
FIRST AMENDMENT — PHYSICIAN COMPELLED SPEECH — SIXTH CIRCUIT UPHOLDS KENTUCKY LAW REQUIRING DOCTORS PERFORMING ABORTIONS TO FIRST CONDUCT AN ULTRASOUND AND DESCRIBE THE IMAGE. — *EMW Women’s Surgical Center, P.S.C. v. Beshear*, 920 F.3d 421 (6th Cir. 2019), *reh’g en banc denied*, Nos. 17-6151/6183, 2019 U.S. App. LEXIS 19623 (6th Cir. June 28, 2019), *cert. denied* 140 S. Ct. 655 (2019).

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹ the Supreme Court rejected a First Amendment challenge to an abortion regulation with a discussion spanning just two sentences.² Since then, lower courts have split over the reach of First Amendment protections in the medical context, particularly in cases having to do with abortion.³ In 2018, the Supreme Court finally weighed in again with *National Institute of Family and Life Advocates v. Becerra*⁴ (*NIFLA*), a decision that recognized First Amendment protections for clinicians at crisis pregnancy centers.⁵ Recently, however, in *EMW Women’s Surgical Center, P.S.C. v. Beshear*,⁶ the Sixth Circuit seemed to sidestep *NIFLA* when it upheld a Kentucky forced ultrasound, or “speech-and-display,” law against a First Amendment compelled speech challenge.⁷ In doing so, the court erroneously applied *Casey*’s Fourteenth Amendment holding to a First Amendment question, and failed to grapple with the Supreme Court’s newly clarified compelled speech framework. Instead, the decision appeared to confirm some commentators’ fears of an uneven application of the law for any case having to do with abortion.

¹ 505 U.S. 833 (1992).

² *Id.* at 884 (plurality opinion) (“To 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. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.” (citations omitted)). The First Amendment challenge in *Casey* was directed toward a Pennsylvania “informed consent” statute that required doctors, prior to performing an abortion, to inform patients of the “probable gestational age” of the fetus, and the risks of abortion and pregnancy. *Id.* at 902 app. at 902 (quoting 18 PA. CONS. STAT. § 3205 (1990)). Doctors were also required to offer patients a state-published pamphlet illustrating phases of fetal development. *Id.* at 902 app. at 903, 906–07 (quoting 18 PA. CONS. STAT. §§ 3205, 3208).

³ Compare *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 577 (5th Cir. 2012) (upholding Texas abortion regulation requiring doctors to first perform ultrasounds and describe the images), and *Planned Parenthood of Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 734–35 (8th Cir. 2008) (upholding South Dakota law requiring abortion providers to inform patients that “the abortion will terminate the life of a whole, separate, unique, living human being,” *id.* at 735), with *Stuart v. Camnitz*, 774 F.3d 238, 250 (4th Cir. 2014) (striking down a North Carolina ultrasound law as a violation of abortion providers’ free speech).

⁴ 138 S. Ct. 2361 (2018).

⁵ See *id.* at 2371.

⁶ 920 F.3d 421 (6th Cir. 2019), *reh’g en banc denied*, Nos. 17-6151/6183, 2019 U.S. App. LEXIS 19623 (6th Cir. June 28, 2019) (*EMW*), *cert. denied* 140 S. Ct. 655 (2019).

⁷ *Id.* at 424.

The Kentucky General Assembly passed the Ultrasound Informed Consent Act,⁸ known as House Bill 2 (H.B. 2), in 2017.⁹ H.B. 2 requires doctors, as a precondition to obtaining a patient's informed consent for abortion, to perform an ultrasound and "[p]rovide a simultaneous explanation of what the ultrasound is depicting," display the ultrasound image for the patient, and make embryonic cardiac activity audible for the patient.¹⁰

EMW Women's Surgical Center (EMW) — the only licensed abortion clinic in Kentucky — and the clinic's three doctors brought suit in the District Court for the Western District of Kentucky against State Attorney General Andrew Beshear, Secretary of the Cabinet of Health and Family Services Vickie Yates Brown Glisson, and Executive Director of the Kentucky Board of Medical Licensure Michael Rodman.¹¹ EMW argued that the new informed consent provisions violated the doctors' First Amendment rights by compelling them to deliver the State's ideological message on abortion.¹² The parties filed cross-motions for summary judgment on the issue of H.B. 2's constitutionality.¹³ Defendants Beshear and Rodman also filed motions for summary judgment, arguing that they were not proper defendants to the action because they lacked enforcement authority.¹⁴

The district court granted EMW's motion for summary judgment, finding that H.B. 2 was unconstitutional, and found that the defendants were proper parties to the dispute.¹⁵ First, Judge Hale explained that H.B. 2 warranted heightened scrutiny, which it could not survive.¹⁶ Unlike the statute at issue in *Casey*, which merely compelled speech, H.B. 2 "compel[led] ideological speech," since it "overtly trumpet[ed] the anti-abortion preference of the legislature."¹⁷ Judge Hale acknowledged that the State's asserted interests in facilitating informed consent and "the

⁸ KY. REV. STAT. ANN. § 311.727 (West 2019).

⁹ *Id.* Several other states have also enacted speech-and-display laws. See GUTTMACHER INST., *Requirements for Ultrasound*, <https://www.guttmacher.org/state-policy/explore/requirements-ultrasound> [https://perma.cc/8KLLK-7KG5].

¹⁰ KY. REV. STAT. ANN. § 311.727.

¹¹ EMW Women's Surgical Ctr., P.S.C. v. Beshear, 283 F. Supp. 3d 629, 632, 647–48 (W.D. Ky. 2017).

¹² *Id.* at 635.

¹³ *Id.*

¹⁴ *Id.* at 647–48.

¹⁵ *Id.* at 648. The court reasoned that the Kentucky Attorney General has inherent power to enforce state law unless such power is delegated by statute to another authority — not the case here. *Id.* And Rodman, as the executive director of the Kentucky Board of Medical Licensure, would serve as the "gatekeeper" to disciplinary actions stemming from violations of H.B. 2. *Id.*

¹⁶ *Id.* at 642.

¹⁷ *Id.* at 641–42 (emphasis added) (quoting Eubanks v. Schmidt, 126 F. Supp. 2d 451, 458 n.11 (W.D. Ky. 2000)).

protection of fetal life and discouragement of abortion” were “substantial” ones, but concluded that H.B. 2 did not advance those interests, “and, in fact, act[ed] to [their] detriment.”¹⁸ Finally, H.B. 2 was not appropriately drawn to achieve the State’s interest — there was “no evidence” that the State’s prior informed consent requirements were inadequate in ensuring that patients received sufficient information to give consent for abortion.¹⁹ The State appealed the decision.²⁰

The Sixth Circuit reversed and remanded.²¹ Writing for the panel, Judge Bush²² rejected the district court’s conclusions that H.B. 2 warranted heightened scrutiny and that it violated doctors’ First Amendment right to free speech.²³ Judge Bush acknowledged that content-based regulations of speech, including physician speech, are generally subject to heightened scrutiny.²⁴ But, as the Fifth and Eighth Circuits previously held, *Casey* dictated that an abortion-related informed consent statute “should be upheld so long as the disclosure is truthful, nonmisleading, and relevant to an abortion.”²⁵ *NIFLA*, Judge Bush wrote, affirmed this three-prong standard.²⁶ Judge Bush concluded that even if H.B. 2 compelled ideological speech, was inconsistent with standard medical practice, or caused detrimental psychological effects on patients, heightened scrutiny was not warranted.²⁷ None of these factors, Judge Bush wrote, changed the level of scrutiny applicable to the regulation.²⁸ Judge Bush further clarified that the entire analysis

¹⁸ *EMW Women’s Surgical Ctr., P.S.C.*, 283 F. Supp. 3d at 645; see also *id.* at 646 (asserting that H.B. 2 “has more potential to harm the psychological well-being of the patient than to further the legitimate interests of the Commonwealth”).

¹⁹ *Id.* at 646. H.B. 2 added to Kentucky’s existing abortion regulations, not challenged in *EMW*’s suit, which require doctors to inform patients of the medical risks associated with abortion and pregnancy, and to offer the patient state-published materials about fetal development. KY. REV. STAT. ANN. § 311.725 (West 2019).

²⁰ *EMW*, 920 F.3d at 421.

²¹ *Id.* Rodman did not appeal the judgment against him, and Adam Meier succeeded Glisson in her role as Secretary. *Id.* at 425. The court ultimately held that state Attorney General Beshear was not a proper party to the suit because “the duty to enforce H.B. 2 . . . lies not with the Attorney General but with the Commonwealth’s attorneys and the county attorneys.” *Id.* at 445–46.

²² Judge Bush was joined by Judge Norris. Judge Donald joined only the holding that Attorney General Beshear was not a proper party to the suit. *Id.* at 423.

²³ *Id.* at 424, 446.

²⁴ *Id.* at 426.

²⁵ *Id.* at 424 (first citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992) (plurality opinion); then citing *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 576 (5th Cir. 2012); and then citing *Planned Parenthood of Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 734–35 (8th Cir. 2008)).

²⁶ See *id.* at 424, 428–29.

²⁷ See *id.* at 434–43.

²⁸ See *id.* Judge Bush also cited testimony that H.B. 2 might have a “positive impact on [patients’] emotional health by persuading them not to have an abortion.” *Id.* at 441.

must turn on whether “H.B. 2 shares the same material attributes as the informed-consent statute in *Casey*.”²⁹

H.B. 2, Judge Bush wrote, met *Casey*’s three-prong test because (1) it related to a medical procedure;³⁰ (2) the required disclosures were truthful and nonmisleading;³¹ and (3) the information conveyed was relevant to the patient’s decision as to whether to obtain an abortion.³² Judge Bush conceded that H.B. 2 differed from the statute at issue in *Casey* in some ways, but concluded that “[t]he sonogram requirements of H.B. 2 conveyed ‘materially identical’ information” to the *Casey* statute’s requirements.³³ In fact, because of its detail and “individualized nature, a sonogram provides even *more* relevant information for the patient’s decision than any of the required materials at issue in *Casey*.”³⁴

Judge Donald dissented. Judge Donald rejected the majority’s three-prong test, writing that those three elements “were central only to *Casey*’s undue burden analysis” — “[n]owhere [were] these elements even mentioned in *Casey*’s discussion of the First Amendment.”³⁵ Instead, *NIFLA* established that “when the state regulates the content of physician speech in a manner that is inconsistent with the practice of medicine, [courts] must apply heightened scrutiny.”³⁶ H.B. 2 triggered heightened scrutiny because its sonogram and auscultation requirements “ha[ve] no basis in the practice of medicine.”³⁷ Judge Donald emphasized that H.B. 2’s requirements undermined two central principles underlying informed consent: “respect for the patient’s autonomy and sensitivity to the patient’s condition.”³⁸ Informed consent also requires that doctors exercise discretion in when, how, and if to provide certain information — discretion that was completely taken away by H.B. 2.³⁹ The statute, Judge Donald wrote, forced doctors to actively “cause patient harm” for “no medical purpose.”⁴⁰

²⁹ *Id.* at 429.

³⁰ *Id.*

³¹ *Id.* at 429–30.

³² *Id.* at 430. Judge Bush defined as “relevant” “information relevant to the woman’s health risks, as well as the impact on the unborn life.” *Id.* at 428–29.

³³ *Id.* at 431 (quoting *A Woman’s Choice—E. Side Women’s Clinic v. Newman*, 305 F.3d 684, 684 (7th Cir. 2002)).

³⁴ *Id.*

³⁵ *Id.* at 448 (Donald, J., dissenting); *see also id.* at 452 (“Indeed, the words ‘truthful,’ ‘not misleading,’ and ‘relevant’ are wholly absent from *NIFLA*, except in the dissent.” (quoting *NIFLA*, 138 S. Ct. 2361, 2385, 2388 (2018) (Breyer, J., dissenting))).

³⁶ *Id.* at 447.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *See id.*

⁴⁰ *Id.* at 447–48.

Judge Donald then found that H.B. 2 failed heightened scrutiny.⁴¹ H.B. 2 did not further the State's interest in facilitating informed consent, and it was not narrowly drawn — the State presented no evidence to show how the previous abortion informed consent statute “was defective in facilitating informed consent.”⁴² Concluding, Judge Donald emphasized her “grave[] concern[]” that the precedent created by the majority would “open[] the floodgates to states . . . to manipulate doctor-patient discourse solely for ideological reasons.”⁴³

Judge Donald was correct that speech-and-display laws like Kentucky's, which require doctors to become mouthpieces for the state's position on abortion, should be subject to heightened scrutiny. Enigmatic as it was, *Casey's* First Amendment discussion was far from a decisive statement on the appropriateness of mere rational basis review for all physician compelled speech claims. The Supreme Court's recent decision in *NIFLA* casts even more doubt on the circuit's reading of *Casey*. By applying *Casey's* three-prong undue burden standard to the First Amendment claim at issue in *EMW*, the Sixth Circuit missed an opportunity not only to clarify *Casey's* First Amendment holding, but also to situate H.B. 2 within the framework set out by *NIFLA*. Instead, the court's decision substantiates fears that rights claims by those who support abortion will ultimately be subject to different, and worse, judicial treatment than will claims by those seeking to restrict abortion.

As Judge Donald correctly noted in dissent, the three-prong “truthful, nonmisleading, and relevant” test was taken not from *Casey's* First Amendment holding, but rather from the plurality's Fourteenth Amendment analysis.⁴⁴ When it came to the First Amendment challenge, *Casey's* plurality gave just two sentences of guidance: “To be sure,” the plurality wrote, “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. We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.”⁴⁵ Some scholars suggest that *Casey's* First Amendment holding, while not offering a fully fleshed-out framework, indicated a balancing of the interests at stake, and perhaps a rationality-with-bite standard of review.⁴⁶ Others have

⁴¹ See *id.* at 449.

⁴² *Id.* at 456.

⁴³ *Id.* at 460.

⁴⁴ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 882 (1992) (plurality opinion).

⁴⁵ *Id.* at 884 (citations omitted).

⁴⁶ See, e.g., Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 837 (1999) (“Without committing to a particular test, the plurality appears to have imported a more stringent rationality review with some consideration of the First Amendment values ‘implicated’ in the communications between professional and client. Ultimately, it left the development of a coherent framework for the analysis of

concluded that the *Casey* Court did not offer a specific standard of review at all.⁴⁷

With little guidance from the Court, a circuit split emerged post-*Casey* as courts began facing the new, more extreme iteration of abortion informed consent laws: so-called “speech-and-display” statutes. While the Fifth Circuit read *Casey* as warranting something akin to rational basis review for First Amendment claims against speech-and-display laws,⁴⁸ the Fourth Circuit identified intermediate scrutiny as the appropriate level of review.⁴⁹

By the time the Sixth Circuit faced *EMW*, however, the Fourth Circuit’s application of intermediate scrutiny was arguably vindicated by the Supreme Court itself in *NIFLA*. *NIFLA* concerned a California law that required licensed crisis pregnancy centers to inform clients, via a posted notice, that the state offers free or low-cost family planning services, or, in the case of unlicensed establishments, that they are not licensed as medical facilities.⁵⁰ In striking down the notice requirement for licensed centers, Justice Thomas rejected California’s argument that the statute, as a regulation of professional conduct meant to facilitate informed consent, should warrant only rational basis review, finding instead that the statute, at a minimum, triggered intermediate scrutiny.⁵¹ While Justice Thomas acknowledged that laws designed to facilitate informed consent may be considered “regulations of professional conduct that incidentally burden speech,” and thus entitled to a lower level of scrutiny,⁵² the Court warned that this exception to general First Amendment principles should be read narrowly, particularly in the medical context where “candor is crucial.”⁵³ The California law itself did not fall under the lower standard of scrutiny employed in *Casey*, Justice

professional speech for another day.” (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 881 (1992)).

⁴⁷ See, e.g., Sonia M. Suter, *The First Amendment and Physician Speech in Reproductive Decision Making*, 43 J.L. MED. & ETHICS 22, 24 (2015) (“The *Casey* plurality . . . failed to characterize the nature of the compelled speech, specify the strength of that First Amendment interest, or articulate the standard of review that applied. As a result, it left ambiguous how to evaluate regulations of professional speech in health care.”).

⁴⁸ See *Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 575 (5th Cir. 2012).

⁴⁹ See *Stuart v. Camnitz*, 774 F.3d 238, 245, 249 (4th Cir. 2014).

⁵⁰ See *NIFLA*, 138 S. Ct. 2361, 2369–70 (2018).

⁵¹ *Id.* at 2375. Typically, content-based regulations of speech are subject to strict scrutiny. See, e.g., *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). As such, *NIFLA*’s application of intermediate rather than strict scrutiny may denote a tacit acknowledgment that informed consent cases pose a more complicated question — though it’s not clear that the application of intermediate versus strict scrutiny makes much of a practical difference, as evidenced by the fact the California statute failed even intermediate review. See *NIFLA*, 138 S. Ct. at 2375.

⁵² *NIFLA*, 138 S. Ct. at 2373.

⁵³ *Id.* at 2374 (quoting *Wollschlaeger v. Governor*, 848 F.3d 1293, 1328 (11th Cir. 2017) (en banc) (W. Pryor, J., concurring)).

Thomas reasoned, because it did “not facilitate informed consent to a medical procedure.”⁵⁴

At the most basic level, the *EMW* majority confused the matter by suggesting that *NIFLA* confirmed *Casey*’s three-prong undue burden test as the constitutional standard for a compelled speech claim by a medical professional.⁵⁵ As Judge Donald pointed out, the words truthful, nonmisleading, and relevant were not mentioned in *NIFLA*, except in dissent.⁵⁶ But further, even if one concedes that — unlike the law in *NIFLA* — H.B. 2 relates to a medical procedure, it does not necessarily follow that the law *actually* “facilitate[s] informed consent” to that procedure.⁵⁷ As others have noted, *NIFLA* at the very least implied that simply slapping the label of “informed consent” on a required disclosure does not automatically render it constitutional.⁵⁸ Analyzing H.B. 2’s ultrasound requirements against prevailing informed consent norms wouldn’t have just changed the analysis in *EMW*, but possibly affected the outcome.⁵⁹ By reinvoking *Casey*’s undue burden test and mischaracterizing the *NIFLA* framework, the Sixth Circuit failed to fully contend with *NIFLA*’s implications for informed consent laws like H.B. 2.

Instead, the court’s analysis of *NIFLA* in *EMW* raised the troubling specter of a “constitutional gerrymander[.]” of abortion — a situation where standard constitutional doctrine is distorted when it comes to abortion.⁶⁰ While some commentators applauded *NIFLA* for greatly

⁵⁴ *Id.* at 2373. Justice Thomas explained that if California’s goal was to provide pregnant people with information about the state services available to them, it could have done so in a way that did not impose requirements on the crisis pregnancy centers. *Id.* at 2376. The assumption that California’s targeting of crisis pregnancy centers was unnecessary or unwarranted is remarkable, and carries extra potency, in light of evidence that crisis pregnancy centers “engage in deliberate efforts to mislead pregnant women.” Teneille R. Brown, *Crisis at the Pregnancy Center: Regulating Pseudo-Clinics and Reclaiming Informed Consent*, 30 *YALE J.L. & FEMINISM* 221, 223 (2018); see also Joanne D. Rosen, Viewpoint, *The Public Health Risks of Crisis Pregnancy Centers*, 44 *PERSP. ON SEXUAL & REPROD. HEALTH* 201, 201 (2012).

⁵⁵ See *EMW*, 920 F.3d at 428–29.

⁵⁶ *Id.* at 452 (Donald, J., dissenting).

⁵⁷ *NIFLA*, 138 S. Ct. at 2373.

⁵⁸ See Thea Raymond-Sidel, Note, *I Saw the Sign: NIFLA v. Becerra and Informed Consent to Abortion*, 119 *COLUM. L. REV.* 2279, 2310–11 (2019) (“It is clear from the *NIFLA* decision itself that regulating an abortion provider and calling such a regulation an informed consent requirement does not make it so. Additional guidance is needed in order to determine what is a proper informed consent requirement and what merely regulates speech as speech.”).

⁵⁹ See Laura Portuondo, *Abortion Regulation as Compelled Speech*, 67 *UCLA L. REV.* (forthcoming 2020) (manuscript at 3), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3359721 [<https://perma.cc/7WKX-ZXL6>] (“Far from excepting them, *NIFLA*’s compelled speech doctrine uniquely undermines a growing body of abortion restrictions.”); Raymond-Sidel, *supra* note 58, at 2315–16 (arguing that abortion laws that force doctors to recite “state-imposed scripts,” including speech-and-display laws, would likely trigger heightened scrutiny under *NIFLA*’s framework).

⁶⁰ See Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering Against Abortion Rights: NIFLA v. Becerra*, 94 *N.Y.U. L. REV.* 61, 66 (2019).

expanding First Amendment protections generally,⁶¹ for others *NIFLA* raised alarm about the Roberts Court's use of the First Amendment as a weapon, and even a new First Amendment Lochnerism.⁶² Indeed, Judge Bush's interpretation of *NIFLA* would put a thumb on the scale for antiabortion speech — allowing states to regulate abortion providers seemingly without limit under the guise of informed consent, while essentially forbidding states from regulating those advocating against abortion, even if they are dispensing misinformation.⁶³

While *Casey*'s First Amendment holding may forever be mired in confusion, *NIFLA*'s lesson is clear: courts must be vigilant against state attempts to co-opt medical providers' voices to deliver political, rather than medical, messages.⁶⁴ This holding must apply equally to crisis pregnancy centers and abortion clinics. The role of courts is to apply the law fairly, without regard to political persuasion.⁶⁵ A topic as divisive as abortion may be the ultimate test of this sacred duty, but of course one central value of the First Amendment is to protect *unpopular* speech. Courts fielding free speech challenges to speech-and-display laws in the future would be wise to grapple honestly with binding precedent, lest the very legitimacy of the courts comes into question.

⁶¹ See Robert McNamara & Paul Sherman, *NIFLA v. Becerra: A Seismic Decision Protecting Occupational Speech*, 2017–2018 CATO SUP. CT. REV., at 197, 197–98 (“[I]t is no exaggeration to say that *NIFLA* cements the Roberts Court as the most libertarian in our nation’s history on free-speech issues.”).

⁶² See Jeremy K. Kessler & David E. Pozen, Introduction, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1960 & n.45 (2018); see also Brendan Williams, *NIFLA v. Becerra: Abortion Speech Only as Free as the Supreme Court Wants It to Be*, 13 CHARLESTON L. REV. 89, 94–95 (2018) (questioning whether courts would apply *NIFLA* equally to laws compelling speech meant to discourage abortion); cf. *NIFLA*, 138 S. Ct. at 2383 (Breyer, J., dissenting) (“Using the First Amendment to strike down economic and social laws that legislatures long would have thought themselves free to enact will, for the American public, obscure, not clarify, the true value of protecting freedom of speech.”). These fears may be well founded, as it is possible that Justice Thomas’s emphasis on the *relation to a medical procedure* evinces an effort on his part to distinguish notice posting from informed consent generally, and thus allow H.B. 2–style abortion regulations within his framework. See *id.* at 2373 (majority opinion) (“The [notice requirement at issue] does not facilitate informed consent to a medical procedure. In fact, it is not tied to a procedure at all.”).

⁶³ See Brown, *supra* note 54, at 225–26 (describing deceptive tactics employed by crisis pregnancy centers); Rosen, *supra* note 54, at 201 (same).

⁶⁴ See *NIFLA*, 138 S. Ct. at 2374–75.

⁶⁵ See *Roe v. Wade*, 410 U.S. 113, 117 (1973) (“[The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.” (quoting *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting))); Andrew Chung, *U.S. Supreme Court Not Politicized, Says Chief Justice Roberts*, REUTERS (Sept. 24, 2019, 10:55 PM) <https://www.reuters.com/article/us-usa-court-chiefjustice/u-s-supreme-court-not-politicized-says-chief-justice-roberts-idUSKBN1WAo8F> [<https://perma.cc/NQ74-RRU4>].