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**ABORTION-RELATED DISCLOSURES AND HOW THE  
MARYLAND GENERAL ASSEMBLY CAN INSTITUTE A NOVEL  
AND INNOVATIVE PREGNANCY DISCLOSURE**

MARY L. SCOTT\*

Nearly half of pregnancies in the United States, more than two million pregnancies every year, are unintended.<sup>1</sup> In 2010, fifty-eight percent, or more than 70,000, of total pregnancies in Maryland were unintended.<sup>2</sup> When an unintended pregnancy occurs, the pregnant person<sup>3</sup> may not understand their options regarding the pregnancy or know about the availability of various pregnancy-related resources. There are many stories of pregnant people who did not terminate or delayed terminating their pregnancy due to inaccurate information. Sharon ended up at a crisis pregnancy center after “search[ing] the internet for ‘free pregnancy test’ and ‘free ultrasound.’”<sup>4</sup> Following the ultrasound, she was told her pregnancy was too far along to get an abortion; however, later at an abortion clinic<sup>5</sup> she discovered

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\* J.D. Candidate, 2020, University of Maryland Francis King Carey School of Law. The author wishes to thank all of her *Maryland Law Review* editors, particularly Adrienne Thomas and Alexandra Botsaris, for their invaluable feedback, and Professor Paula Monopoli for her steadfast and reassuring presence as well as her thoughtful guidance. The author also wishes to thank her parents Jane and Peter, her in-laws Dawn and Greg, and her siblings Anna, David, and Elizabeth for their unwavering love and support. Lastly, the author wishes to thank her husband and partner, Alexander, who motivates her daily through his constant love and his enthusiastic support of her dreams.

1. GUTTMACHER INST., FACT SHEET: UNINTENDED PREGNANCY IN THE UNITED STATES (2019), <https://www.guttmacher.org/sites/default/files/factsheet/fb-unintended-pregnancy-us.pdf>.

2. KATHRYN KOST, GUTTMACHER INST., UNINTENDED PREGNANCY RATES AT THE STATE LEVEL: ESTIMATES FOR 2010 AND TRENDS SINCE 2002 8 (2015), [https://www.guttmacher.org/sites/default/files/report\\_pdf/stateup10.pdf](https://www.guttmacher.org/sites/default/files/report_pdf/stateup10.pdf).

3. While the majority of people who become pregnant identify as female, I use the term pregnant people in this Comment to include those who do not identify as female but may still become pregnant either intentionally or unintentionally. However, pregnancy has long been considered a women’s rights issue and I ask the reader to keep the history of the oppression of women and the fight for women’s rights in mind.

4. Brief for 51 Reproductive Rights, Civil Rights, and Social Justice Organizations as Amici Curiae Supporting Respondents at 17–18, *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018) (No. 16-1140).

5. Abortion clinics differ from crisis pregnancy centers because they abortion clinics provide abortion procedures, while crisis pregnancy centers are faith-based groups that wish to discourage people from seeking abortions. Laura Bassett, *What Are “Crisis Pregnancy Centers,” and Why Does the Supreme Court Care About Them?*, HUFFINGTON POST (Nov. 13, 2017), [https://www.huffingtonpost.com/entry/crisis-pregnancy-centers-supreme-court\\_us\\_5a09f40ae4b0bc648a0d13a2](https://www.huffingtonpost.com/entry/crisis-pregnancy-centers-supreme-court_us_5a09f40ae4b0bc648a0d13a2). There are reports that crisis pregnancy centers transmit biased information to those seeking assistance. NARAL PRO-CHOICE AMERICA, THE TRUTH

she was within the legal timeframe to elect an abortion.<sup>6</sup> Cherisse called a number on an advertisement that said, “Need abortion? Call us.”<sup>7</sup> After attending two separate appointments, she was incorrectly informed that it was too late for an abortion because “the procedure would perforate her uterus, and she would never be able to have children” despite the fact that she was still in the first trimester.<sup>8</sup> Cherisse reluctantly decided not to terminate the pregnancy since she wanted to be a mom someday.<sup>9</sup>

Additionally, receiving inaccurate medical information regarding pregnancy can endanger the lives of pregnant people.<sup>10</sup> Sarah went to a crisis pregnancy center after taking a home pregnancy test but was told she was not pregnant and must have miscarried.<sup>11</sup> In fact, it was an ectopic pregnancy and Sarah needed emergency surgery to remove the fertilized egg and the fallopian tube in which it was located, putting her life and future fertility at risk.<sup>12</sup> These stories and countless others illustrate how inaccurate information regarding pregnancy can cause many unwanted and unnecessary consequences.

Informed consent is required for all medical procedures,<sup>13</sup> but this requirement has been obfuscated with regard to abortion.<sup>14</sup> While disclosure of the risks of a particular procedure is a routine part of informed consent, the United States Supreme Court’s past rulings allow a state to intermingle its interest in protecting human life with abortion-related informed consent disclosures.<sup>15</sup> Some states jumped on this opportunity to introduce scientific

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ABOUT CRISIS PREGNANCY CENTERS (2017), <https://www.prochoiceamerica.org/wp-content/uploads/2016/12/6.-The-Truth-About-Crisis-Pregnancy-Centers.pdf>.

6. Brief for 51 Reproductive Rights, Civil Rights, and Social Justice Organizations, *supra* note 4, at 17–18.

7. *Id.* at 19.

8. *Id.* Abortions are legal in most states until the point of viability, which is between twenty-four to twenty-eight weeks after the pregnant person’s last menstrual period. *State Bans on Abortion Throughout Pregnancy*, GUTTMACHER INST. (Mar. 1, 2019), <https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions>. While some states have pushed this standard back to twenty weeks, the first trimester still ends significantly before this point of viability, at twelve weeks. *Id.*; *Stages of Pregnancy*, OFFICE ON WOMEN’S HEALTH (Jan. 30, 2019), <https://www.womenshealth.gov/pregnancy/youre-pregnant-now-what/stages-pregnancy>.

9. Brief for 51 Reproductive Rights, Civil Rights, and Social Justice Organizations, *supra* note 4, at 19–20.

10. *Id.* at 23.

11. *Id.*

12. *Id.* An ectopic pregnancy occurs when a fertilized egg implants outside of the uterus, usually in a fallopian tube. *Frequently Asked Questions FAQ155 Pregnancy*, AM. COLL. OF OBSTETRICIANS AND GYNECOLOGISTS (Feb. 2018), <https://www.acog.org/-/media/For-Patients/faq155.pdf?dmc=1&ts=20190702T0106394685>.

13. *See Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir. 1972) (establishing the concept of informed consent for medical procedures).

14. *See infra* Section I.B.

15. *See infra* Section I.B.

ically invalid information, such as abortion increases the possibility of suicide<sup>16</sup> and various cancers,<sup>17</sup> into their informed consent requirements.<sup>18</sup> Additionally, some states require abortion providers to show pregnant people a sonogram image of the fetus and describe the various aspects of the image or amplify the sound of the heartbeat.<sup>19</sup> The Supreme Court declined opportunities to strike down these various disclosures for abortion procedures.<sup>20</sup>

However, in 2018, the Court struck down a California law, the FACT Act,<sup>21</sup> requiring a notice to be posted in the waiting room of crisis pregnancy centers stating that many pregnancy services, including abortion, were offered by the state for little or no cost.<sup>22</sup> When the FACT Act became law in California, a number of crisis pregnancy center organizations, such as the National Institute of Family and Life Advocates (“NIFLA”), protested and asked the United States District Court for the Southern District of California for a preliminary injunction.<sup>23</sup> While the history of abortion-related disclosures suggested the FACT Act would stand, the Court struck down the law

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16. See, e.g., S.D. CODIFIED LAWS § 34-23A-10.1(1)(e)(ii) (2011) (“A consent to an abortion is not voluntary and informed, unless . . . the physician provides that pregnant [person] with . . . [a] description of all known medical risks of the procedure and statistically significant risk factors to which the pregnant [person] would be subjected, including . . . [i]ncreased risk of suicide ideation and suicide . . .”).

17. See KAN. STAT. ANN. § 65-6709(a)(3) (West 2018) (“At least 24 hours before the abortion the physician who is to perform the abortion or the referring physician has informed the [person] in writing of . . . a description of risks related to the proposed abortion method, including . . . risk of breast cancer . . .”).

18. As of February 1, 2019, five states mandate counseling including information regarding a supposed link between breast cancer and abortion, and eight states mandate counseling including information regarding a supposed link between negative psychological effects and abortion. *An Overview of Abortion Laws*, GUTTMACHER INST. (Feb. 1, 2019), <https://www.guttmacher.org/state-policy/explore/overview-abortion-laws>. The American Cancer Society reports that there is no link between breast cancer and abortion. *Abortion and Breast Cancer Risk*, AM. CANCER SOC’Y (June 19, 2014), <https://www.cancer.org/cancer/cancer-causes/medical-treatments/abortion-and-breast-cancer-risk.html>. Similarly, Guttmacher Institute reviewed several studies regarding feelings after having an abortion and found no evidence of later mental health problems. *Emotional and Mental Health After Abortion*, GUTTMACHER INST., <https://www.guttmacher.org/perspectives50/emotional-and-mental-health-after-abortion> (last visited Jan. 14, 2019).

19. As of February 1, 2019, three states require an abortion provider to display and describe an ultrasound image; nine additional states require the provider to perform the ultrasound and offer the option to view the image. *Requirements for Ultrasound*, GUTTMACHER INST. (Feb. 1, 2019), <https://www.guttmacher.org/state-policy/explore/requirements-ultrasound>.

20. These abortion-related disclosures began to emerge in state laws following *Planned Parenthood of Southeastern Pennsylvania v. Casey*, in which the Supreme Court allowed a twenty-four-hour waiting period to stand as an acceptable requirement of informed consent. 505 U.S. 833, 885 (1992). The Supreme Court declined to grant certiorari to any of the cases discussed in this Comment except *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018).

21. 2015 Cal. Stat. 5351.

22. *Becerra*, 138 S. Ct. at 2375.

23. *Id.* at 2370.

while other abortion-related disclosure requirements, such as the requirements discussed above, stand in thirty-seven states.<sup>24</sup>

This Comment will first examine the history of abortion-related disclosures since the legalization of abortion in 1973.<sup>25</sup> Specifically, it will review the decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>26</sup> and the subsequent Circuit Court split regarding whether *Casey* established a test for future abortion-related disclosures.<sup>27</sup> In particular, this Comment will discuss recent cases in which Baltimore, Maryland and the State of California attempted to reverse the paradigm and impose disclosure requirements on crisis pregnancy centers before the United States Court of Appeals for the Fourth Circuit in *Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor of Baltimore*,<sup>28</sup> before the United States Court of Appeals for the Ninth Circuit in *NIFLA v. Harris*,<sup>29</sup> and finally before the Supreme Court in *NIFLA v. Becerra*.<sup>30</sup> This Comment will argue that due to the Supreme Court's decision in *Becerra* and in order to effectively educate the pregnant population of the state, the Maryland General Assembly should develop a novel Pregnancy Disclosure—the substance of which this Comment proposes—to inform pregnant people of all their options at the first possible opportunity, including available resources and both abortion and childbirth risks.<sup>31</sup>

## I. BACKGROUND

Since the legalization of abortion, constant legal challenges arise regarding many aspects of this right. The Supreme Court's allowance for abortion-related disclosures continues to evolve over time. Section I.A discusses the evolution of abortion-related disclosures since abortion became legal in 1973.<sup>32</sup> Additionally, Section I.B examines the current split among the Circuit Courts regarding which test should be applied to abortion-related disclosures.<sup>33</sup> Lastly, Section I.C reviews the most recent Maryland-specific case, *Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor of Baltimore*,<sup>34</sup> the most recent Supreme Court case regarding abor-

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24. Parental consent or involvement is required in thirty-seven states and a waiting period after counseling is required in twenty-seven states. *An Overview of Abortion Laws*, *supra* note 18.

25. *See infra* Section I.A.

26. 505 U.S. 833 (1992).

27. *See infra* Section I.B.

28. 879 F.3d 101 (4th Cir. 2018); *see infra* Section I.C.1.

29. 839 F.3d 823 (2016), *rev'd sub nom.* *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018); *see infra* Section I.C.2.

30. 138 S. Ct. 2361 (2018); *see infra* Section I.C.3.

31. *See infra* Section II.A–C.

32. *See infra* Section I.A.

33. *See infra* Section I.B.1–2.

34. 879 F.3d 101 (4th Cir. 2018); *see infra* Section I.C.1.

tion-related disclosures, *NIFLA v. Becerra*,<sup>35</sup> and the case below in the Ninth Circuit.<sup>36</sup>

A. *The History of Abortion-Related Disclosures from Roe to Casey*

Following the legalization of abortion in *Roe v. Wade*,<sup>37</sup> legal battles ensued testing the boundaries of this right. Cases before the Supreme Court included issues regarding consent from spouses<sup>38</sup> and parents;<sup>39</sup> the use of federal funds;<sup>40</sup> and the use of state-owned facilities and staff.<sup>41</sup> The case history regarding abortion-related disclosures<sup>42</sup> is especially important given the *Becerra* ruling.<sup>43</sup>

Initially following *Roe v. Wade*, the Court did not allow any additional disclosure requirements to stand.<sup>44</sup> While the Court upheld a state law requiring informed consent from the person receiving the abortion in *Planned Parenthood of Central Missouri v. Danforth*,<sup>45</sup> it struck down provisions of an Akron ordinance in *City of Akron v. Akron Center for Reproductive Health*<sup>46</sup> requiring the physician performing the procedure to inform their

35. 138 S. Ct. 2361 (2018); *see infra* Section I.C.2.

36. 839 F.3d 823 (9th Cir. 2016), *rev'd sub nom.* *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018); *see infra* Section I.C.3.

37. 410 U.S. 113 (1973). The Court legalized abortion based on the historical right of privacy it found to exist in the Constitution. *Id.* at 152–53. Specifically, the Court determined this right of privacy “encompass[ed] a [pregnant person’s] decision whether or not to terminate [their] pregnancy.” *Id.* at 153. However, the state still had a valid interest in preserving human life; therefore, the right to abortion remains subject to limitations. *Id.* at 154.

38. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 67–69 (1976) (overturning Missouri law requiring a married woman to get her husband’s consent for an abortion).

39. *Hodgson v. Minn.*, 497 U.S. 417, 423–24, 427 (1990) (overturning law requiring minors to notify both parents to obtain an abortion and instituting a judicial bypass procedure for minors to seek abortion without parental involvement).

40. *Harris v. McRae*, 448 U.S. 297, 318 (1980) (upholding the Hyde Amendment restriction on the use of Medicaid funds for abortion except in cases of life endangerment, rape, or incest).

41. *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 511 (1989) (upholding the ban on use of public employees and facilities to perform abortions).

42. The term “abortion-related disclosure” is used to encompass any requirement prior to an abortion in which a pregnant person must receive mandatory counseling or information, undergo a mandatory ultrasound, or wait a specific length of time between counseling and the procedure. *See, e.g., Counseling and Waiting Periods*, GUTTMACHER INST. (Feb. 1, 2019), <https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion> (discussing states that require counseling and/or waiting periods before an abortion); *Requirements for Ultrasound*, *supra* note 19 (detailing states that mandate ultrasounds before an abortion).

43. *See infra* Section I.C.

44. *See, e.g., City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 452 (1983) (affirming the United States Court of Appeals for the Sixth Circuit’s judgment regarding the unconstitutionality of sections of the Akron ordinance regulating abortions). The ordinance required parental consent for minors seeking abortions, informed consent for all seeking an abortion, a twenty-four-hour waiting period, and the “humane and sanitary” disposal of fetal remains. *Id.* at 422–24 (quoting AKRON, OHIO CODIFIED ORDINANCES § 1870.16 (1978)).

45. 428 U.S. 52, 67 (1976).

46. 462 U.S. 416 (1983).

patient “of the status of [their] pregnancy, the development of [their] fetus, the date of possible viability, the physical and emotional complications that may result from an abortion, and the availability of agencies to provide [them] with assistance and information with respect to birth control, adoption, and childbirth.”<sup>47</sup> The Court found that the information required was “designed not to inform the [person]’s consent but rather to persuade [them] to withhold it altogether.”<sup>48</sup> Additionally, the Akron ordinance restricted a physician’s ability to determine what information was relevant to a particular patient.<sup>49</sup> Instead, the physician was hamstrung to provide potentially irrelevant information, including what the Court described as “a ‘parade of horrors’ intended to suggest that abortion is a particularly dangerous procedure.”<sup>50</sup>

This logic led the Court to declare state laws requiring physicians to relay very specific, and potentially misleading, information to their patients prior to an abortion unconstitutional.<sup>51</sup> In *Thornburgh v. American College of Obstetricians & Gynecologists*,<sup>52</sup> Pennsylvania passed legislation requiring physicians to inform their pregnant patients seeking abortions at least twenty-four hours before consent is given that “there may be detrimental physical and psychological effects,” that medical assistance benefits may be available for the child’s care, and that the father of the child is liable to provide child support, among other requirements.<sup>53</sup> Justice Blackmun writing for the majority stated, “Forcing the physician . . . to present the materials . . . to the [pregnant person] makes [them] in effect an agent of the State . . . .”<sup>54</sup> Additionally, the Court concluded much of the information that the law required the physician to discuss was not relevant to informed consent and, therefore, “advance[d] no legitimate state interest.”<sup>55</sup>

However, the momentum of the Court shifted in 1992 with *Planned Parenthood of Southeastern Pennsylvania v. Casey*.<sup>56</sup> The case involved the Pennsylvania Abortion Control Act of 1982,<sup>57</sup> which required informed consent, mandatory disclosures regarding abortion and its alternatives by a physician followed by a twenty-four-hour waiting period, informed consent of a parent for a minor’s abortion with a judicial bypass option, a require-

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47. *Id.* at 442 (citing AKRON, OHIO CODIFIED ORDINANCES § 1870.06(B)).

48. *Id.* at 444.

49. *Id.* at 444–45.

50. *Id.* at 445.

51. *See, e.g., Thornburgh v. American Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (holding that a twenty-four hour waiting period was unconstitutional).

52. 476 U.S. 747 (1986).

53. *Id.* at 760–61 (quoting 18 PA. CONS. STAT. § 3205(b) (1982)).

54. *Id.* at 763.

55. *Id.*

56. 505 U.S. 833 (1992).

57. 1982 Pa. Laws 476.

ment for married women to certify that their husbands were informed of their abortion, and reporting requirements for facilities that provided abortions.<sup>58</sup> The Court split into several different factions, and Justices O'Connor, Souter, and Kennedy authored the plurality opinion.<sup>59</sup> *Casey* is most well-known for establishing the undue burden test, which allows the state to take steps to protect its interest in life and dissuade a person from having an abortion provided that those steps do not impose a "substantial obstacle."<sup>60</sup> Due to the plurality, several sections of the opinion did not gain the majority of the Court,<sup>61</sup> including the section related to the provision that required a physician to apprise the patient "of the nature of the procedure, the health risks of the abortion and of childbirth, and the 'probable gestational age of the unborn child.'"<sup>62</sup> This provision also required the physician to notify the patient of the availability of printed materials regarding the fetus's development, child support requirements, and a list of adoption agencies.<sup>63</sup> Contrary to the Court's previous ruling in *Thornburgh*, Justices O'Connor, Souter, and Kennedy concluded that Pennsylvania's interest in protecting life allowed the physician disclosure requirements to stand, as they were a "reasonable measure to ensure an informed choice."<sup>64</sup> These Justices also state that *Thornburgh* and *Akron* went "too far" in finding a constitutional violation in what they describe as "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."<sup>65</sup> While Planned Parenthood of Southeastern Pennsylvania argued that the physician disclosure requirements violated their First Amendment rights,<sup>66</sup> Justices O'Connor, Souter, and Kennedy indicated

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58. *Casey*, 505 U.S. at 844.

59. *Id.* at 843.

60. *Id.* at 877.

61. *Id.* at 841–42. There was no majority for Section IV, *see id.* at 869, 872 (rejecting the trimester framework set forth in *Roe v. Wade* and discussing that the state's interest may prohibit or restrict abortions after viability); Section V.B, *see id.* at 881 (discussing the informed consent requirement, including the twenty-four-hour waiting period); Section V.D, *see id.* at 899 (discussing the parental consent provision); or Section V.E, *see id.* at 900 (discussing the recordkeeping and reporting requirements), of the opinion.

62. *Id.* at 881.

63. *Id.*

64. *Id.* at 883. In *Thornburgh*, a similar requirement was struck down; the majority found that "[t]his type of compelled information is the antithesis of informed consent." 476 U.S. at 764. In *Akron*, while the informed consent requirements were very similar to those seen in *Casey* (development of fetus, physical and emotional complications, and the availability of agencies to help if the pregnant person decides not to terminate the pregnancy), the Court found that these disclosure requirements went "beyond permissible limits." 462 U.S. at 442–44.

65. *Casey*, 505 U.S. at 882.

66. Planned Parenthood of Southeastern Pennsylvania argued that the requirements forced the physicians "[u]nder duress of law" to "recite a litany of government-mandated information." Brief for Petitioner at 54, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (Nos. 91-744, 91-902). Forcing the physician to relay specific information, no matter who the patient was

that since physicians, within the practice of medicine, are “subject to reasonable licensing and regulation by the State,” no constitutional violation occurred.<sup>67</sup> Under the newly introduced undue burden test, Justices O’Connor, Souter, and Kennedy did not find the physician disclosure requirements to be a “substantial obstacle to a [person] seeking an abortion” and, therefore, determined that the requirements did not constitute an undue burden and were constitutional.<sup>68</sup>

Justices Stevens and Blackmun, while joining Justices O’Connor, Souter, and Kennedy for some sections of their opinion, both dissented regarding the section on the physician disclosure requirements. Justice Stevens found the disclosures not useful and, therefore, undue, as the statute did not allow for differences in situation or education and instead required the same information to be distributed to all patients across the board.<sup>69</sup> He cautioned that “[w]henver government commands private citizens to speak or to listen, careful review of the justification for that command is particularly appropriate.”<sup>70</sup> Justice Blackmun, referencing sections of the *Thornburgh* majority opinion in his dissent, maintained that the physician disclosure requirements made the physician “in effect an agent of the State” and that the required disclosure information was not relevant to the patient’s informed consent and, therefore, “advance[d] no legitimate state interest.”<sup>71</sup> While *Casey* clearly indicated a shift in the Supreme Court’s approach to abortion regulation, the federal circuit courts interpreted *Casey*’s impact in different ways.

### *B. The Circuit Split Following Casey and the Introduction of the Reasonableness Test*

Following the Supreme Court’s decision in *Casey*, a circuit split developed as to whether *Casey* established a test for abortion-related disclosures.<sup>72</sup> The United States Courts of Appeals for the Eighth and Fifth Circuits determined that *Casey* established a “reasonableness” test, in addition to the undue burden test, specifically for abortion-related disclosures.<sup>73</sup> However, the United States Courts of Appeals for the Fourth and Ninth Cir-

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or what the individual circumstances were, went against the standard practice of the physician tailoring the information for each individual patient and their needs. *Id.* at 51.

67. *Casey*, 505 U.S. at 884 (citing *Whalen v. Roe*, 429 U.S. 589, 603 (1977)).

68. *Id.* at 884–85.

69. *Id.* at 921 (Stevens, J., dissenting).

70. *Id.*

71. *Id.* at 935–36 (Blackmun J., dissenting) (quoting *Thornburgh v. American Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 762–63 (1986)).

72. *See NIFLA v. Harris*, 839 F.3d 823, 837 (9th Cir. 2016), *rev’d sub nom. NIFLA v. Becerra*, 138 S. Ct. 2361 (2018) (discussing the circuit split regarding the proper test to apply to an abortion-related disclosure).

73. *See infra* Section I.B.1.

cuits disagreed and did not believe that *Casey* established a test, instead using the intermediate scrutiny test for abortion-related disclosures.<sup>74</sup>

1. *The Eighth and Fifth Circuits Adopt the Casey Reasonableness Test*

The Eighth and the Fifth Circuits found that *Casey* established a test for abortion-related disclosures based on the following line from the *Casey* plurality opinion: “If the information the State requires to be made available to the [pregnant person] is truthful and not misleading, the requirement may be permissible.”<sup>75</sup> Additionally, as previously discussed, Justices O’Connor, Souter, and Kennedy found that *Thornburgh* and *Akron* went “too far” when the Court found these abortion-related disclosures, which the Justices described as truthful and nonmisleading, to be unconstitutional.<sup>76</sup> These three Justices also specify that the physician’s free speech rights are not violated by *Casey*’s abortion-related disclosure as it falls under the purview of state regulation.<sup>77</sup> Following *Casey*, the Eighth and Fifth Circuit courts interpreted this language to develop a “reasonableness” test, which meant that future abortion-related disclosures only had to be considered truthful and not misleading to be constitutional, with no other considerations.<sup>78</sup>

In *Planned Parenthood of Minnesota, North Dakota, & South Dakota v. Rounds*,<sup>79</sup> the Eighth Circuit reversed a preliminary injunction against a South Dakota bill<sup>80</sup> that, among other requirements, specified that a physician must disclose to a patient “[t]hat the abortion will terminate the life of a whole, separate, unique, living human being.”<sup>81</sup> The Eighth Circuit

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74. See *infra* Section I.B.2.

75. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992); see *Planned Parenthood of Minn., N.D., & S.D. v. Rounds*, 530 F.3d 724, 734–35 (8th Cir. 2008) (finding “*Casey* and *Gonzales* establish that . . . [the state] can use its regulatory authority to require a physician to provide truthful, non-misleading information”); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576 (5th Cir. 2012) (finding under *Casey* and *Gonzales* that “informed consent laws that do not impose an undue burden on the [person]’s right to have an abortion are permissible if they require truthful, non-misleading, and relevant disclosures.”).

76. *Casey*, 505 U.S. at 882.

77. *Id.* at 884 (citations omitted).

78. See *Rounds*, 530 F.3d at 726 (upholding South Dakota’s abortion-related disclosure); *Lakey*, 667 F.3d at 578 (upholding Texas’s abortion-related disclosure).

79. 530 F.3d 724, 734–35 (8th Cir. 2008).

80. H.B. 1166, 2005 Leg., 80th Sess. (S.D. 2005).

81. *Rounds*, 530 F.3d at 726 (quoting H.B. 1166, 2005 Leg., 80th Sess. (S.D. 2005)). Additionally, the South Dakota bill required the physician to inform the prospective patient that the patient “ha[d] an existing relationship with that unborn human being,” and “[t]hat by having an abortion, [their] existing relationship and [their] existing constitutional rights with regards to that relationship will be terminated.” *Id.* (quoting H.B. 1166, 2005 Leg., 80th Sess. (S.D. 2005)). The physician also had to inform the patient that an abortion had “statistically significant risk factors,” including depression and increased risk of suicide. *Id.* (quoting H.B. 1166, 2005 Leg., 80th Sess. (S.D. 2005))

agreed that requiring a physician to disclose certain information to a pregnant person before performing an abortion could implicate the physician's First Amendment rights; however, the court found that since physicians are "subject to reasonable licensing and regulation by the State," a disclosure requirement did not violate the First Amendment as long as the information in the disclosure was truthful and not misleading.<sup>82</sup> Additionally, the court wrote that the state's interest and "profound respect for the life within the [person]"<sup>83</sup> meant that the court could, and would, uphold an abortion-related disclosure "even if that information might also encourage the patient to choose childbirth over abortion."<sup>84</sup>

Four years later, the Fifth Circuit similarly reversed the grant of a preliminary injunction against a Texas law in *Texas Medical Providers Performing Abortion Services v. Lakey*.<sup>85</sup> This law required physicians to "perform and display a sonogram of the fetus, make audible the heart auscultation of the fetus for the [person] to hear, and explain to [them] the results of each procedure."<sup>86</sup> Additionally, the law required a twenty-four-hour waiting period and other common informed consent requirements that appeared across the country following the *Casey* ruling.<sup>87</sup> The Fifth Circuit found that laws regarding abortion disclosures "are part of the state's reasonable regulation of medical practice and do not fall under the rubric of compelling 'ideological' speech that triggers First Amendment strict scrutiny."<sup>88</sup> Since the requirements of the bill, including the sonogram and heartbeat, "are the epitome of truthful, non-misleading information," they are considered reasonable and not infringements upon the physician's First Amendment rights.<sup>89</sup> The Fifth Circuit, like the Eighth Circuit, quoted *Casey* regarding the state's ability to "further the 'legitimate goal of protecting the life of the unborn'"<sup>90</sup> and upheld an abortion-related disclosure that required the physician to express the state's preference for childbirth over abortion.<sup>91</sup>

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82. *Id.* at 734–35, 738 (quoting *Casey*, 505 U.S. at 884, 882). The court also interpreted the Supreme Court's decisions in *Casey* and *Gonzales v. Carhart*, 550 U.S. 124 (2007), to allow mandated disclosures to withstand First Amendment protections "even if that information might also encourage the patient to choose childbirth over abortion." *Id.* at 735.

83. *Id.* at 734 (quoting *Gonzales*, 550 U.S. at 157).

84. *Id.* at 734–35.

85. 667 F.3d 570 (5th Cir. 2012).

86. *Id.* at 573 (citing TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(4) (West 2011)).

87. The other requirements include completion of a form that the physician must maintain for seven years and the provision of educational materials about how to "establish paternity and secure child support." *Id.* (citing TEX. HEALTH & SAFETY CODE ANN. § 171.0123).

88. *Id.* at 576.

89. *Id.* at 578.

90. *Id.* at 575 (quoting *Casey*, 505 U.S. at 882).

91. *Id.*

Under the *Casey* reasonableness test, as interpreted by the Eighth and Fifth Circuits, all that is required to withstand a First Amendment challenge is that an abortion-related disclosure contain information found truthful and non-misleading.<sup>92</sup> Additionally, given the state's interest in protecting life, it is permissible for the disclosure to favor or encourage childbirth over abortion.<sup>93</sup> However, not all of the federal circuits agree with this interpretation.

## 2. *The Fourth Circuit Adopts the Intermediate Scrutiny Test*

The United States Court of Appeals for the Fourth Circuit disagreed with the Fifth and Eighth Circuits that *Casey* established a reasonableness test to replace strict scrutiny regarding abortion-related disclosures and a physician's First Amendment rights.<sup>94</sup> Instead, the Fourth Circuit, and later the United States Court of Appeals for the Ninth Circuit, apply an intermediate scrutiny test.<sup>95</sup>

When the First Amendment is implicated, different levels of scrutiny may be applied to the law or regulation in question<sup>96</sup>—rational basis,<sup>97</sup> intermediate scrutiny,<sup>98</sup> or strict scrutiny.<sup>99</sup> When a First Amendment case applies intermediate scrutiny, it first determines whether the law or regulation in question is content-based or “draws distinctions based on the message a speaker conveys.”<sup>100</sup> While content-based laws are presumptively unconstitutional,<sup>101</sup> Supreme Court precedent, such as *Casey*, recognized that the state can nonetheless regulate physicians and their First Amendment speech regarding abortion.<sup>102</sup> The next inquiry is whether the law or regulation is viewpoint neutral or viewpoint discriminatory; if a law or regulation is viewpoint discriminatory, it is “based on ‘the specific motivating

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92. See *supra* notes 84 & 94 and accompanying text.

93. See *supra* notes 85–86 and *infra* notes 95–96 and accompanying text.

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

95. *Id.* at 249; *NIFLA v. Harris*, 839 F.3d 823, 834 (9th Cir. 2016), *rev'd sub nom.* *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018).

96. See *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 637 (1994) (“[B]ecause not every interference with speech triggers the same degree of scrutiny under the First Amendment, we must decide at the outset the level of scrutiny applicable . . .”).

97. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–88 (1955). Rational basis requires only that the legislation rationally might have been carried out to meet a state interest. *Id.*

98. Also referred to as heightened scrutiny, the law “must serve important governmental objectives and must be substantially related to achievement of those objectives.” *Craig v. Boren*, 429 U.S. 190, 197 (1976). While the Supreme Court has utilized the intermediate scrutiny test in relation to gender discriminatory laws, appellate courts have used it in First Amendment cases. *Stuart*, 774 F.3d at 248.

99. To survive strict scrutiny, the law or regulation must be “‘narrowly tailored’ to achieve a ‘compelling’ government interest.” *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) (quoting *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995)).

100. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015).

101. *Id.* at 2226.

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

ideology or the opinion or perspective of the speaker.”<sup>103</sup> If a law or regulation involving speech by a professional, such as a physician, is found to be both content-based and viewpoint-discriminatory, the Ninth Circuit outlines a continuum of First Amendment protected speech.<sup>104</sup> When a professional speaks to add to the public dialogue and no more, they are afforded First Amendment rights as any other person who added to the public dialogue; to regulate this speech would require strict scrutiny.<sup>105</sup> However, as discussed previously in *Casey*, the state also has the power to heavily regulate professional conduct, like medical treatment. In this case, the First Amendment protections are significantly weaker, falling under rational basis.<sup>106</sup> Required disclosures, such as abortion-related disclosures, fall in between the two poles—while they are not public dialogue, they are also not professional conduct. Given this midpoint, the Fourth and Ninth Circuits believe that intermediate scrutiny is the most appropriate test to use when analyzing the constitutionality of abortion-related disclosures.<sup>107</sup> This test reviews the law or regulation to determine if it “directly advances a substantial governmental interest and that the measure is drawn to achieve that interest.”<sup>108</sup>

The Fourth Circuit became the first circuit court to utilize the intermediate scrutiny test for an abortion-related disclosure. Two years after the Fifth Circuit ruled in *Lakey*, a similar state law came before the Fourth Circuit in *Stuart v. Camnitz*.<sup>109</sup> Like the Texas law, this North Carolina law required physicians to “perform an ultrasound, display the sonogram, and describe the fetus” in addition to offering the option to hear the heart tone.<sup>110</sup> But the Fourth Circuit did not agree that *Casey* established a reasonableness test for physicians’ First Amendment rights when it came to abortion-related disclosures; instead, the court interpreted *Casey* as stating that in that particular case, the physicians’ First Amendment rights were not

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103. *Reed*, 135 S. Ct. at 2230 (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). *Reed* finds that viewpoint-discriminatory laws or regulations are an “egregious form of content discrimination” and are, therefore, presumptively unconstitutional. *Id.* (quoting *Rosenberger*, 515 U.S. at 829).

104. *See* *Pickup v. Brown*, 728 F.3d 1042, 1053–55 (9th Cir. 2013) (outlining the protected speech continuum for professionals). The United States Court of Appeals for the Fourth Circuit also subscribes to this continuum of speech used by the Ninth Circuit. *Stuart v. Camnitz*, 774 F.3d 238, 248 (4th Cir. 2014).

105. *Pickup*, 728 F.3d at 1053.

106. *Id.* at 1055.

107. *See* *Stuart*, 774 F.3d at 245 (“Recognizing that the Requirement both compelled speech and regulated the medical profession, the court applied neither strict scrutiny nor rational basis review, but rather the intermediate scrutiny standard . . .”); *NIFLA v. Harris*, 839 F.3d 823, 839 (9th Cir. 2016), *rev’d sub nom.* *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018).

108. *Harris*, 839 F.3d at 841 (quoting *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 572 (2011)).

109. 774 F.3d 238 (4th Cir. 2014). The state law in this case was from North Carolina. *Id.* at 242; *see supra* note 86 and accompanying text; and *infra* note 110 and accompanying text.

110. *Id.* at 242–43.

at risk.<sup>111</sup> In the instant case, the Fourth Circuit found that under the North Carolina law, physicians' First Amendment rights were implicated because the physician was required to take actions and speak certain information, whether or not they felt it was psychologically safe to do so with a particular patient and whether or not that patient wanted to hear what the physician was saying.<sup>112</sup> The court conceded that the state may regulate the medical profession; however, a physician's First Amendment rights exist on a continuum between "public dialogue" and "regulation of professional conduct," necessitating different levels of scrutiny depending on the situation.<sup>113</sup> Here, the Fourth Circuit found that the North Carolina law was content-based and, while admitting that the protection of life is a valid and important state interest, did not believe the law in question was drawn narrowly enough to avoid "impeding too greatly on individual liberty interests."<sup>114</sup> The Fourth Circuit found the law exceeded the confines of the Pennsylvania abortion-related disclosure law the Supreme Court found constitutional in *Casey*.<sup>115</sup> The physician requirements imposed by the Pennsylvania law, the Fourth Circuit reasoned, "deviate[d] only modestly from traditional informed consent,"<sup>116</sup> while the additional requirements imposed by the North Carolina law, specifically the forced sonogram viewing and verbal description, impermissibly "[t]ransform[] the physician into the mouthpiece of the state."<sup>117</sup> The requirements took what should be an open dialogue between a physician and their patient and turned it into a lecture by the physician with no possibility to frame the conversation with the information most relevant to that particular patient.<sup>118</sup> Therefore, the Fourth Circuit held the North Carolina law violated the First Amendment rights of the physicians

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111. *Id.* at 249 "[T]he plurality simply stated that it saw 'no constitutional infirmity in the requirement that the physician provide the information mandated by the State *here*.'" (quoting *Casey*, 505 U.S. at 884)).

112. *Id.* at 250. There were no exceptions listed in the law for the requirements, except for a medical emergency. *Id.* at 243. The physician was required to continue sharing the required information even if the patient covered their eyes and ears. *Id.*

113. *Id.* at 248 (emphasis omitted) (quoting *Pickup v. Brown* 740 F.3d 1208, 1227, 1229 (9th Cir. 2013)). The Ninth Circuit describes this continuum further. First Amendment protection is greatest in the "public dialogue" side of the continuum and slides to "professional conduct," which includes forms of treatment, where the state's power to regulate is greater. *Harris*, 839 F.3d at 839 (quoting *Pickup*, 740 F.3d at 1227–29).

114. *Stuart*, 774 F.3d at 246–50.

115. *Id.* at 250.

116. *Id.* at 252. Informed consent, established to ensure that patients make autonomous choices about their own body, requires that physicians give patients information regarding "the diagnosis, the prognosis, alternative treatment options (including no treatment), and the risks and likely results of each option." *Id.* at 251. In *Casey*, the abortion-related disclosures deviate from informed consent because they additionally require the physician to inform the person of the gestational age of the fetus and let them know of additional state materials they can review if they wish regarding available resources if the person decides not to get an abortion. *Id.* at 252.

117. *Id.* at 253–54.

118. *Id.*

and affirmed the district court's grant of a preliminary injunction.<sup>119</sup> However, as discussed below, the Fourth Circuit came to a different conclusion in *Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor of Baltimore*.<sup>120</sup>

*C. Abortion-Related Disclosure with a "Twist": Requiring Disclosure for Crisis Pregnancy Centers Instead of Abortion Providers*

After *Roe v. Wade* legalized abortion, states often attempted to require abortion providers to disclose information to a person seeking an abortion<sup>121</sup>—especially after the change to the undue burden standard in *Casey*.<sup>122</sup> However, states and cities began requiring abortion-related disclosures on the “flip side”: Instead of requiring abortion providers to disclose information to those seeking abortions, those organizations seeking to prevent and reduce abortions (namely, crisis pregnancy centers) were required to disclose that abortions were available in other locations or were not available at that location.<sup>123</sup> Specifically, this occurred in Baltimore, Maryland<sup>124</sup> and most recently in California.<sup>125</sup>

*1. The Maryland Connection: Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor of Baltimore*

Both Baltimore City and the State of California attempted to shift the onus of the abortion-related disclosure from the previous model; instead of tasking the abortion provider with delivering a variety of state-required messaging regarding the risks of abortion, Baltimore City and California required crisis pregnancy centers to inform their clients of services not provided by the centers.<sup>126</sup> However, both cases for the disclosure were ultimately unsuccessful.

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119. *Id.* at 256.

120. 879 F.3d 101 (4th Cir. 2018).

121. *See, e.g.*, *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 422–24 (1983) (requiring the physician to “make certain specified statements to the patient”).

122. *See An Overview of Abortion Laws, supra* note 18 (highlighting the many states that require state-mandated counseling and other requirements prior to an abortion).

123. *See, e.g.*, *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.*, 879 F.3d 101, 106 (4th Cir. 2018) (discussing the city's requirement that crisis pregnancy centers post a notice in their waiting room indicating they do not offer abortion services); *NIFLA v. Harris*, 839 F.3d 823, 830 (9th Cir. 2016), *rev'd sub nom*, *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018) (discussing the state's requirement that crisis pregnancy centers, along with other licensed and unlicensed pregnancy centers, display information regarding state abortion services).

124. *See infra* Section I.C.1.

125. *See infra* Section I.C.2–3.

126. *Greater Balt. Ctr. for Pregnancy Concerns, Inc.*, 879 F.3d at 106; *Becerra*, 138 S. Ct. at 2368.

In 2009, Baltimore enacted City Ordinance 09-252 requiring any limited service pregnancy center to post a conspicuous disclaimer in the waiting room in both English and Spanish stating that the center “does not provide or make referral for abortion or birth-control services.”<sup>127</sup> Given the clear targeting of limited service pregnancy centers (otherwise known as crisis pregnancy centers), the ordinance was neither facility-neutral nor audience-neutral.<sup>128</sup> The Greater Baltimore Center for Pregnancy Concerns, a crisis pregnancy center that did not refer for abortions, filed an injunction, citing First Amendment free speech violations.<sup>129</sup> The Fourth Circuit ultimately decided that the ordinance regulated neither commercial speech nor professional speech.<sup>130</sup> It found the ordinance to be both content-based and viewpoint-discriminatory, as it applied only to pregnancy-related service facilities and no other parties.<sup>131</sup> Given these findings, the Fourth Circuit reviewed the ordinance under the strict scrutiny standard.<sup>132</sup> While the court agreed that “[t]he City’s interests are plainly important,” they found a lack of hard evidence proving the ordinance was necessary to correct the effect of deceptive advertising on behalf of the crisis pregnancy centers.<sup>133</sup> Additionally, the court remained unconvinced that the City could not enact less restrictive requirements to reach its goal, such as a public information campaign, rather than requiring the crisis pregnancy centers to publish information counter to its mission.<sup>134</sup> Although the Supreme Court denied certiorari, the Court granted certiorari for an abortion-related disclosure case that also flipped the disclosure onto crisis pregnancy centers rather than abortion providers in the 2017 term.<sup>135</sup>

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127. *Greater Balt. Ctr. for Pregnancy Concerns, Inc.*, 879 F.3d at 106 (quoting Balt. City Health Code §§ 3-501 to 3-506 (2010)).

128. The ordinance defined “limited-service pregnancy center” as “any entity ‘whose primary purpose is to provide pregnancy-related services’ . . . but ‘does not provide or refer for’ abortions or ‘nondirective and comprehensive’ birth control.” *Id.* at 106 (quoting Balt. City Health Code § 3-501).

129. *Id.*

130. *Id.* at 108–09.

131. *Id.* at 112.

132. *Id.* at 111. The strict scrutiny test “requires that compelled disclosures be ‘narrowly tailored’ to achieve a ‘weighty’ government interest.” *Id.* (quoting *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 798 (1988)).

133. *Id.*

134. *Id.* at 112.

135. *Mayor of Balt. v. Greater Balt. Ctr. for Pregnancy Concerns, Inc.*, 138 S. Ct. 2710 (2018); see *infra* Section I.C.3.

2. *NIFLA v. Harris: The Ninth Circuit Finds California's Abortion-Related Disclosure for Crisis Pregnancy Centers to Withstand Intermediate Scrutiny*

In *NIFLA v. Harris*,<sup>136</sup> which subsequently went to the Supreme Court as *NIFLA v. Becerra*,<sup>137</sup> the onus of the abortion-related disclosure again shifted from the abortion provider to crisis pregnancy centers. The California legislature passed the California Freedom, Accountability, Comprehensive Care, and Transparency Act (“FACT Act”) to ensure that “[a]ll California [people], regardless of income, . . . have access to reproductive health services.”<sup>138</sup> Research suggested that thousands of people were unaware of public state-funded family planning programs, including abortion.<sup>139</sup> Due to the time-sensitive nature of pregnancy, especially if the pregnant person wishes to consider abortion, the legislature found the most effective way to give pregnant people notice about state-funded programs was to require licensed pregnancy-related clinics to inform their pregnant clients of these programs.<sup>140</sup> This “Licensed Notice,” to be posted conspicuously in a waiting area or given to each client in printed or digital form, read: “California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible [people]. To determine whether you qualify, contact the county social services office at [insert the telephone number].”<sup>141</sup> Additionally, the legislature found that crisis pregnancy centers, which “aim to discourage and prevent [people] from seeking abortions,” interfered with a person’s “ability to be fully informed and exercise their reproductive rights.”<sup>142</sup> These centers sometimes portrayed themselves as health clinics when they actually held no licensure with the state.<sup>143</sup> To address this problem, the FACT Act required unlicensed clinics to provide a second notice, known as the “Unlicensed Notice,” to clients on site and in any advertising: “This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services.”<sup>144</sup> The National Institute of Family and Life Advocates (“NIFLA”), along with

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136. 839 F.3d 823 (9th Cir. 2016), *rev'd sub nom.* *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018).

137. 138 S. Ct. 2361 (2018).

138. *Harris*, 839 F.3d at 829 (first and third alterations in original) (quoting FACT Act, A.B. No. 775 §1(a), 2015 Cal. Stat. 5351, 5352).

139. *Id.*

140. *Id.* at 830.

141. *Id.* (second alteration in original) (quoting 2015 Cal Stat. 5351, 5353).

142. *Id.* at 829 (quoting Cal. Assem. Comm. on Health, Analysis, AB 775, 2015–2016 Leg., Reg. Sess., at 3 (2015)).

143. *Id.*

144. *Id.* at 830 (quoting 2015 Cal. Stat. 5351, 5354).

other crisis pregnancy center organizations, challenged the two notices as unconstitutional on First Amendment free speech grounds.<sup>145</sup>

The Ninth Circuit found that both the Licensed Notice and the Unlicensed Notice passed First Amendment requirements regarding abortion-related disclosures.<sup>146</sup> The Ninth Circuit, like the Fourth Circuit, stated that *Casey* did not establish a reasonableness rule regarding the level of scrutiny courts must apply to abortion-related disclosures and instead applied the continuum approach used in *Stuart*.<sup>147</sup> The court found the FACT Act to be content-based but not viewpoint discriminatory.<sup>148</sup> While the Ninth Circuit admitted that compelling the pregnancy-related facilities to post the Licensed or Unlicensed Notice when the facilities might not otherwise post them “necessarily alters the content of the speech,” the Notices were not viewpoint discriminatory because all pregnancy-related facilities had to post them, regardless of their ideology or personal feelings towards abortion.<sup>149</sup> Following this determination, the court found that intermediate scrutiny was appropriate for the Licensed Notice as it fell in the middle of the continuum, affording the medical professional some First Amendment protection while recognizing that the protection is diminished within the confines of a professional relationship.<sup>150</sup> Additionally, the Licensed Notice survived intermediate scrutiny since the state has substantial interest in the health of its citizens and ensuring they have access to state-sponsored medical services including abortion.<sup>151</sup> The Licensed Notice was drawn to achieve this state interest because it only informed readers of the services and did not encourage their use.<sup>152</sup> While NIFLA argued that the state could find other ways to disseminate the Licensed Notice information, such as a public information campaign, the Ninth Circuit found that given the time-sensitive nature of pregnancy, an effective way to let pregnant people know about the services was to inform them anytime they went to a clinic.<sup>153</sup> Additionally, the court found that the Unlicensed Notice survived any level of review,

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145. *Id.* at 831.

146. *Id.* at 841, 843.

147. *Id.* at 837–39.

148. *Id.* at 835.

149. *Id.* (quoting *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)).

150. *Id.* at 840.

151. *Id.* at 841.

152. *Id.* at 842.

153. *Id.* Additionally, since the court was using intermediate scrutiny, there was no requirement for the state to use the least restrictive means possible to communicate their message as there had been in other cases reviewed under strict scrutiny. *See, e.g.*, *Evergreen Ass’n, Inc. v. City of N.Y.*, 740 F.3d 233, 250 (2d Cir. 2014) (striking down the New York City Department of Health and Mental Hygiene’s regulation encouraging pregnant people to consult with a licensed provider under strict scrutiny, stating that the government could use an advertising campaign); *Centro Tepeyac v. Montgomery Cty.*, 722 F.3d 184, 190–91 (4th Cir. 2013) (striking down a county ordinance similar to *Evergreen* under strict scrutiny, finding the government had “several options less restrictive than compelled speech” (quoting *Centro Tepeyac v. Montgomery Cty.*, 779 F. Supp. 2d 456, 469 n.9 (D. Md. 2011))).

even strict scrutiny, since the state has a compelling interest to make sure its citizens know whether a clinic is licensed or not before entrusting that clinic with their wellbeing.<sup>154</sup> NIFLA appealed the Ninth Circuit's opinion.

3. *NIFLA v. Becerra: On Appeal, the Supreme Court Reversed the Ninth Circuit but Failed to Resolve the Circuit Split Regarding the Casey Reasonableness Test*

On appeal from the Ninth Circuit, the Supreme Court granted certiorari and heard *NIFLA v. Becerra*.<sup>155</sup> The Court determined that the Licensed Notice constituted a content-based regulation of speech, as it “compell[ed] individuals to speak a particular message” and, therefore, “alte[r] the content of [their] speech.”<sup>156</sup> The Court indicated that content-based regulations cannot be imposed by the state unless there is persuasive evidence of a long-standing tradition of such restriction; in this case, the Court was not persuaded.<sup>157</sup> The Court also failed to find that the notices fell under the umbrella of commercial speech, another sub-category afforded less protection under the First Amendment.<sup>158</sup>

However, even if a separate category of speech did exist and applied to the notice, the Court found the Licensed Notice did not meet intermediate scrutiny, let alone strict scrutiny.<sup>159</sup> While the legislature's stated goal was to reach people who were unfamiliar with the state services, the Licensed Notice only applied to pregnancy-specific clinics, not all clinics.<sup>160</sup> Given this goal, why would the legislature require the notice only in a narrow subset of clinics?<sup>161</sup> Therefore, the Court found that NIFLA and the other petitioners were likely to succeed on the merits of their Licensed Notice challenge.<sup>162</sup>

The Court found the Unlicensed Notice to be unjustified and unduly burdensome.<sup>163</sup> The Court described the state's justification for the notice as “purely hypothetical” and found that imposing this notice requirement only on unlicensed pregnancy-related clinics and not on other unlicensed clinics distinguished between the speech of different speakers (or in this case, different clinics), making it viewpoint discriminatory.<sup>164</sup> Additional-

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154. *Id.* at 843.

155. 138 S. Ct. 2361 (2018), *rev'g* *NIFLA v. Harris*, 839 F.3d 823 (9th Cir. 2016).

156. *Id.* at 2380 (second and third alterations in original) (quoting *Riley v. Nat'l Fed'n of Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988)).

157. *Id.* at 2372.

158. *Id.*

159. *Id.* at 2375.

160. *Id.*

161. *Id.* at 2376.

162. *Id.*

163. *Id.* at 2377.

164. *Id.* at 2377–78.

ly, the Court found the Unlicensed Notice burdensome as the notice applied to all print and digital advertising and one California county required disclosures to be in thirteen languages.<sup>165</sup> Therefore, the Court also found the petitioners were likely to succeed on the merits of their Unlicensed Notice challenge.<sup>166</sup>

While the Supreme Court decided *Becerra* in the opposite fashion of the Ninth Circuit, the Court did not resolve the circuit split regarding whether *Casey* established a reasonableness test for physician abortion-related disclosures. The number of these abortion-related disclosures grew exponentially following *Casey*, but confusion remains regarding which disclosures are constitutional and which are not.<sup>167</sup> While the Supreme Court could have taken *Becerra* as an opportunity to resolve the circuit split regarding whether *Casey* instituted a new test for abortion-related disclosures, the Court did not resolve this split.<sup>168</sup> Additionally, as Baltimore City and California have tried to flip abortion-related disclosures and place the onus on those who wish to avoid or deter abortions rather than on those who wish to perform or undergo an abortion, they have not been successful.<sup>169</sup>

## II. ANALYSIS

Given the lack of success in targeting abortion-related disclosures at crisis pregnancy centers,<sup>170</sup> it may be time to consider a new and novel approach. The Maryland General Assembly should create a Pregnancy Disclosure, a written document to be distributed when a person is first diagnosed as pregnant or when a person first reports their pregnancy, that details the full range of available resources and the potential risks of both abortion and childbirth in order to fully inform a pregnant person of their options. In Section II.A, this analysis begins with a discussion of the elements and format of the Pregnancy Disclosure.<sup>171</sup> Section II.B then explains the precedents that indicate the constitutionality of the Pregnancy Disclosure.<sup>172</sup> Lastly, Section II.C discusses why the Pregnancy Disclosure has constitutional advantages.<sup>173</sup>

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165. *Id.* at 2378.

166. *Id.*

167. *See supra* note 24.

168. *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018).

169. *See, e.g., id.* at 2378 (finding that NIFLA were “likely to succeed on the merits of their claim that the FACT Act violates the First Amendment”); *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor of Balt.*, 879 F.3d 101, 113 (4th Cir. 2018) (finding that the city “fails to satisfy heightened First Amendment scrutiny”).

170. *See supra* note 169.

171. *See infra* Section II.A.

172. *See infra* Section II.B.1–2.

173. *See infra* Section II.C.

A. *Elements and Format of the Pregnancy Disclosure*

Health care facility personnel or pregnancy-related facility personnel, whenever a person is either first diagnosed as pregnant or first reports their pregnancy, should provide the Pregnancy Disclosure in a written format. While the written format still requires the facility personnel to provide information they may not agree with, it allows the pregnant person and the facility personnel to engage in a conversation appropriate to the individual pregnant person's questions and concerns.<sup>174</sup> The facility personnel should provide the Pregnancy Disclosure in the person's preferred language and may provide an electronic or digital copy unless the person requests a hard copy.<sup>175</sup> The health care facility could mean any facility governed by the Maryland Office of Health Care Quality<sup>176</sup> or a licensed physician's office or practice.<sup>177</sup> Additionally, the requirements determining a pregnancy-related facility should be similar to those found in California's FACT Act discussed in *NIFLA v. Becerra* to capture any place of business that may interact with pregnant people and fall outside of the health care facility category.<sup>178</sup> Therefore, the Pregnancy Disclosure will be facility-neutral, unlike other abortion-related disclosures that targeted crisis pregnancy centers.<sup>179</sup> The Pregnancy Disclosure will also be audience-neutral, as it will not target pregnant people who have expressed their wish to have an abortion.<sup>180</sup>

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174. The lack of a required verbal disclosure by the physician differentiates the Pregnancy Disclosure from the North Carolina law ruled unconstitutional in *Stuart v. Camnitz*, which required the physician to verbally describe the fetus in detail while displaying an ultrasound image, even if the pregnant person did not want to hear or see it. 774 F.3d 238, 243 (4th Cir. 2014).

175. Regarding translation, see MD. CODE ANN., State Gov't § 10-1103 (2018) for state services. The Pregnancy Disclosure could be provided through the Department of Health.

176. Such as freestanding birthing centers (MD. CODE REGS. 10.05.02 (2017)), Acute General Hospitals and Special Hospitals (MD. CODE REGS. 10.07.01 (2018)), and Surgical Abortion Facilities (MD. CODE REGS. 10.12.01 (2017)).

177. Including physicians' services (MD. CODE REGS. 10.09.02 (2018)) and freestanding clinics (MD. CODE REGS. 10.09.08 (2018)).

178. If the facility provides two or more of the following, they should be considered a pregnancy-related facility and subject to the Pregnancy Disclosure requirements: (1) offers pregnancy testing/diagnosis; (2) offers ultrasounds, sonograms, or prenatal care; (3) advertises or solicits patrons with offers to provide sonography, tests, counseling; (4) offers abortion services; (5) staff or volunteers collect health information from clients. *NIFLA v. Becerra*, 138 S. Ct. 2361, 2369 (2018).

179. In *Becerra*, the FACT Act specifically attempted to regulate crisis pregnancy centers, which the California State Assembly defined as "pro-life (largely Christian belief-based) organizations that offer a limited range of free pregnancy options, counseling, and other services." 138 S. Ct. at 2368 (quoting WATTERS ET AL., PREGNANCY RESOURCE CENTERS: ENSURING ACCESS AND ACCURACY OF INFORMATION 4 (2011)). In *Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor of Baltimore*, the Baltimore City ordinance applied only to "limited-service pregnancy centers" that provided pregnancy-related information but did not refer for abortions or comprehensive birth control. 879 F.3d 101, 106 (4th Cir. 2018) (quoting BALT. CITY HEALTH CODE §§ 3-501–3-506 (2010)).

180. In *Casey*, *Lakey*, and *Rounds*, the disclosures in question were required of physicians before performing an abortion. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992);

The Pregnancy Disclosure should include pregnancy-related resources within either the county or the state, including but not limited to abortion providers, crisis pregnancy centers, and adoption agencies, and provide the names of the resources, services provided at each resource, and contact information. The Pregnancy Disclosure should also contain informed consent information for both abortion and childbirth, including the scientifically valid risks and potential side effects of both.<sup>181</sup> A physician or other health care provider, before performing an abortion procedure or before acting as a pregnant person's obstetrician, nurse-midwife, or otherwise delivering a baby should ensure that their patient has read and understood the information contained in the Pregnancy Disclosure regarding the upcoming procedure.<sup>182</sup> While these requirements necessitate health care providers passing on a fair amount of information on the state's behalf, the Pregnancy Disclosure will likely be constitutionally sound.<sup>183</sup>

*B. The Pregnancy Disclosure Meets Both the Reasonableness Test and the Intermediate Scrutiny Test*

Regardless of whether the Supreme Court decides if *Planned Parenthood of Southeastern Pennsylvania v. Casey* established a new test for abortion-related disclosures<sup>184</sup> or if the intermediate scrutiny test used by the Fourth and Ninth Circuits is more appropriate,<sup>185</sup> the Pregnancy Disclosure is constitutional. The Pregnancy Disclosure does not discriminate regarding what types of facilities must provide the Pregnancy Disclosure, unlike the FACT Act in *Becerra* or the Baltimore City Ordinance in *Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor of Baltimore*.<sup>186</sup> While both of these laws targeted crisis pregnancy centers,

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Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 573 (5th Cir. 2012); *Planned Parenthood Minn., N.D., & S.D. v. Rounds*, 530 F.3d 724, 726 (8th Cir. 2008).

181. Currently, thirty states do require that information regarding the health risks of continuing a pregnancy are included in an abortion-related disclosure. *Counseling and Waiting Periods for Abortion*, GUTTMACHER INST. (Feb. 1, 2019), <https://www.guttmacher.org/state-policy/explore/counseling-and-waiting-periods-abortion>. However, several states' disclosures include inaccurate or scientifically invalid information and risks associated with abortion. See *supra* note 18.

182. This is standard for informed consent—to ensure that the patient read and understood the risks and potential side effects of a medical procedure. *Informed Consent*, AMERICAN MEDICAL ASSOCIATION, <https://www.ama-assn.org/delivering-care/ethics/informed-consent> (last visited Feb. 6, 2019).

183. Currently, a Maryland law exists stating that a provider or hospital cannot be required to refer for abortion. MD. CODE ANN., HEALTH-GEN. § 20-214 (West 2018). However, it may be overcome given the facility-neutral and audience-neutral approach of the Pregnancy Disclosure. Both liberal and conservative state representatives have an interest in passing the Pregnancy Disclosure since it includes information about abortion services, but also includes information about faith-based groups like crisis pregnancy centers and about the risks of abortion.

184. See *infra* Section II.B.1.

185. See *infra* Section II.B.2.

186. See *supra* note 179.

the Pregnancy Disclosure expands to all pregnancy-related facilities and also other health care facilities that are not pregnancy specific. Instead of warning those people going to crisis pregnancy centers, the Pregnancy Disclosure takes a holistic approach to educating pregnant people early regarding the available resources and risks of either abortion or childbirth. While the Pregnancy Disclosure requires the facility personnel to deliver the state's message, doing so in a written format like the Pregnancy Disclosure is less invasive to the facility personnel's First Amendment rights than requiring a verbal disclosure.<sup>187</sup> Having defined the terms of the Pregnancy Disclosure, it can be examined more closely under both the *Casey* reasonableness test and the intermediate scrutiny test.

*1. The Pregnancy Disclosure Meets the Casey Reasonableness Test Since It Is Truthful and Nonmisleading*

Given that Maryland will most likely be subjected to the intermediate scrutiny test, the Pregnancy Disclosure should stand.<sup>188</sup> However, even if a future Supreme Court solidifies that *Casey* established a reasonableness abortion-related disclosure test, the Pregnancy Disclosure should still surpass these test requirements. As previously discussed,<sup>189</sup> since physicians are "subject to reasonable licensing and regulation by the State,"<sup>190</sup> the Fifth and Eighth Circuit Courts find that language in *Casey* established a reasonableness test that only requires the abortion-related disclosure to be truthful and non-misleading to withstand a First Amendment claim.<sup>191</sup> In this case, the Pregnancy Disclosure will contain only factual and scientifically valid information regarding both abortion and childbirth risks. It will not contain any encouragement regarding which path a pregnant person should choose. While *Casey* states that the disclosure will be allowed even when "the State expresses a preference for childbirth over abortion,"<sup>192</sup> there should be no encouragement of neither childbirth nor abortion in this Pregnancy Disclosure.

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187. See *Stuart v. Camnitz*, 774 F.3d 238, 253 (4th Cir. 2012) ("The coercive effects of the speech are magnified when the physician is compelled to deliver the state's preferred message in his or her own voice. This Requirement treads far more heavily on the physicians' free speech rights than the state pamphlet provisions at issue in *Casey*.").

188. Maryland is in the Fourth Circuit, which chose to use the intermediate scrutiny test and found that *Casey* did not establish a new test for abortion-related disclosures. *Stuart v. Camnitz*, 774 F.3d 238, 248 (4th Cir. 2014).

189. See *supra* Section I.B.1.

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

191. See, e.g., *Planned Parenthood of Minn., N.D., & S.D. v. Rounds*, 530 F.3d 724, 734 (8th Cir. 2008) (finding South Dakota's abortion-related disclosure to be truthful and nonmisleading); *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576 (5th Cir. 2012) (finding Texas's abortion-related disclosure to be truthful and nonmisleading).

192. 505 U.S. at 882.

sure.<sup>193</sup> Therefore, given the straightforward nature of the reasonableness test, the Pregnancy Disclosure should be found constitutional.

2. *The Pregnancy Disclosure Meets the Intermediate Scrutiny Test Because There Is a Significant Government Interest and the Disclosure Addresses That Interest*

The Fourth Circuit upheld the intermediate scrutiny test for abortion-related disclosures in *Stuart v. Camnitz*.<sup>194</sup> Therefore, given that Maryland falls within the Fourth Circuit, it is most likely that the Pregnancy Disclosure would be reviewed under intermediate scrutiny.

To begin, it first must be determined whether the law or regulation is content-based.<sup>195</sup> Because the Pregnancy Disclosure requires all health care facilities and pregnancy-related facilities to provide information that they might not otherwise provide, it qualifies as content-based.<sup>196</sup> In this case, the content-based nature of the Pregnancy Disclosure is not dispositive according to the Fourth and Ninth Circuits.<sup>197</sup> The next point to consider is whether the law is viewpoint discriminatory.<sup>198</sup> If the law is found to be viewpoint discriminatory, it is presumptively unconstitutional.<sup>199</sup> In this case, the Pregnancy Disclosure does not promote one ideological view over another.<sup>200</sup> No viewpoint or encouragement is offered; rather, only resources and scientifically valid information regarding pregnancy, abortion, and childbirth.

Since the Pregnancy Disclosure is content-based but viewpoint neutral, the First Amendment analysis can proceed. On the continuum of First

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193. This differentiates the Pregnancy Disclosure from another Maryland case, *Centro Tepyac v. Montgomery County*, 722 F.3d 184 (4th Cir. 2013), in which the county disclosure encouraged pregnant people to consult with a licensed health care provider.

194. See *supra* Section I.B.2.

195. “A regulation discriminates based on content when ‘on its face,’ the regulation ‘draws distinctions based on the message a speaker conveys.’” *NIFLA v. Harris*, 839 F.3d 823, 835 (9th Cir. 2016), *rev’d sub nom.* *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018) (quoting *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015)).

196. In fact, no health care facility or pregnancy-related facility would be likely to provide all of the information found in the Pregnancy Disclosure. It is likely that the abortion services providers would not normally provide information about crisis pregnancy centers and vice versa.

197. See, e.g., *Stuart*, 774 F.3d at 245 (discussing that abortion-related disclosures that are content-based may still be valid); *Harris*, 839 F.3d at 834 (finding content-based disclosures can continue through the First Amendment analysis).

198. Viewpoint discriminatory means that the law is “based on ‘the specific motivating ideology or the opinion or perspective of the speaker.’” *Reed*, 135 S. Ct. at 2230 (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)).

199. *Reed* finds that viewpoint-discriminatory laws or regulations are an “egregious form of content discrimination” and, therefore, presumptively unconstitutional. *Id.* (quoting *Rosenberger*, 515 U.S. at 829).

200. While both abortion service providers and crisis pregnancy centers are listed in the information section of the Disclosure, and the risks of abortion are included in the informed consent section of the Disclosure, there is no ideological view expressed.

Amendment scrutiny methodology, the Pregnancy Disclosure falls in the middle; while it does not constitute professional conduct or treatment, it is also not public dialogue.<sup>201</sup> Substantial regulation is allowed since professionals are advancing the welfare of their patients, not contributing to public debate, when engaging in a patient-physician relationship.<sup>202</sup> Because the Pregnancy Disclosure falls at the midpoint, the appropriate level of scrutiny is neither strict scrutiny, used in a public dialogue context, or rational basis, which gives great state power and control.<sup>203</sup> Rather, the appropriate test is intermediate scrutiny, which requires that the Pregnancy Disclosure advance a substantial government interest and that the disclosure is drawn to achieve that interest.<sup>204</sup>

The Pregnancy Disclosure advances a significant government interest in making sure all pregnant people are aware of all available options regarding their pregnancy and are informed of the potential risks and side effects of medical procedures such as abortion. As previously stated, fifty-eight percent, or more than 70,000, of total pregnancies in Maryland were unintended in 2010;<sup>205</sup> when more than half of the pregnant population of the state did not plan for that pregnancy, there is a high likelihood that some of these pregnant people may be unaware of the options and resources. It is clearly a significant government interest to ensure these pregnant Marylanders understand these options, including abortion, and the resources available to them. Given the time sensitive nature of pregnancy, it is also vital that pregnant people receive this information as soon as possible; therefore, as reasoned in California's FACT Act, the best way to reach these pregnant people is through health care facilities or pregnancy-related facilities.<sup>206</sup> While the Pregnancy Disclosure is required more widely across all health care facilities and pregnancy-related facilities unlike previous abortion-related disclosures, this audience-neutral and facility-neutral wide net allows the pregnant person to be informed of all their options as early as possible.<sup>207</sup> With the Pregnancy Disclosure, pregnant people are informed of all their options and the risks of both abortion and childbirth as soon as the pregnancy becomes known to the health care provider. Whether the person decides to have an abortion or carry the child to term, the Pregnancy

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201. See *Pickup v. Brown*, 728 F.3d 1042, 1053–55 (9th Cir. 2013) (finding that there is a middle ground for professionals such as physicians that falls between public dialogue and professional conduct).

202. *Id.*

203. *Id.*

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

205. See KOST, *supra* note 2.

206. *NIFLA v. Becerra*, 138 S. Ct. 2361, 2369 (2018).

207. Abortion-related disclosures like Pennsylvania's in *Planned Parenthood of Southeastern Pennsylvania v. Casey* do not take effect until a person has expressed their wish to have an abortion. 505 U.S. at 844.

Disclosure unveils valuable information and resources to make the decision as soon as possible and with all the necessary information in a format that does not encourage or discourage any path forward. Consequently, the Pregnancy Disclosure advances a significant government interest, namely the state's interest in the public health of the pregnant population in the state. From a public health perspective, the wide array of health facilities and professionals included within the Pregnancy Disclosure, making it facility-neutral, should alert a large percentage of pregnant people early in their pregnancy to important resources.<sup>208</sup> This allows the pregnant person sufficient notice of their options and the resources available. The audience-neutral approach of the Pregnancy Disclosure also gets this vital information to all pregnant people, regardless of whether they consider an abortion or not.<sup>209</sup> The early months of a pregnancy are crucial when deciding to terminate the pregnancy or to carry the fetus to term; abortion procedures are simpler, less invasive, and cheaper in the earlier weeks and months<sup>210</sup> and, similarly, prenatal care, such as ensuring the appropriate amount of folic acid, is vital to the healthy development of a pregnancy that will be continued.<sup>211</sup> The earlier the pregnant people of Maryland receive this information, the earlier they can engage with whatever resources they may need to help them make a decision and the quicker they can feel more in control regarding what lies ahead.<sup>212</sup>

Additionally, the Pregnancy Disclosure is drawn to achieve this state interest in its pregnant population's health by reaching the pregnant person at the earliest possible point through a facility-neutral and audience-neutral net of all health care facilities and pregnancy-related facilities. Therefore, under the intermediate scrutiny test, the Pregnancy Disclosure does not violate the First Amendment.

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208. In a survey, ninety-seven percent of practicing obstetrician-gynecologists encountered patients seeking abortions. Debra B. Stulberg et al., *Abortion Provision Among Practicing Obstetrician-Gynecologists*, 118 *OBSTETRICS & GYNECOLOGY* 609, 611 (2011).

209. Currently, abortion-related disclosures do not occur until a pregnant person enters an abortion clinic or other facility offering abortions and requests the procedure. *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992) (requiring a disclosure when a person wants to have an abortion, but not otherwise required for pregnant people at large).

210. First-trimester abortions carry minimal risk and there is almost no risk of future problems such as infertility or ectopic pregnancy. GUTTMACHER INST., *FACT SHEET: INDUCED ABORTION IN THE UNITED STATES* 2 (2018), [https://www.guttmacher.org/sites/default/files/factsheet/fb\\_induced\\_abortion.pdf](https://www.guttmacher.org/sites/default/files/factsheet/fb_induced_abortion.pdf).

211. *What Is Prenatal Care and Why Is It Important?*, EUNICE KENNEDY SHRIVER NATIONAL INST. OF CHILD HEALTH AND HUMAN DEV. (Jan. 31, 2017), <https://www.nichd.nih.gov/health/topics/pregnancy/conditioninfo/prenatal-care>. Additionally, prenatal care helps reduce the risk of pregnancy complications and the fetus and infant's risk of complications, as well as ensure the pregnant person's diet and medication usage is safe for the fetus. *Id.*

212. "In the healthcare context, mandated disclosures can successfully preserve patient choice and broader liberty interests, impart important dignitary values, and restore a semblance of control to helpless-feeling patients." Erin Bernstein, *The Upside of Abortion Disclosure Laws*, 24 *STANFORD L. & POL'Y REV.* 171, 197 (2013) (footnotes omitted).

*C. Constitutional Advantages Make the Pregnancy Disclosure an Attractive Option for the Maryland General Assembly*

In addition to being constitutional under the reasonableness test and intermediate scrutiny test, the Pregnancy Disclosure has additional constitutional advantages. While abortion-related disclosures are often fought through litigation by various groups,<sup>213</sup> in this case groups from both sides of the debate can band together to form the Pregnancy Disclosure. Given that it is facility-neutral and audience-neutral, in addition to providing information about both crisis pregnancy centers and abortion services, it should find wide-ranging support. Additionally, the legislative process rather than legal challenges and litigation regarding abortion-related disclosures will allow Maryland citizens to share their thoughts and concerns with their elected representatives regarding the content of the Pregnancy Disclosure. Working through the legislative process will signify that the people of Maryland, through their representatives, support an inclusive and informational message to all pregnant people regarding all of their options.

### III. CONCLUSION

Since the legalization of abortion in 1973 after *Roe v. Wade*, the permissibility of abortion-related disclosures has changed over time.<sup>214</sup> Given the recent decision in *NIFLA v. Becerra*,<sup>215</sup> Maryland should institute a novel approach to protect and inform its pregnant population. The Maryland General Assembly should pass a facility-neutral and audience-neutral Pregnancy Disclosure that informs all pregnant people of the available resources and the scientifically valid risks of both abortions and childbirth. This comprehensive document will fully inform and empower all pregnant people to make their own best choice. The Pregnancy Disclosure should pass constitutional muster under either the *Casey* reasonableness test,<sup>216</sup> if the Court should declare it to be the test for abortion-related disclosures, or

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213. See, e.g., *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976) (describing that Planned Parenthood initiated a lawsuit against the state regarding the spousal notification requirement); *Casey*, 505 U.S. 833 (1992) (describing that Planned Parenthood of Southeastern Pennsylvania sued for injunctive relief from the act passed by the Pennsylvania legislature); *Planned Parenthood of Minn., N.D., & S.D. v. Rounds*, 530 F.3d 724 (8th Cir. 2008) (describing Planned Parenthood of Minnesota, North Dakota & South Dakota filed a suit against the enactment of the South Dakota bill).

214. See, e.g., *Becerra*, 138 S. Ct. 2361 (2018); *Stuart*, 774 F.3d 238 (2014); *Lakey*, 667 F.3d 570 (2012); *Rounds*, 530 F.3d 724 (2008); *Casey*, 505 U.S. 833 (1992); *Thornburgh v. American Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986); *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416 (1983); *Danforth*, 428 U.S. 52 (1976).

215. In which the Supreme Court struck down an abortion-related disclosure directed at crisis pregnancy centers, rather than the “traditional” abortion-related disclosure allowed after *Casey* directed at abortion providers. *Becerra*, 138 S. Ct. at 2378.

216. See *supra* Section II.B.1.

the current Fourth Circuit precedent intermediate scrutiny test.<sup>217</sup> Additionally, the Pregnancy Disclosure has both constitutional and public health advantages beyond just properly informing the pregnant population<sup>218</sup>—it shows that Maryland residents wish for pregnant people to be fully informed about all of their options and resources from the earliest point, and it staves off potential litigation regarding the policy reflected in the Pregnancy Disclosure. Ultimately, instituting the proposed Pregnancy Disclosure will better serve all future pregnant people in Maryland, especially those with unintended pregnancies, by ensuring that every pregnant person knows of the available resources and the potential risks. The Pregnancy Disclosure will help avoid stories like those told by Sharon,<sup>219</sup> Cherisse,<sup>220</sup> and Sarah,<sup>221</sup> and instead allow every individual to make the best choice for themselves and their loved ones.

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217. *See supra* Section II.B.2.

218. *See supra* Section II.C.

219. *See supra* note 4.

220. *See supra* note 7.

221. *See supra* note 11.