Legal Victories for Life

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I. Introduction
   A. Introduce Kristen and ADF
   B. Briefly mention the *Dobbs* decision and ADF involvement
   C. Connect the legal victories for life to Isaiah 42:9 (theme verse for National Leadership Summit)

II. *Dobbs v. Jackson Women's Health Organization*
   A. Discuss Supreme Court's decision and ADF's involvement in more detail.
      1. The Gestational Age Act in Mississippi in 2018 limits abortions after 15 weeks of gestational age, permitting them only in medical emergencies or for severe fetal abnormality.
      2. ADF worked with Mississippi lawmakers and Governor Bryant to draft and enact the Gestational Age Act in 2018, and they served on the Mississippi team defending the law at the Supreme Court as constitutional and fighting to have *Roe* and *Casey* overturned.
      3. Fifth Circuit reversed, and the case was remanded for further proceedings.
      4. A rational-basis review should be applied to state abortion regulations under constitutional challenge.
      5. Regulation of abortion falls under the same level of scrutiny as other health and safety regulations by the states.
      6. The history of criminalizing abortion by many states pre-*Roe,* and the lack of precedent for the court to establish a right not explicitly mentioned in the Constitution suggests the Fourteenth Amendment does not protect the right to abortion.
      7. *Roe* and *Casey* determined the balance between the interest in what constitutes "potential life" and the interest of a woman wanting an abortion. Still, the states may evaluate these interests differently, and such differences do not disturb the order of "liberty."
      8. *Roe* imposed a precedent that looked too much like legislation and enforced an unjustified distinction between pre- and post-viability abortions, and Casey's "undue burden" test fails the workability requirement.
      9. If the Constitution does not ensure the right to abortion, then the power to regulate abortion must be returned to the states.
      10. *Roe* and *Casey* overruled.
   B. 32,000 babies were saved from abortion in the six months following *Dobbs.*
   C. A little more than a year after *Dobbs*, fourteen States now have enforceable laws protecting unborn life at its earliest stages.

D. One State (Georgia) protects unborn life beginning at six weeks. And two more States protect unborn life beginning at twelve weeks. Two States protect unborn life beginning at 15 weeks, and one more (Utah) protects unborn life beginning at 18 weeks. Many other States protect life beginning around the time of viability with various exceptions.
E. In contrast, seven States have no gestational limits at all. And two States have enacted explicit constitutional protections for abortion.
F. Since *Dobbs*, eight state supreme courts have ruled on state constitutional rights to abortion.
    1. *Planned Parenthood Great Northwest v. State*, 522 P.3d 1132 (Idaho 2023): The Idaho Supreme Court upheld three Idaho laws: (1) protecting unborn life from the outset of pregnancy, (2) protecting unborn life after a fetal heartbeat, and (3) imposing civil liability on abortion providers. The court held that the Idaho Constitution does not "guarantee" a fundamental right to abortion." It further held that the Iowa Constitution contains "no explicit right of 'privacy'" and upheld the laws under the rational basis test.
    2. *Members of Medical Licensing Board of Indiana v. Planned Parenthood Great Northwest, Hawai'i, Alaska, Indiana, Kentucky, Inc.*, 211 N.E.3d 1 (Ind. 2023): Several abortion providers challenged the enforcement of a bill prohibiting abortion in Indiana, except when necessary to preserve the life of the mother, as a violation of the Indiana Constitution and its protection of the right to abortion. The Indiana Supreme Court determined the Indiana Constitution does not contain a fundamental right to abortion, except when in the preservation of the life of the mother, even though there is no such text in the Indiana Constitution. The court then vacated the trial court's injunction and declared the bill's enforcement constitutional.
    3. *Planned Parenthood of the Heartland, Inc. v. Reynolds ex rel. State*, 975 N.W.2d 710 (Iowa 2022): Shortly before *Dobbs*, the Iowa Supreme Court upheld an Iowa statute that required a 24-hour waiting period before an abortion procedure may be performed. The court held that the Iowa Constitution does not protect a right to abortion and that strict scrutiny does not apply, overturning a previous Iowa Supreme Court decision. The court denied rehearing following *Dobbs*.
    4. *Cameron v. EMW Women's Surgical Ctr.*, 664 S.W.3d 633 (Ky. 2023): The Kentucky Supreme Court considered Kentucky's trigger law and heartbeat law. However, the court avoided the constitutional issue, instead ruling that abortion providers did not have third-party standing to challenge the law on behalf of their patients. The trial court later dismissed the lawsuit entirely.
    5. *Weems v. State*, 529 P.3d 798 (Mont. 2023): The Montana Supreme Court struck down a state law "restrict[ing] providers of abortion . . . to physicians and physician assistants." Relying on a pre-*Dobbs* Montana Supreme Court case, the court held that the Montana Constitution "protects a woman's right of procreative autonomy . . . [that is] to seek and obtain a specific lawful medical procedure . . . from a health care provider

of her choice." It then held that the statute implicated that right and applied strict scrutiny.

6. *Wrigley v. Romanick*, 988 N.W.2d 231 (N.D. 2023): The North Dakota Supreme Court struck down a state law protecting unborn life from the beginning of pregnancy. The court held that the "North Dakota Constitution provides a fundamental right to receive an abortion to preserve a pregnant woman's life or health." It then applied strict scrutiny, holding that the statute failed to survive strict scrutiny because it was not narrowly tailored to protect a woman's health or unborn life.
7. *Oklahoma Call for Reproductive Justice v. Drummond*, 526 P.3d 1123 (Okla. 2023): Several Oklahoma abortion providers brought an original-jurisdiction action in the Oklahoma Supreme Court challenging both the State's longstanding abortion prohibition, which traces back to 1890, and the State's newer trigger law, which was scheduled to take effect in August 2022. The court held that "the Oklahoma Constitution creates an inherent right of a pregnant woman to terminate a pregnancy when necessary to preserve her life," but "ma[d]e no ruling on whether the Oklahoma Constitution provides a right to an elective termination of a pregnancy." Puzzlingly, the court held that the longstanding law's life of the mother exception was sufficient but that the trigger law's medical emergency exception was not.
8. *Planned Parenthood South Atlantic v. State*, 882 S.E.2d 770 (S.C. 2023): The South Carolina Supreme Court struck down a state law protecting life after the detection of a fetal heartbeat. It held that the state constitutional right to privacy extended to a woman's decision to have an abortion and that the law failed strict scrutiny.

III. *National Institute for Family and Life Advocates v. Becerra*

A. NIFLA challenged a 2015 California law forcing pro-life pregnancy centers to point women toward abortion.
B. The so-called "FACT Act" regulated pregnancy centers in two ways:
   1. First, it required medically licensed pregnancy centers to post a sign notifying women that California provides free or low-cost services, including abortions, and give them a phone number to call.
   2. Second, it forced unlicensed pregnancy resource centers to post a sign informing women that California had not licensed the center to provide medical services.
C. Together, these requirements forced pro-life pregnancy centers to choose between expressing a message with which they disagree or suppressing their ability to serve women by advertising that they are not state-licensed clinics.
D. ADF brought a lawsuit on behalf of NIFLA, alleging that the Act violated the First Amendment by compelling speech and targeting the free exercise of religion.
E. The Southern District of California denied NIFLA's motion for a preliminary injunction. *Nat'l Inst. of Family & Life Advocates v. Harris*, No. 15-cv-2277, 2016 WL 3627327 (S.D. Cal. Feb. 9, 2016).

1. The district court correctly recognized that NIFLA's claims were ripe for adjudication.
2. On the merits, the court held that the notice for licensed clinics "is professional conduct subject to rational basis review" and that "[e]ven if speech is implicated . . . the Act regulates professional speech," and that professional speech regulations are subject to intermediate scrutiny. It then held that "the Act survives intermediate scrutiny."
3. The court also held that the disclosure for unlicensed clinics "withstands any level of constitutional scrutiny."
4. Regarding NIFLA's free exercise claim, the court held that "there [w]as no evidence to suggest the Act burdens only conduct motivated by religious belief" and that "the Act survives not only rational basis but strict scrutiny review."

F. ADF appealed that ruling to the Ninth Circuit. The Ninth Circuit affirmed. *Nat'l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823 (9th Cir. 2016).
1. Like the district court, the Ninth Circuit held that NIFLA's claims were constitutionally and prudentially ripe.
2. On the merits, the Ninth Circuit held that the Act was "content-based, but viewpoint neutral" and that strict scrutiny was "inappropriate" for content-based, but viewpoint neutral, "abortion-related disclosures."
3. It then held that the licensed notice regulates "professional speech," that "intermediate scrutiny should apply," and that it "satisfies intermediate scrutiny."
4. It further held that "abortion-related disclosures" in the licensed notice were subject to a lower level of constitutional scrutiny merely because they relate to the speech of licensed professionals.
5. Similarly, the Ninth Circuit held that the unlicensed notice "will survive even strict scrutiny."
6. The court further held that "[t]he Act is facially neutral," "operationally neutral," and "generally applicable" under the Free Exercise Clause. It then explained that "the Act . . . survives rational basis review."

G. Both the district court and Ninth Circuit decisions reflect the "abortion distortion," or the tendency of federal (and sometimes state) courts to distort generally applicable legal rules if the subject matter of a case involves abortion. The Supreme Court later disavowed this distortion in *Dobbs*.

H. ADF petitioned for certiorari on both the free speech and free exercise issues. The Supreme Court granted cert on the free speech issue, and former ADF-CEO Michael Farris argued the case before the Court in March 2018.

I. In a 5–4 decision, the Court held that both the licensed and unlicensed notices compelled pregnancy centers' speech in violation of the First Amendment. *Nat'l Inst. for Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).
1. Majority Opinion (Justice Thomas):
    a. Justice Thomas, writing for the majority, explained that the licensed notice was a content-based regulation of speech because it required clinics "to inform women how they can obtain state-subsidized

abortions" and at the same time, they "try to dissuade women from choosing that option."

b. The majority then rejected the Ninth Circuit's lower level of protection for professional speech, explaining that constitutional free speech protection does not "turn[] on the fact that professionals [a]re speaking" and that the States do not have "unfettered power to reduce a group's First Amendment rights simply by imposing a licensing requirement."
c. The Court further explained that the licensed notice did not qualify for lower constitutional scrutiny because "it requires [pregnancy centers] to disclose information about state-sponsored services—including abortion, anything but an 'uncontroversial' topic" and because it "does not facilitate informed consent to a medical procedure."
d. The majority held that the licensed notice could not survive even intermediate scrutiny.
e. It faulted the Act for being "wildly underinclusive" by exempting "nearly 1,000 community clinics" from its scope, which the Court said, "raises serious doubts about whether the government is, in fact, pursuing the interest it invokes."
f. The Court further explained that California could inform low-income women about its services with a public-information campaign and that a "tepid response" to such a campaign could mean that women "do not want" the abortion "services" offered by the State but could not justify California's attempt to "co-opt [pregnancy centers] to deliver its message for it."
g. The Court then addressed the unlicensed notice, holding that it failed even the intermediate scrutiny test applicable to regulations of commercial speech.
h. The Court highlighted the facts that California could point to no evidence that women go into pregnancy centers not knowing what they are and that the services that triggered the unlicensed notice did not require a medical license.
i. It then faulted the unlicensed notice for covering "a curiously narrow subset of speakers," suggesting that "the State ha[d] left unburdened those speakers whose messages are in accord with its views."
j. The Court also criticized the length of the notice, explaining that it would require "a billboard for an unlicensed facility that says, 'Choose Life' to surround that two-word statement with a 29-word statement from the government, in as many as 13 different languages," "drown[ing] out the facility's message."

2. Concurrence (Justice Kennedy):
   i. Justice Kennedy, joined by Chief Justice Roberts, Justice Alito, and Justice Gorsuch, concurred with the majority opinion but wrote separately "to underscore the apparent viewpoint discrimination here is a matter of serious constitutional concern," but that "[t]he Court . . . [wa]s corrects not to reach this question" because "[i]t was not sufficiently developed."

ii. He explained that "[i]t does appear that viewpoint discrimination is inherent in the design and structure of this Act" because "the State requires primarily pro-life pregnancy centers to promote the State's own preferred message advertising abortions."
iii. He further noted that "the history of the Act's passage and its underinclusive application suggest a real possibility that these individuals were targeted because of their beliefs."

3. Dissent (Justice Breyer):
   a. Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, dissented from the opinion of the Court.
   b. The dissent argued that the Act was not different than abortion informed consent under *Casey*, asking "[i]f a State can lawfully require a doctor to tell a woman seeking abortion about adoption services, why should it not be able, as here to require a medical counselor to tell a woman seeking prenatal care about childbirth and abortion services?"
   c. But the dissent ignored the fact that the California law required pregnancy centers to post signs visible to all clients, regardless of whether those clients were seeking specific medical services or were even pregnant, not to relay certain information to women seeking "prenatal care."
   d. Instead, it would have expanded the Court's informed consent doctrine far beyond requiring doctors to relay certain information to a woman before performing a specific medical procedure.
4. Bottom line: The Supreme Court confirmed that the First Amendment protects all Americans, including professionals, from being forced to speak a message contrary to our beliefs.

J. California agreed to a permanent injunction on remand.

IV. The Far Reach of the *NIFLA* Decision

A. In 2019, 2,700 U.S. pregnancy centers served roughly two million women, men, and youth, with services valued at over $266 million.
B. The role of pregnancy centers is even more important after *Dobbs.* Again, 32,000 lives were saved because of that decision and the work of thousands of PCCs.
C. *NIFLA* has also had a tremendous impact on the state of legal play, especially the standard of review for informed consent and compelled speech laws.
   1. Brief Overview: Generally, courts apply a rational basis plus standard of review to examine the constitutionality of informed consent laws; that is, courts conduct a rational basis review combined with the analysis of an additional factor. Courts differ on the terminology of this additional factor; some require examining whether the compelled speech is ideological, while others require the speech to be truthful, non-misleading, and relevant. Regardless terminology, the factor is meant to determine that the compelled

speech is factual and related to conduct instead of viewpoint-based or ideological.
2. While many courts use this rational basis plus standard, it is also notable that some other courts take a different approach and review informed consent regulations under intermediate scrutiny.
3. And when laws regulating physician-patient communications mandate compelled silence as opposed to compelled factual disclosures, most courts use heightened scrutiny.

D. **Doctrine of Informed Consent Where It Came from and Where It Is Going.**
1. Under common law, "informed consent is generally required for medical treatment . . . [t]he informed consent doctrine has become firmly entrenched in American tort law." *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 269 (1990).
2. Thus, if a physician fails to obtain informed consent from their patient, they may be subject to tort or criminal liability. *Cruzan*, 497 U.S. at 269. In the 1914 case of *Schloendorff v. Society of N.Y. Hospital,* 105 N.E. 92, 93 (1914), the court noted: "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who operates without his patient's consent commits an assault, for which he is liable in damages."
3. In fact, in such circumstances, "[a]n action for failure to obtain informed consent may be brought under a theory of battery.'" *NIFLA v Becerra,* 138 S. Ct. 2361, 2373 (2018) (citing Cause of Action Against Physician for Negligence in Prescribing Drugs or Medicines, 9 Causes of Action 1 (2021)).
4. The doctrine of informed consent and attending liability has also been codified and particularized in various statutes. *Looney v. Moore*, 886 F.3d 1058, 1068–70 (11th Cir. 2018) (noting that the informed consent doctrine is codified in Alabama's medical malpractice statute).
5. Importantly, courts have upheld informed consent statutes in the abortion context. For example*, Texas Med. Providers Performing Abortion Services v. Lakey*, 667 F.3d 570 (5th Cir. 2012) upheld a statute requiring the disclosure and explanation of a sonogram and fetal heartbeat to obtain informed consent for an abortion. And *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421 (6th Cir. 2019) similarly upheld a statute requiring a physician to perform an ultrasound to obtain informed consent for an abortion.

B. What does informed consent require?
a. Under the doctrine of informed consent, a physician is required "to divulge in a reasonable manner . . . sufficient information to enable the patient to make an informed judgment." *Bradley v. Sugarbaker*, 809 F.3d 8, 22 (1st Cir. 2015) (citing *Harnish v. Children's Hosp. Med. Ctr.,* 439 N.E.2d 240, 242 (1982)).

b. What level of information is considered sufficient to inform the patient or what specific disclosures must be made largely depends on what the jurisdictional standard or the statutory scheme requires.

B. **Informed Consent Regulations as Compelled Speech**

1. While laws compelling speech are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests," *NIFLA*, 138 S. Ct. at 2371 (citing *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015)), in the informed consent context, regulations compelling disclosures by doctors have not traditionally been reviewed under a strict scrutiny standard. Such laws usually pass constitutional muster under some form of rational basis review. *Id.* at 2373.

2. The Supreme Court has upheld laws compelling speech in the informed consent context as one of many "regulations of professional conduct that incidentally burden speech[,]" and explained that these regulations are "afforded less [First Amendment] protection." *Id.* at 2372-73.
3. The Court has also explained that "[u]nder [its] precedents it is clear the State has a significant role to play in regulating the medical profession. *See also Gonzales v. Carhar*t, 550 U.S. 124, 157 (2007).
4. As a result, because of the States' traditional power to regulate the medical profession, states "may require doctors to provide information to their patients to ensure patients can give their informed consent for an abortion, like for any other medical procedure." *Beshear*, 920 F.3d at 437.
5. The question in the informed consent context is whether informed consent laws are regulations of conduct that only incidentally burdens speech. If so, this justifies the Court's different treatment of these compelled disclosure laws.
6. The Court explains that "[l]ongstanding torts for professional malpractice, for example, 'fall within the traditional purview of state regulation of professional conduct'. . . [and that] [w]hile drawing the line between speech and conduct can be difficult, this Court's precedents have long drawn it." *NIFLA*, 138 S. Ct. at 2373 (citing *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

B. *NIFLA*

a. As discussed above, in *NIFLA*, the issue of regulating conduct was central to the Court's holding. It notably found that the regulation at issue was not regulation of professional conduct and was thus subject to strict scrutiny, noting 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. In fact, it is not tied to a procedure at all . . . The licensed notice regulates speech as speech." *Id.* at 2373–74.
b. Professional Speech: Although the Supreme Court expressed deference to states regulating professional conduct that incidentally burdens speech, in *NIFLA v. Becerra*, the Court failed to adopt the reasoning of some lower courts that treated "professional speech" as a unique category of speech

to be excepted from strict scrutiny review. *NIFLA*, 138 S. Ct. at 2371 (citing *King v. Governor of New Jersey*, 767 F.3d 216, 232 (3d Cir. 2014); *Pickup v. Brown*, 740 F.3d 1208, 1227–1229 (9th Cir. 2014).

c. These courts had developed a theory that professional speech received less protection in general (the professional speech doctrine) and that First Amendment protection of professional speech existed on a continuum. *Pickup*, 740 F.3d at 1227-28 (holding that First Amendment protection of professional speech existed on a continuum: the public dialogue of a professional received the highest protection, speech in the context of the professional relationship received less protection, and the state had the greatest power to regulate professional conduct that incidentally burdened speech).
d. The Court rejected this idea of professional speech, in general, receiving less First Amendment protection and specified that "outside of the context of disclosures under *Zauderer* [laws requiring professionals to disclose factual, noncontroversial information in a commercial context] and professional conduct—this Court's precedents have long protected the First Amendment rights of professionals." *NIFLA*, 138 S. Ct. at 2374.
e. Yet, while the Supreme Court in *NIFLA* "recognize[d] that First Amendment heightened scrutiny does not apply," *Beshear*, 920 F.3d at 429, to informed consent laws regulating professional conduct, it failed to articulate what specific level of scrutiny was to be used which has led to courts adopting different standards of review.

B. **The Standards of Review for Informed Consent/Professional Conduct Regulations**
   1. ***In the Context of Abortion Regulations***
      i. Informed Consent disclosure regulations have been most heavily litigated in the abortion context, and due to this, much of the case law surrounding the standards of review of informed consent statutes reflects a combination of First Amendment Jurisprudence and language from the now-abrogated undue burden test from *Planned Parenthood of Se. Pennsylvania v. Casey*. However, it is very likely that these standards apply to informed consent regulations in all contexts and are not voided by *Casey*'s abrogation.
      ii. In *Casey*, the Supreme Court held that an informed consent provision relating to an abortion procedure that required "the giving of truthful, non-misleading [and relevant] information . . . cannot be considered a substantial obstacle to obtaining an abortion, and . . . is no undue burden." *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 883 (1992), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). Subsequently, lower courts used this "truthful, non-misleading, [and relevant]" language as a standard to review whether an informed consent statute was constitutionally permissible.

iii. *Casey* additionally responded to a First Amendment challenge to the informed consent statute, noting "[t]o be sure, the physician's First Amendment rights not to speak are implicated . . . but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State," *Casey*, 505 U.S. at 884, which seemingly instructs a rational basis review. *See Lakey*, 667 F.3d at 575 (noting in *Casey,* "[t]he three sentences with which the Court disposed of the First Amendment claims are, if anything, the antithesis of strict scrutiny.").

A. ***Rational Basis Plus Review***
   1. With *Casey* and *NIFLA* in mind, circuit courts have developed various standards of review to determine whether an informed consent statute is constitutional. The Fifth, Sixth, and Eighth Circuits have all in some way combined a variation of ***Casey's*** "truthful non-misleading" language and rational basis review as a standard of review for informed consent laws.
   2. The Fifth Circuit articulated a three-pronged standard of review explaining what informed consent laws are constitutionally permissible:
   3. First, informed consent laws that do not impose an undue burden on the woman's right to have an abortion are permissible if they require truthful, non-misleading, and relevant disclosures. Second, such laws 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. Third, 'relevant' informed consent may entail not only the physical and psychological risks to the expectant mother . . . but also the state's legitimate interests in protecting the potential life within her. *Lakey*, 667 F.3d at 576 (quotations omitted).

B. Impact of NIFLA on the standard of review for informed consent and compelled speech laws.
   a. The Sixth Circuit, when describing its standard, noted that "the [Supreme] Court clarified that the First Amendment has a limited role to play in allowing doctors to avoid making truthful mandated disclosures related to informed consent[,]" and thereby [u]nder the First Amendment, we will not highly scrutinize an informed-consent statute, including one involving informed consent to an abortion, so long as it meets these three requirements: (1) it must relate to a medical procedure; (2) it must be truthful and not misleading; and (3) it must be relevant to the patient's decision whether to undertake the procedure . . . *Beshear*, 920 F.3d at 428–29.
   b. The Eighth Circuit, in *Planned Parenthood Minnesota, et al. v. Rounds*, had a very similar test holding that "with respect to First Amendment concerns, 'while the State cannot compel an individual simply to speak the State's ideological message, it can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion, even if that information might also encourage the patient to choose childbirth . . .'" *Planned Parenthood Minnesota, et al. v. Rounds*, 686 F.3d 889, 893 (8th Cir. 2012) (en banc)

(citing *Planned Parenthood Minnesota, et al. v. Rounds*, 530 F.3d 724, 734–35 (8th Cir. 2008)).

c. *The Additional Factor* While the Fifth and Eighth Circuits' standards include the examination of whether the compelled speech is ideological as a factor, the Sixth's does not, and the court explicitly opposed this component being part of the analysis. *Beshear*, 920 F.3d 421, 435–36 (6th Cir. 2019) (explaining that the '"ideological' label has not been used by the Supreme Court as a reason to apply heightened scrutiny to mandated factual disclosures . . . what matters for First Amendment purposes is whether the disclosed facts are truthful, non-misleading, and relevant to the procedure, not whether they fall on one side of the debate . . ."). However, the Sixth Circuit's disagreement with the non-ideological factor may be explained by its context: discussing a Fourth Circuit decision that found the use of ultrasound to be ideological speech that warranted intermediate scrutiny. *Id.* (citing *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014).

d. The Fifth Circuit warned against broad readings of the definition of ideological that possibly made the Sixth Circuit Court so hesitant. It referenced *Wooley v. Maynard*, noting "that 'ideological' speech is speech which conveys a 'point of view,"' *Lakey*, 667 F.3d at 577 n. 4 (citing *Wooley v. Maynard*, 430 U.S. 705, 715 (1977), and "[t]he distinction the Court there sought to employ was between factual information and moral positions or arguments . . . surely a photograph and description of its features constitute the purest conceivable expression of 'factual information.'" *Id. Cf. Doe et. al. v Att'y Gen. of Indiana et. al.*, Case 1:20-cv-03247-RLY-MJD at *23-24 (S.D. Ind. Sept. 26, 2022)(holding a statute that required the remains of aborted children to be buried or cremated and the disclosure of such actions was "expressive conduct that receives First Amendment protection" and ". . . inherently conveys a message," and thus was subject to strict scrutiny and not part of the professional regulation of conduct exception outlined by *NIFLA*).

e. Despite their different terminology, these three standards are arguably the same at their essence. The standards utilize rational basis review with an additional component to ensure that the compelled speech falls into the regulation of professional conduct exception outlined by the Supreme Court. Whether this component requires the speech to be truthful, non-misleading, and relevant, or non-ideological, the goal is to determine that the law regulates conduct and only incidentally burdens speech (as opposed to the State using its regulation to make a physician its ideological mouthpiece). Additionally, despite the adoption of the language from *Casey*, the use of this language functions differently; the language aims to limit informed consent disclosures to factual information related to a medical procedure (as opposed to preventing a regulation from being an undue burden), making it likely the standard applies beyond the abortion context as explained in depth *infra*.

a. ***Intermediate Scrutiny*** While the Fifth, Sixth, and Eighth Circuit Courts developed somewhat similar standards, the Fourth Circuit adopted an intermediate scrutiny test requiring the state to demonstrate that "the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest." *Stuart*, 774 F.3d at 249–50 (citing *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2667–68 (2011)).
b. The Fourth Circuit, addressing a statute that mandated the performance of ultrasound to obtain informed consent for an abortion, found that "[a] heightened intermediate level of scrutiny is thus consistent with Supreme Court precedent and appropriately recognizes the intersection here of regulation of speech and regulation of the medical profession. . ." *Id*. at 249–50.
c. This decision has since been undermined by *NIFLA*; the Sixth Circuit explained that:
d. *Stuart's* basis for applying heightened scrutiny is called into question by Supreme Court precedent . . . *Stuart* adopted a "sliding-scale" test first applied by the Ninth Circuit in *Pickup v. Brown* . . . the *NIFLA* Court, after citing the Ninth Circuit in *Pickup* . . . did not adopt any of the "different rules" applied in *Pickup* . . . as discussed, the Supreme Court explicitly carved out two exceptions to that general test that do not call for heightened scrutiny. *Beshear*, 920 F.3d at 435-36.
e. The Fourth Circuit, however, upheld this standard post-*NIFLA* in a case concerning the regulation of the legal profession. *Capital Associated Indus. v. Stein*, 922 F.3d 198, 209 (4th Cir. 2019) (holding that "intermediate scrutiny is the appropriate standard for reviewing conduct regulations that incidentally impact speech.") The Fourth Circuit addressed *NIFLA* and noted that while the Court specified, strict scrutiny was not required, it did not specify which scrutiny was required; with this in mind, the Fourth Circuit found that "intermediate scrutiny strikes the appropriate balance between the state's police powers and individual rights." *Id. See also Am. Med. Ass'n v. Stenehjem,* 412 F. Supp. 3d 1134, 1149 (D.N.D. 2019) (adopting the Fourth Circuit's intermediate scrutiny standard of review and describing the *Rounds* rational basis plus standard as an "abortion-specific standard.").

B. ***These Standards likely apply outside the abortion context.***
a. It should first be noted that since the Fourth Circuit has applied its intermediate scrutiny standard of review in other regulations of professional conduct, it is likely that it would apply this standard to other informed consent laws. *Stein*, 922 F.3d at 209.
b. While it has yet to be determined whether the standards of the Fifth, Sixth, and Eighth Circuits apply outside of the abortion context, the courts' language in these cases suggests these standards would apply to informed consent regulations across the board.
c. The Sixth Circuit, in *Beshear*, was particularly emphatic in responding to an accusation from the dissent that the court was mixing its analysis with

the undue burden test and focusing on the wrong provision of the Constitution; the court noted: indeed, we do address the relevant provision—the First Amendment. *Casey* and *NIFLA* recognize that First Amendment heightened scrutiny does not apply to incidental regulation of professional speech that . . . includes mandated informed-consent requirements, provided that the disclosures are truthful, non-misleading, and relevant . . . We, therefore, are applying *Casey* and *NIFLA* as they directly pertain to the First Amendment claim and not to any undue-burden claim under the Fourteenth Amendment. *Beshear*, 920 F.3d at 429.

f. The Sixth Circuit made clear that its analysis was solely that of a First Amendment inquiry. While it used the "truthful, non-misleading, and relevant" language of *Casey,* it was doing so in the context of a First Amendment analysis.
g. The Fifth Circuit standard pronounced in *Lakey* likewise was independent of an undue burden analysis and specifically articulated under the heading "First Amendment." *Lakey*, 667 F.3d at 574. While the first prong of the Fifth Circuit's standard references the undue burden law of *Casey*, it is merely a statement of fact recognized by *Casey* that "informed consent laws that do not impose an undue burden on the woman's right to have an abortion are permissible if they require truthful, non-misleading, and relevant disclosures." *Id.* at 576. Moreover, the Fifth Circuit Court was not even addressing any challenge to the law as an undue burden but rather answering whether the sonogram disclosure law violated the First Amendment and whether the law was void for vagueness. *Id.*
h. The Eighth Circuit specifically prefaced its standard of review, stating, "Thus, *with respect to First Amendment concerns*," *Rounds*, 686 F.3d at 893 (emphasis added), making clear it applies to a First Amendment analysis. While the court later noted that "to succeed on either its undue burden or compelled speech claims, Planned Parenthood must show that the disclosure at issue is either untruthful, misleading or not relevant to the patient's decision to have an abortion[,]" *id.* (Quotations omitted), in its decision, it conducted both analyses separately. First, the court articulated the *Casey* truthful non-misleading framework for the undue burden analysis; then, it separately articulated the First Amendment standard of review stated above. This clear articulation and separation make it again very likely that the Eight Circuit's standard of review (like those of the Fifth and Sixth Circuits) applies outside the abortion context.

B. ***In other Contexts***
   a. An analysis of the standards of review for informed consent and professional conduct regulations in other contexts notably differ from the standards of the *Lakey*, *Beshear*, *Rounds*, and *Stuart* cases. The reason for the discrepancy in these other contexts is much of the litigation involves regulations requiring compelled silence by physicians which implicates different issues than compelled factual disclosures. Additionally, the affirmative disclosure regulations that have been litigated do not implicate informed consent in the physician-patient context.

b. ***Affirmative Disclosure Regulations***

i. ***HIV Disclosures*** While not in the professional doctor-patient context, affirmative disclosures in the context of informed consent to conduct have been required for individuals with HIV. Most courts have upheld these laws as conduct regulations seemingly under a rational basis review.

ii. The Ohio Supreme Court upheld a law that "prohibit[ed] HIV positive individuals from engaging in sexual conduct without disclosing the HIV status prior to engaging in the conduct." *State v. Batista*, 91 N.E.3d 724, 729 (2017). The court noted that "[t]he First Amendment does not prevent statutes regulating conduct from imposing incidental burdens on speech" and that "the disclosure is incidental to the statute's regulation of the targeted conduct. Thus, this statute regulates conduct, not speech, and does not violate the First Amendment right to free speech." *Id.* at 728.

iii. The court was not exactly clear on what scrutiny it applied to the law in the First Amendment context and merely foreclosed the First Amendment challenge with its comments on conduct (suggesting rational basis review was used). However, the court upheld the statute under an equal protection challenge as well, and there explicitly used rational basis review, noting that the statute was "rationally related to the state's legitimate interest in preventing the transmission of HIV to sexual partners who may not be aware of the risk." *Id.* at 730.

iv. Other courts have upheld similar laws that criminalized the intentional transmission of HIV and contained an affirmative defense for consent via disclosure. *People v. Russell*, 630 N.E.2d 794, 796 (1994) (citing (720 Ill. Comp. Stat. Ann. 5/12-16.2)); *State v. S.F.*, 483 S.W.3d 385 (Mo.2016) (en banc). These courts similarly did not use intermediate or strict scrutiny signifying that rational basis review was used and was appropriate. *Russell*, 630 N.E.2d at 796 (holding that "the statute nor the cases before us have even the slightest connection with free speech . . . the statute in question is not violative of . . . the United States Constitution."); *S.F.*, 483 S.W.3d at 387-88 (holding the statute "does not regulate speech. It regulates conduct—specifically, conduct that exposes unknowing or nonconsenting individuals to HIV[,]" and "any speech compelled . . . is incidental to its regulation of the targeted conduct and does not constitute freedom of speech violation."). However, an Iowa Supreme Court case is an outlier; while still upholding a similar HIV disclosure regulation, the court found the law content-based and subject to strict scrutiny. *State v. Musser*, 721 N.W.2d 734, 744 (Iowa 2006).

v. ***Affirmative Disclosures Required of Lawyers*** While most affirmative disclosures required by lawyers fit into the *Zauderer* commercial speech exception articulated in *NIFLA*, in *Fox v. State*,

the Missouri Supreme Court addressed a statute that concerned the professional conduct exception. *Fox v. State*, 640 S.W.3d 744 (Mo. 2022). The statute at issue required attorneys (defense, prosecution, or otherwise) to inform sexual assault survivors of certain sexual assault survivors' rights before commencing an interview. *Id.*

vi. The court found the statute was not a regulation of conduct incidentally burdening speech and applied strict scrutiny noting the statute "does not closely correspond to a preexisting professional requirement, and the compelled speech is more significant than the regulation of professional conduct." *Id.* at 752. The court explained, "The regulations in *Casey* and *NIFLA* were tied to a preexisting professional requirement—obtaining informed consent before performing a procedure. . . As a result, the required speech—providing certain disclosures—was incidental to professional conduct—obtaining informed consent. The regulation here, though, does not . . ." *Id.* at 752.

vii. ***Prohibitionary Regulations*** Most courts apply heightened scrutiny to laws prohibiting physicians from speaking about certain topics.

viii. ***Inquiry about Firearms*** In one case, a law prohibited physicians from writing or speaking about firearms to their patients in certain circumstances. The Eleventh Circuit did not view this law as a regulation of professional conduct incidentally burdening speech but rather held that the law was a content-based regulation of speech and subject to heightened scrutiny (in this case, intermediate). *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1312 (11th Cir. 2017) (en banc).

ix. While the court noted that state officials argued that "the First Amendment is not implicated because any effect on speech is merely incidental to the regulation of professional conduct[,]" the court distinguished this prohibitionary regulation from a professional conduct regulation explaining that the provisions of the law "expressly limit the ability of certain speakers—doctors and medical professionals—to write and speak about a certain topic—the ownership of firearms—and thereby restrict their ability to communicate and/or convey a message. As a result, there can be no doubt that these provisions trigger First Amendment scrutiny." *Id.* at 1307.

x. ***Medical Marijuana*** Another prohibitionary case involved a federal government policy that aimed to prohibit physicians from recommending marijuana in states where it had been decriminalized for medical purposes; the policy was to be enforced by revoking physicians' licenses if they prescribed or recommended medical marijuana to their patients. *Conant v. Walters*, 309 F.3d 629, 632 (9th Cir. 2002). The Ninth Circuit enjoined the policy,

finding it a content-based regulation of speech, and reviewed it with strict scrutiny. *Id.*

xi. The court stated that the policy punishes physicians "on the basis of the content of doctor-patient communications . . . [it] does not merely prohibit the discussion of marijuana; it condemns expression of a particular viewpoint, i.e., that medical marijuana would likely help a specific patient. Such condemnation of particular views is especially troubling in the First Amendment context." *Id.* at 637. The court acknowledged that it had historically recognized legitimate regulations of the medical profession but that these regulations must be content-neutral and not attempt to "dictate the content of what is said in therapy." *Id.* (citing *NAAP v. California Bd. of Psychology*, 228 F.3d 1043, 1055 (9th Cir.2000)).

B. ***Counseling Bans***

a. In an Eleventh Circuit case, the court found that a statute banning "conversion therapy" was a content-based regulation of speech and subject to strict scrutiny. The court acknowledged that "States may regulate professional conduct, even though that conduct incidentally involves speech[,]" but noted that "[t]he government cannot regulate speech by relabeling it as conduct . . . What the governments call a 'medical procedure' consists—entirely—of words. As the district court itself recognized, plaintiffs' therapy is not just carried out in part through speech: the treatment provided . . . is entirely speech." *Otto v. City of Boca Raton, Fla.*, 981 F.3d 854, 865 (11th Cir. 2020) (citing *NIFLA*, 138 S. Ct. at 2372) (quotations omitted).

b. The Ninth Circuit held the opposite in *Pickup v Brown* and *Tingley v Ferguson*, two cases that involved conversion therapy bans for minors. *Pickup*, which was decided pre-*NIFLA* (and articulated the professional speech doctrine and continuum theory), found that the ban was a regulation of conduct subject to rational basis review. *Pickup*, 740 F.3d at 1231.

c. In *Tingley*, the Ninth Circuit reviewed *NIFLA* as well as *Pickup* and found that the statute at issue fit into *NIFLA's* "second exception . . . that 'States may regulate professional conduct, even though that conduct incidentally involves speech.'" *Tingley v. Ferguson,* 47 F.4th 1055, 1062 (9th Cir. 2022) (citing *NIFLA*,138 S. Ct. at 2372). While the court acknowledged *NIFLA* abrogated *Pickup's* professional speech doctrine, it maintained that *Pickup* was not fully abrogated and that it was bound to follow *Pickup*'s continuum theory in terms of its review of professional conduct regulation. *Id.*

d. As *Pickup* had found the conversion therapy ban to be a regulation of conduct subject to the least First Amendment protection on the continuum, the court used a rational basis standard of review which it held the law satisfied, stating that "States do not lose the power to regulate the safety of medical treatments performed under the authority of a state license

merely because those treatments are implemented through speech rather than through scalpel." *Id*.

e. These decisions notably differed from the Ninth Circuit's treatment of a prohibitionary regulation in *Conant*. The Ninth Circuit attempted to differentiate these decisions from *Conant*, arguing that a conversion therapy ban regulated treatment which was conduct, not speech. *Id.* The court explained that:

f. Unlike the law at issue in *Conant* that prohibited doctors from recommending the use of marijuana to patients, California's ban on practicing conversion therapy on minor patients still allowed therapists to discuss conversion therapy with patients, recommend that patients obtain it (from unlicensed counselors, from religious leaders, or out-of-state providers, or after they turn 18) . . . California's conversion therapy ban "regulate[d] only treatment" and "any effect it may have on free speech interests is merely incidental. *Tingley*, 47 F.4th at 1062 (citing *Pickup* 740 F.3d at 1231)

g. This reasoning was criticized in ***Pickup's*** dissent, which argued the decision "ignores established free speech doctrine, misreads our cases, and thus insulates from First Amendment scrutiny California's prohibition—in the guise of a professional regulation—of politically unpopular expression;" in other words, the decision allows the state to "avoid First Amendment judicial scrutiny by defining disfavored talk as "conduct[.]" *Pickup*, 740 F.3d at 1215 (O'Scannlain, J., dissenting).

h. The Third Circuit similarly criticized the *Pickup* decision despite adopting its professional speech doctrine in *King v. Governor of New Jersey*. In *King*, the court addressed a conversion therapy ban and upheld it, but unlike the Ninth Circuit, held that conversion therapy "communications are "speech" for purposes of the First Amendment." *King*, 767 F.3d at 224–25. The court criticized *Pickup,* stating, "the enterprise of labeling certain verbal or written communications "speech" and others "conduct" is unprincipled and susceptible to manipulation" and "speech is speech, and it must be analyzed as such for purposes of the First Amendment." *Id.* at 228-29. With this in mind, the Third Circuit Court recognized the ban was a content-based restriction on speech and held it was subject to intermediate scrutiny (not strict scrutiny because of the now abrogated professional speech doctrine). *Id.* at 236-38.

i. ***Telemedicine*** One prohibitionary case prohibited a method of communication rather than a certain subject to be communicated. The case involved a law that required veterinarians to physically examine animals to lawfully practice veterinary medicine (and barred veterinarians from practicing by telemedicine alone). *Hines v. Quillivan*, No. 1:18-CV-155, 2021 WL 5833886 (S.D. Tex. Dec. 9, 2021). The court reviewed the law with strict scrutiny, finding the law was a content-based regulation of speech. *Id.* at *4. The court explained that the law as applied to the plaintiff did not fall into the regulation of professional conduct exception but targeted speech alone because "all of [the veterinarian's] interactions

with pet owners took the form of verbal and written communications." *Id.* at *2.

i. ***Unauthorized Practice of Law*** While outside the medical context, unauthorized practice of law cases give some more insight into the court's treatment of professional conduct regulations. As noted *supra*, the Fourth Circuit maintained its intermediate scrutiny standard in a case that involved a ban on corporations practicing law. *Stein*, 922 F.3d at 209. In this case, the court found the law to be one regulating professional conduct, noting that "North Carolina's ban on the practice of law by corporations fits within *NIFLA's* exception for professional regulations that incidentally affect speech." *Id.* at 207. The court further explained that the law was "part of a generally applicable licensing regime that restricts the practice of law to bar members and entities owned by bar members" and any effect on speech "is merely incidental to the primary objective of regulating the conduct of the profession." *Id.* at 207-08.

j. In another case involving a "narrow and novel" as applied challenge to an unauthorized practice of law (UPL) statute, the court found that the statute was content-based and subject to strict scrutiny. *Upsolve, Inc. v. James*, 2022 WL 1639554, at *9-10 (S.D.N.Y. May 24, 2022). The UPL statute here defined the practice of law as the giving of legal advice (among other actions). *Id.* While the court noted that UPL statutes usually "regulate professional "conduct" and merely burden a non-lawyers speech incidentally[,]" it found that the restriction of the plaintiff giving legal advice alone was a restriction of speech itself. *Id.*

k. As demonstrated, in cases of prohibitionary regulations on physicians' speech (that is, banning physicians from speaking about certain topics or in certain ways), most courts apply heightened scrutiny; *Tingsley* and *Pickup* are two notable exceptions to this rule.

B. **A final word about the importance of NIFLA**

a. In *NIFLA v. Becerra*, the Supreme Court made clear that while professional speech is not a unique category of speech to be excepted from strict scrutiny, regulations concerning professional conduct that incidentally burden or compel speech (like informed consent laws) are not subject to strict scrutiny review. The Court, however, failed to specify what scrutiny should be used to review these laws. Due to this, different standards have been used to review informed consent laws. In terms of the traditional informed consent regulations compelling affirmative factual disclosures, many courts have applied a rational basis plus review, while other courts have reviewed the laws with intermediate scrutiny. Outside of the physician-patient disclosure context, informed consent laws relating to HIV disclosure have also been upheld (in most cases under rational basis review) as regulations of conduct incidentally burdening speech.

b. In cases of prohibitionary laws regulating physicians' speech, courts have consistently used heightened scrutiny (excepting the Ninth Circuit's

Tingley and *Pickup*). These laws differ significantly from the affirmative factual disclosure regulations because they are almost always content-based restrictions on speech.

c. As illustrated by the cases above, the professional conduct exception does not give states free reign over professionals' speech. When regulating professional conduct that incidentally burdens speech, states are required to conform to certain restrictions; these laws must be tied to a preexisting professional duty/procedure (such as obtaining informed consent), *Cf. Fox v. State*, 640 S.W.3d 744 (Mo. 2022) (see *supra*) and cannot force the physician to become the state's ideological mouthpiece.
d. As noted in *NIFLA*, the Supreme Court was very hesitant to reduce protection for professional speech in general. The Court specifically warned of the dangers of the state co-opting the medical profession, noting that "regulating the content of professionals' speech pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information," and "Throughout history, governments [including the Soviet government and Nazi Germany] have manipulat[ed] the content of doctor-patient discourse to increase state power and suppress minorities." *NIFLA*, 138 S. Ct. at 2374 (quotations omitted).
e. In conclusion, given the analysis in the cases above, it is appropriate that informed consent factual disclosure laws are reviewed under a rational basis plus review. Traditionally, states have always been able to regulate the medical profession in this regard, and the rational basis plus standards ensure that these compelled disclosure laws do not go beyond the states' authority. On the other hand, laws prohibiting physicians from speaking about certain topics—like counseling bans—are appropriately reviewed with heightened scrutiny because they almost always aim to suppress or discriminate against different viewpoints or certain conduct.

V. Events following *Dobbs* and *NIFLA*

A. Violence and vandalism toward pregnancy centers in the wake of *Dobbs*

1. Even before the Dobb's opinion was officially released and the draft of the opinion was leaked, over 80 pro-life pregnancy centers around the U.S. were vandalized, most with threatening messages or set fire to.
2. The Department of Homeland Security was forced to issue a memo warning about domestic violence extremists who may retaliate to the decision to overturn *Roe* the same day Dobbs was released.
3. A group called Jane's Revenge formed after Dobbs was released in 2022, a militant pro-abortion rights group responsible for attacks against pro-life pregnancy centers around the U.S.
4. Life Choices, a pregnancy center in Longmont, Colorado, was firebombed the day after *Dobbs* was released, forcing a yearlong renovation and preventing the center from providing their services.
5. Attorney General Ashley Moody of Florida filed a complaint against anti-abortion activist groups Jane's Revenge and ANTIFA for vandalizing and

setting fire to three crisis pregnancy center buildings. First Liberty Institute is filing a second suit on behalf of one of those clinics.

6. Recent Cases of Violence Against Reproductive Health Care Providers, https://www.justice.gov/crt/recent-cases-violence-against-reproductive-health-care-providers

B. In 2023, at least fifteen States considered nearly twenty-seven measures attacking the life-affirming work of pregnancy centers.
C. Laws targeting pregnancy centers were enacted in Illinois, Colorado, and Vermont.
    1. In Illinois, a 2016 law requires healthcare providers with conscience-based objections to abortion to inform patients of the supposed "benefits" of abortion and refer patients to a list of providers that offer abortion. ADF represents NIFLA and three Illinois pregnancy centers in a lawsuit challenging that statute.
    2. In Colorado, the Becket Fund filed suit against a 2023 law making it illegal for pro-life pregnancy centers and medical clinics to offer or advertise abortion pill reversal.
    3. And in Vermont, ADF recently filed suit against a 2023 law specifically targeting the speech of pro-life pregnancy centers.
D. These laws violate the Supreme Court's decision in *NIFLA*, which prohibits "wildly underinclusive" laws that "disfavor[] a particular speaker or viewpoint."
E. ADF is working with NIFLA to fight back against these laws.
F. In September of this year, ADF represented NIFLA at a federal trial in the Illinois case.
    1. The Illinois law requires only those health care providers who have "conscience-based refusals" to provide particular medical treatments, including abortion, and requires those providers to violate their conscience by discussing the benefits of and referring for those treatments.
    2. ADF argued at trial that the law unconstitutionally compels speech based on content and viewpoint and that it unconstitutionally targets religion by limiting its application to providers with conscience-based refusals.
G. In July of this year, ADF filed a lawsuit on behalf of NIFLA and two Vermont pregnancy centers against the Vermont pregnancy center law.
    1. That law is facially viewpoint discriminatory because it applies only to those centers that do not provide or refer for abortion and "emergency contraception."
    2. ADF challenged two provisions of the law: (1) the Advertising Prohibition, which prevents pregnancy centers from advertising their services in a way that Vermont's pro-abortion attorney general thinks is misleading, and (2) the Provider Restriction, which requires centers to hire licensed medical staff to provide broadly defined "services," "information," and "counseling."
    3. ADF's complaint alleges that both provisions violate constitutionally restrict the centers' free speech and are unconstitutionally vague.
H. Cases building on *NIFLA*
    1. *Gaspee Project v. Mederos*, 13 F.4th 79 (1st Cir. 2021): The First Circuit upheld a Rhode Island law requiring "limited disclosure of funding sources

responsible for certain independent expenditures and electioneering communications." The Plaintiffs, two "not-for-profit organizations that engage in issue advocacy related to matters of public policy," argued that the requirement compelled speech under *NIFLA*. The First Circuit rejected that argument, explaining that "on-ad disclaimer regimes concerning funding sources in election-related contexts are similarly not comparable to requiring pro-life clinics to explain to patients that they may seek free abortion services from the government."

2. *Brokamp v. James*, 66 F.4th 374 (2d Cir. 2023): The Second Circuit upheld a New York licensing-scheme for mental health counselors. Applying *NIFLA*, the court first determined that the law "does not turn on the content of what a person says" but "only to speech having a particular purpose, focus, and circumstance." It then applied intermediate scrutiny, holding that the law "addresses an important government" interest" in "promoting and protecting public health" and that it "does not burden more speech than necessary to allow the state to protect residents against incompetent and deceptive mental health counselors."
3. *Greater Phila. Chamber of Commerce v. City of Phila.*, 949 F.3d 116 (3rd Cir. 2020): The Third Circuit upheld "a Philadelphia Ordinance that prohibits employers from inquiring into a prospective employee's wage history in setting or negotiating that employee's wage." Relying on *NIFLA*, the court held that the ordinance's "effect on speech" was "incidental" and "d[id] not place the provision under First Amendment scrutiny."
4. *Recht v. Morrisey*, 32 F.4th 398 (4th Cir. 2022): The Fourth Circuit upheld a West Virginia statute requiring attorneys to include certain disclosure in "advertisements made 'in connection with a prescription drug or medical device approved by the [FDA].'" The court distinguished *NIFLA* on the grounds that "the disclosure requirements here are directly targeted at promoting the State's interest 'in dissipate[ing] the possibility of consumer confusion or deception'" and "they do so by providing information directly connected to the subject of the advertisement, rather than by compelling speech concerning unrelated or competing services." It then applied the lower level of constitutional review for commercial speech, holding that unlike *NIFLA*, the State's interest in "preventing deception of consumers is undeniably strong" and that the "disclosure requirements" are "no broader than reasonably necessary" because it requires only "two or three short sentences."
5. *Net Choice, LLC v. Paxton*, 49 F.4th 439 (5th Cir. 2022): The Fifth Circuit considered a Texas statute that prevents social media platforms from engaging in "viewpoint-based censorship of users' posts" requires platforms to "make certain disclosures" regarding their policies concerning "content-moderation." The court first held that the censorship provision was a regulation of conduct, not speech, and passed intermediate scrutiny. It then applied the commercial speech doctrine to the disclosure requirements, distinguishing *NIFLA* on the grounds that the requirements did not "unduly burden (or 'chill') protected *speech*." The court ultimately

upheld both provisions. Plaintiff trade associations representing social media providers petitioned for cert in December 2022 and issued a CVSG order on January 23, 2023.

6. *EMW Women's Surgical Center, P.S.C. v. Beshear*, 920 F.3d 421 (6th Cir. 2019): Kentucky's Ultrasound Informed Consent Act required a doctor to show the pregnant mother an ultrasound while describing it to her and play the audio of the baby's heartbeat before providing an abortion. The Sixth Circuit held that the Act did not violate the First Amendment because *NIFLA* recognized "that First Amendment heightened scrutiny does not apply to incidental regulation of professional speech that is part of the practice of medicine and that such incidental regulation includes mandated informed-consent requirements, provided that the disclosures are truthful, non-misleading, and relevant." *Id.* at 429. The Supreme Court denied cert.
7. *Doe v. Rokita*, 54 F.4th 518 (7th Cir. 2022): Indiana law requires "abortion providers to dispose of fetal remains by either burial or cremation" and to disclose to patients all statutory options for fetal disposition, including that "women may choose to take custody of the remains and dispose of them as they please." Plaintiffs argued that the law violated abortion patients' free exercise rights and abortion providers' free speech rights. The Seventh Circuit rejected both challenges. Regarding the free exercise claim, the court explained that "Indiana does not require any woman who has obtained an abortion to violate any belief, religious or secular" because the law "applies only to hospitals and clinics." And with regard to the free speech claim, the Seventh Circuit correctly held that *Dobbs* did not overrule *Casey*'s truthful and non-misleading test for informed consent laws, only *Casey*'s holding that "states may not substantially burden a woman's ability to obtain an abortion before a fetus's viability." The Seventh Circuit correctly distinguished informed consent laws from the compelled speech law struck down in *NIFLA*, citing *Casey*'s holding that "a state may require medical professionals to provide information that facilitates patients' choices directly linked to procedures that have been or may be performed."
8. *Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2022): ADF represents a Christian therapist in a pre-enforcement challenge to Washington law banning "conversion therapy" for minors struggling with same-sex attraction. The district court dismissed ADF's complaint, and ADF appealed. Relying on a case that the Supreme Court specifically abrogated in *NIFLA*, the Ninth Circuit distinguished *NIFLA* on the grounds that the law "is a regulation on conduct that incidentally burdens speech. The court then inexplicably applied the rational basis test, even though intermediate scrutiny is the usual constitutional test for such regulations. It then held that "[t]he Washington legislature acted rationally when it decided to protect the 'physical and psychological well-being' of its minors by preventing state-licensed health care providers form practicing conversion therapy on them." The Ninth Circuit further distinguished

NIFLA on the grounds that "some subcategories of speech by professionals *are*, in fact, excepted from heightened scrutiny and instead subject to less scrutiny. But rather than fitting the Washington law into the "commercial speech" or "informed consent" subcategories identified in *NIFLA*, the Ninth Circuit held that "[t]here is a long (if heretofore unrecognized) tradition of regulation governing the practice of those who provide health care within state borders." The court did not attempt to explain why, if such a tradition exists, the Supreme Court would not have applied it in *NIFLA*, which also dealt with a statute regulating health care professionals. The court also rejected ADF's free exercise claim. After the Ninth Circuit denied ADF's petition for rehearing en banc, ADF petitioned for cert on both the free exercise and free speech claims. The Court set the case for a conference on September 26, 2023.

9. *Animal Legal Defense Fund v. Kelly*, 9 F. 4th 1219 (10th Cir. 2021): The Tenth Circuit struck down a Kansas statute preventing investigators from documenting and publicizing the abuse of animals. Applying *NIFLA*, the court held that the law was a regulation of speech that discriminated on the basis of viewpoint and content and that it failed strict scrutiny.
10. *Otto v. City of Boca Raton, Fla.*, 981 F.3d 854 (11th Cir. 2020): The Eleventh Circuit struck down a Florida ordinance "prohibit[ing] therapists from engaging in counseling or any therapy with a goal of changing a minor's sexual orientation[] . . . or changing a minor's gender identity or expression." Relying on *NIFLA*, the court rejected the City's arguments that the content-based regulation was entitled to a lower level of review because it regulated professional speech or because it regulated conduct rather than speech. It also noted the *NIFLA* criticized cases upholding similar laws in other circuits. The court then applied strict scrutiny and struck down the ordinance.
11. *NetChoice, LLC v. Attorney General*, 34 F.4th 1196 (11th Cir. 2022): The Eleventh Circuit also considered a Florida law that prohibited social media platforms from moderating content in certain ways, required platforms to disclose their content-moderation policies, and allowed "deplatformed user[s] to 'access or retrieve all of the user's information, content, material, and data for at least 60 days.'" The court then rejected the argument that the entire statute was subject to strict scrutiny because it was viewpoint discriminatory under *NIFLA*. It then held that while the content-moderation requirements were content-based and subject to strict scrutiny, the disclosure requirements fell under *NIFLA*'s exception for "[l]aws that compel commercial disclosures." The court ultimately struck down the content-moderation restrictions but upheld the disclosure requirements.

VI. Message of Hope

A. ADF will fight for your pregnancy centers against laws regulating centers' speech and services.

B. Supreme Court's decisions in *Dobbs* and *NIFLA* are proof that God has heard our prayers just as He heard the prayers of the Israelites who prayed for rescue from Babylon.
C. 14 States are currently enforcing laws protecting life at its earliest stages
D. Several more States have laws protecting life later in pregnancy
E. NIFLA has also been assisting ADF's end-of-life cases
F. Call to prayer for ADF cases

VII. Conclusion
A. Our hope lies in God, not our own efforts, the government, the law, or the Supreme Court
B. God will be victorious
C. Connect everything back to Isaiah chapter 42