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259. Zauderer v. Office of Disciplinary Counsel of the Super. Ct. of Ohio, 471 U.S. 626, 651 (1985); *see also* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (focusing on the First Amendment rights of consumers in elaborating commercial speech doctrine).
260. *See infra* Part III.D.
261. Sorrell v. IMS Health Inc., 564 U.S. 552, 578–79 (2011).
262. *Stuart*, 774 F.3d at 246.
263. Brief of Appellants at 30, Hopkins v. Jegley, 267 F.Supp.3d 1024 (E.D. Ark. 2017) (No. 17-2879) (citing Stenberg v. Carhart, 530 U.S. 914, 962 (2000) (Kennedy, J. dissenting)).

In sum, fetal-protective laws that indirectly message abortion seekers by compelling society-facing expression are unlikely to survive intermediate scrutiny. Such laws offer neither direct nor effective means of communicating with abortion seekers. They are not part of a coherent scheme of regulation, but instead single out abortion providers to message respect for potential life while failing to use other expressive tools, such as supportive policies, to accomplish their goal. Finally, they burden far more speech, and more listeners, than necessary to inform abortion seekers' choice and ignore less burdensome means of expressing their message. Thus, even if states can convince courts that their society-facing laws should escape strict scrutiny because they are informed consent provisions, these laws will likely fail intermediate scrutiny for the same reason: they are not obviously informed consent provisions in the first place. The further such laws stray from traditional, *Casey*-like informed consent provisions—which require direct doctor-patient discourse about the procedure at hand—the less likely they are to be appropriately tailored to their ends.

CONCLUSION

Counterintuitively, in striking down a piece of prochoice legislation, *NIFLA* opened the door to new kinds of First Amendment challenges to restrictive abortion laws. By lowering the bar to professional compelled speech claims, it uniquely undermined abortion regulations that compel doctors to engage in conduct that expresses respect for potential life. Due in large part to limitations imposed by the Fourteenth Amendment, states must assert that these laws are both intended and likely to convey a message of respect for potential life, leaving them susceptible to *Barnette* and *Wooley*-style compelled expressive conduct claims. This explicit expressive intent means that—at least where their laws are aimed exclusively at messaging society as an end itself—states facing such challenges may not claim that their laws merely incidentally burden speech. Even where aimed at informing abortion seekers, *NIFLA* subjects such laws to intermediate scrutiny. Where regulations stray too far from the kind of informed consent provisions contemplated in *Casey*, as fetal demise and burial laws do, they are unlikely to survive this review.

Ultimately, *NIFLA* manifests a growing tension between the Supreme Court's expanding First Amendment doctrine and its Fourteenth Amendment jurisprudence. Where compelled professional

speech receives strict scrutiny under the First Amendment, *Gonzales v. Carhart*'s suggestion that states may compel conduct in the name of expressing respect for potential life to society as a whole becomes increasingly untenable. Faced with a compelled expressive conduct challenge to a society-facing abortion regulation such as a fetal demise or burial law, the Court would thus be presented with a choice. It could choose to explicitly limit *Gonzales* to an interest in informing abortion seekers, or, if it determined that the Partial-Birth Abortion Act compelled conduct, overrule *Gonzales* entirely. Alternatively, the Court could maintain its abortion jurisprudence as is, and articulate more stringent limitations on its compelled speech doctrine. If it chooses the first path, as this Article has demonstrated, it will sacrifice a growing number of abortion regulations premised on expressing respect for potential life. If it chooses the second, it must apply its new limitations on the First Amendment equally to non-abortion cases, undermining increasingly popular compelled speech claims against antidiscrimination laws, such as the law in *Masterpiece Cakeshop*. Regardless, a compelled expressive conduct claim in the abortion context is uniquely positioned to test the boundaries of the ascendant First Amendment in a manner likely to advance reproductive liberty and equality.