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The Intersection of Free Speech and Abortion: How Federal Courts are Influencing Doctrine to Further Anti-Abortion Goals

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Abstract

Maintaining the accessibility to abortion has been a longstanding battle. While funding for Crisis Pregnancy Centers is increasing, states are cutting funding for abortion clinics (Ludden, 2015) and they are closing at a rate of 1.5 each week (Redden, 2015). Since *Roe v. Wade* (1973), hundreds of cases have been brought to challenge its legality and limit it as much as possible. The inability to challenge *Roe* directly has led many conservative legislators to play abortion politics by proxy, regulating what goes on inside *and* outside clinics, and the federal courts' play a pivotal role in reviewing these regulations. During the 1980s and 1990s, anti-abortion groups employed different forms of protest to discourage abortions, tax abortion providers' resources, and disrupt the flow of information to women seeking abortions in what is known as "clinic-front activism" (Wilson, 2016). Crisis Pregnancy Centers (CPCs) have a reputation for withholding or sharing false information to women which can engender serious mental and physical health consequences (Holtzman, 2017), but federal courts have inconsistently applied the law when addressing concerns about these practices. Controversies over abortion have recently migrated into this area of free speech, and federal court rulings have been increasingly curtailing the efforts of progressive state lawmakers to combat the attempts of anti-abortion groups and states to manipulate information for women seeking abortions. The Supreme Court has served as an important partner to the anti-abortion movement, playing a pivotal role in limiting the parameters of abortion. This is being done in three ways: (1) the Supreme Court has used its discretion over its docket to deny hearing cases, which consequently permits the decisions of the lower court that favor anti-abortion coalitions to stand; (2) federal courts make rulings that are favorable to the anti-abortion movement by selectively using established doctrine to support those positions; and (3) federal courts have created favorable doctrine to defend anti-abortion positions. The abortion debate is no longer just about a woman's right to choose, it is now a battle about who can control the types of abortion related information that women encounter. Constitutional laws governing these issues seem to be changing significantly in response to these efforts that had initially started as small-scale clinic front activism. In the realm of abortion, federal court decisions appear increasingly to favor expanding the goals of anti-abortion groups and vastly curtailing those who support abortion. It has spurred into a much larger movement that continues to constrict the rights of those seeking an abortion to this day.

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Table of Contents

Introduction

On March 30, 2015, Arizona Governor Doug Ducey signed into law S.B. 1318, which amended Arizona's informed consent laws. The requirements for obtaining a patient's informed consent to have an abortion were amended to include that a woman must be informed that: "it may be possible to reverse the effects of a medication abortion if the woman changes her mind but that time is of the essence," and "information on and assistance with reversing the effects of a medication abortion is available on the department of health services' website" (Senate Bill 1318, 2015). This law is controversial, however, because there is a lack of scientific evidence suggesting that an abortion can actually be reversed (Sneed, 2015). The only evidence to support the law was provided by Dr. Mary Davenport, a member of the American Association of Pro-Life Obstetricians and Gynecologists. She asserted that a medically induced abortion could be reversed, relying on an anecdotal study of six patients, in which four of whom were able to carry pregnancies to term (Pieklo, 2015). In this study, the patients had ingested mifepristone, a common anti-progestational steroid that is used to terminate an early pregnancy (MedlinePlus, April 2016; Pieklo, 2015), and were given a dose of progesterone, a type of progestin (female hormones) shortly after (MedlinePlus, 2016, May 15; Pieklo, 2015).

Two health care facilities and three physicians challenged S.B. 1318, alleging that the provisions violated both the rights of physicians and their patients under the First Amendment (*Planned Parenthood Arizona v. Brnovich*, 2016). Referring to the alleged harms of physicians in *Planned Parenthood Arizona,* the District Court held that "whether physicians perform abortions without advising their patients regarding the Act's medication abortion reversal provisions and face punishment, or unwillingly convey the state-mandated message under threat of prosecution, as alleged, their First Amendment rights are concretely and imminently affected" (*Planned*

Parenthood Arizona v. Brnovich, 2016). Planned Parenthood Arizona also claimed that the bill was a concrete invasion of patient's First Amendment rights to receive information concerning their medical treatment from a physician that is believed to be exercising his or her professional medical judgement. In their ruling, the District Court cited a few relevant Supreme Court decisions and held that "it is well established that the right to hear— the right to receive information— is no less protected by the First Amendment than the right to speak" (*Planned Parenthood Arizona v. Brnovich,* 2016). Although this 'abortion reversal' law was stopped in Arizona, it has gained traction in several other conservative states (Kruesi, 2018), and these laws have not yet been challenged in court.[1]

Compare these laws about the mandatory disclosure of *false* information with California's FACT Act, a disclosure ordinance that aimed to provide the public with accurate information about health clinics. The FACT Act was passed by the legislature in 2015 (Holtzman, 2017) and was subsequently struck down by the Supreme Court in 2018 in *National Institute of Family and Life Advocates (NIFLA) v. Becerra* (2018). The FACT Act differentiated between two types of facilities, namely so-called "licensed covered facilities" and "unlicensed covered facilities" (Holtzman, 2017). Licensed covered facilities are defined as having the

[1] In 2018, Idaho passed a similar measure that requires women seeking abortions to be informed that drug-induced abortions can be halted halfway, "despite opposition from medical groups that say there is little evidence to support the claim" (Kruesi, 2018). Similar laws have also been passed in Arkansas, Utah, and South Dakota (Kruesi, 2018).

primary purpose to provide family planning or pregnancy related services, whereas a facility is considered an "unlicensed covered facility" if it does not have a licensed medical provider on staff, but its primary purpose is to provide pregnancy-related services (Holtzman, 2017).

The proposed provisions of the FACT Act contained two notice requirements. The first required licensed clinics to display a notice that said, "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women," and provided a phone number for women to call to determine eligibility (*NIFLA v. Becerra*, 2018). This notice was to be posted in the waiting room, printed and distributed to all clients, or provided digitally at check-in (*NIFLA v. Becerra,* 2018). The second notice requirement was about unlicensed clinics, and it mandated that a government-drafted notice be displayed that stated "[t]his facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services" (*NIFLA v. Becerra*, 2018). The State asserted a legitimate stated interest in preserving informed consent for women seeking abortions through these ordinances, but the Court ruled otherwise. The Court held that the State sought not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information (*NIFLA v. Becerra*, 2018), and so the FACT Act was considered a content-based regulation which violated the First Amendment.

These competing interpretations of the First Amendment seemingly leave the law in a surprising position, protecting false information while depriving state governments the capacity to inform patients with accurate information. As demonstrated in *NIFLA*, it was considered unconstitutional to compel speech about factual information about an anti-choice clinic (*NIFLA v. Becerra,* 2018), but regarding regulations that compelled speech about an unfounded claim

that abortions can be reversed, the courts have taken a significantly less restrictive stance. There are critical concerns over why these fluctuating decisions are problematic, as the outcomes of these cases are a matter of public health and can put the health of many women at risk. Gostin (2001) asserts that governmental duties exist; they are:

> To assure the conditions for people to be healthy (e.g., to identify, prevent, and ameliorate risks to health in the population), and the limitations on the power of the state to constrain the autonomy, privacy, liberty, proprietary, or other legally protected interests of individuals for protection or promotion of community health.

This includes having an inherent interest to uphold the free flow of information to its people, as to fulfill their duty to promote community health (Gostin, 2001). While there are limitations on governmental power, for both the courts and the legislature, it seems as though these limitations are becoming more and more unclear. In the realm of abortion, federal court decisions appear to increasingly favor expanding the goals of anti-abortion groups and vastly curtailing those who support abortion.

In order to understand the reasoning for the shifting doctrines in favor of the anti-abortion movement, one must look to the growing role of the First Amendment in the abortion debate. Controversies over abortions and abortion rights have recently migrated into the area of free speech, and federal court rulings have been increasingly curtailing the efforts of progressive state lawmakers to combat the attempts of anti-abortion groups and states to manipulate information for women seeking abortions. The inability to challenge *Roe v. Wade* (1973) directly has led many conservative legislators to play abortion politics by proxy, regulating what goes on inside *and* outside clinics, and the federal courts' play a pivotal role in reviewing these regulations. The federal courts have seemingly taken a larger role in regulating the types of information that can

and must be disclosed by clinics, although not all of these rulings have been consistently in the interest of pregnant women.

One potential avenue for affecting constitutional change relies on a cooperative "support structure." Such structure is comprised of litigants and legal organizations with the resources to bring the right cases to court as well as legal academics and interest groups to nurture and develop the ideas that support doctrinal change (Epp, 1998). This paper takes a look at how abortion politics have changed since *Roe,* looking first to the frontal efforts to overturn and then outlining how they have changed since. The emergence of "new federalism" in Supreme Court jurisprudence, has altered the power between the federal government and the states and rulings have changed accordingly. I will further explore this inquiry in my analysis, which will include a discussion on how the appointment of conservative personnel to the federal judiciary has greatly contributed to these doctrinal changes. I will outline the impacts of several cases that have involved anti-abortion activists engaging in clinic front protests (Wilson, 2013), and explain how these tactics were used to impede access to abortion clinics. The discussion will continue with a detailed narrative of how the debate has made its way inside clinics to not just inhibit physical access to clinics but also directly impact access to abortion related information.

The data section of this paper will include a systematic overview of federal cases that are representative of the doctrinal change that is occurring in abortion cases through First Amendment protections. This will be supplemented with a detailed analysis on what these shifting decisions mean for women seeking reproductive health services that was done by discerning the laws that have been passed in relation to their accompanying court cases. I have found that these cases can be grouped into three categories. In some instances, we will see how the Supreme Court has exercised its authority to control which cases are heard and how that has

permitted many lower court rulings that favor anti-abortion coalitions to stand. There is also a collection of cases that is demonstrative of federal courts making rulings that are favorable to the anti-abortion movement by selectively using established doctrine to support those positions. Lastly, there are several cases that reflect how the federal courts have created favorable doctrine to defend anti-abortion positions. Despite a strong resistance by the pro-choice movement, restrictive abortion legislation continues to make its way through the legislature, and federal courts by and large have supported it. What used to just be a debate about whether a woman had the right to an abortion has evolved into a much deeper conversation about controlling what types of information women can even receive about abortion.

Background

In *Roe v. Wade* (1973), the United States Supreme Court recognized a right to abortion as part of a larger set of privacy guarantees protected by the Constitution. The right to privacy protects individuals to make fundamental life decisions free from government interference. This encompasses the ability for people to decide whether and when to have children, who to marry, and potentially when to die. In *Roe,* a Texas woman seeking an abortion was faced with restrictions that prohibited abortion unless the pregnancy posed a risk to her life (*Roe v. Wade,* 1973). The decision of this case has been directly challenged in subsequent years, on several fronts, including the right to privacy and the First Amendment. These challenges have resulted in the scope of the law being narrowed.

Justice Blackmun contended that only a compelling state interest would justify regulating a woman's fundamental right to privacy, and that legislation must be narrowly tailored toward a

legitimate state interest (Roe v. Wade, 2019). *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) abandoned the framework of the trimester division of a pregnancy and instead balanced the right of privacy against the potential rights of a fetus. *Casey* adopted an 'undue burden test' to determine whether State regulations had the purpose or effect of placing substantial obstacles in the path of a woman seeking an abortion before viability (*Planned Parenthood v. Casey*, 1992). In efforts to combat this ruling, states began to enact restrictive abortion laws to make it more difficult to get an abortion and to dissuade women from seeking an abortion (Medoff, 2015).

Since the rulings of cases like *Roe* and *Casey*, some states have enacted burdensome regulations that were nonetheless consistent with Supreme Court precedent. According to the Guttmacher Institute, these types of laws placed restrictions on physicians and hospital requirements, gestational limits, limits on public funding and coverage from private insurance, restrictions on waiting periods, regulations on parental involvement and counseling, the ability of a medical facility to not perform abortion procedures and placing restrictions on 'partial birth' abortions (Guttmacher Institute- An Overview, 2018). Some of these additional attempts to restrict abortion procedures were found in *Gonzales v. Carhart* (2007) and *Whole Woman's Health v. Hellerstedt* (2016). *Gonzales* prohibited a rarely used abortion procedure known as intact dilation and evacuation (*Gonzales v. Carhart*, 2007), and *Whole Woman's Health* struck down provisions of a Texas law that had required abortion clinics to meet the standards of ambulatory surgical centers and abortion doctors to have admitting privileges at a nearby hospital (Roe v. Wade, n.d.). Although these efforts were largely unsuccessful, many states have implemented different types of Targeted Restrictions on Abortion Providers (TRAP) laws, which place restrictions on building requirements, hospital relationships, location requirements, and

reporting requirements on abortion providers. Such laws have made it more difficult for women to access abortion services and has increased both the risks and costs associated with abortion (Planned Parenthood Action Fund, 2018).[2]

Recently, several states have passed 'early abortion bans,' or laws that explicitly ban abortions after a certain point within the early stages of pregnancy. As of June 5, 2019, nine states have passed early abortion bans to some degree. Utah and Arkansas passed laws making abortion illegal after 18-22 weeks. Laws passed in Ohio, Missouri, Kentucky, Louisiana, Mississippi, and Georgia ban abortion after 6-8 weeks. Finally, the most restrictive law against abortion in the United States has been passed in Georgia, which explicitly bans abortion unless the pregnant woman's health is at risk (Gordon & Hurt, 2019).

As anti-abortion activists continued to mobilize, so did counter efforts which supported reproductive rights. Groups such as NARAL Pro-Choice America, NARAL Pro-Choice America Foundation, and the National Abortion Federation mobilized around the time of *Roe* to combat the efforts of those groups opposed to abortion. More recently, organizations such as the Center for Reproductive Rights, the Feminist Majority Foundation, and the Physicians for Reproductive Health were founded in the late 1980s through the early 1990s to aid in these efforts. Since 1969, NARAL Pro-Choice America (NARAL) has been pushing for the expansion of women's rights. A notable undertaking is the 1985 "Abortion Rights, Silent No More Campaign" (NARAL Pro-Choice America, 2019). Some states have also passed laws that favor the abortion movement,

[2] *Whole Woman's Health* did strike down a Texas TRAP law, although this did not automatically invalidate all other TRAP laws (NARAL Pro-Choice America, 2018).

with New York, Vermont, and Illinois being the only three states to have passed laws affirming the legality of abortion regardless of whether *Roe* gets overturned (Gordon & Hurt, 2019). Additionally, reproductive rights groups such as the ACLU have organized against these bans to defend the rights of women seeking abortions. As of October 29, 2019, in *Robinson, et al. v. Marshall, et al.*, the U.S. District Court in Alabama notably granted a preliminary injunction blocking the Alabama law that banned abortion in nearly all instances (American Civil Liberties Union, 2019).

There have also been organized efforts to directly combat the progress of resistance to abortion from former executive administrations. During his Presidency, Ronald Reagan not only tried to have the decision of *Roe* overturned, but he also tried to fill Supreme Court vacancies with judges who would further Reagan's anti-abortion agenda (NARAL Pro-Choice America, 2019). In combatting the Reagan Administration's attempts to reverse the decision of *Roe*, NARAL increased grassroots organizing and campaigning to promote abortion rights. NARAL and several other pro-choice organizations were instrumental in preventing the nomination of Judge Robert Bork (NARAL Pro-Choice America, 2019), and through testifying, arranging rallies and protests, and organizing against anti-abortion legislation, these groups served as the barrier that protected women's rights. The abortion debate remains a contentious topic with many advocates on both sides of the debate. State legislators are continuing to make efforts to contest TRAP laws and other frontal efforts that restrict abortion. However, maintaining the accessibility to abortion information and services has proven difficult as federal courts have taken a larger role in regulating abortion. Controversies about abortion have migrated from the realm of privacy to the realm of free speech and federal courts have exercised their authority in ways that largely favor the anti-abortion movement and curtail the efforts of progressive state

lawmakers. The past inabilities to challenge *Roe* directly, have led to an organized countermovement (Decker, 2016) that plays abortion politics by proxy.

Free Speech Meets Abortion

The anti-abortion movement has adopted a new strategy to undermine the constitutionality of abortion, appealing adverse decisions to federal courts to get lower decisions reversed (Wilson, 2013). These appeals were frequently about regulations of where people could protest, how close pro-life activists were permitted to be in proximity to an abortion clinic, what information clinics must disclose, and what information some doctors could share with patients. In addition to the aforementioned cases, there was an organized effort in combatting *Roe,* from what is known as the Conservative Legal Movement (CLM) (Decker, 2016). Following *Roe* and the passage of several other left-leaning policies, in February 1973, a group of California lawyers left the Reagan Gubernatorial Administration to form a nonprofit, "public interest" legal foundation that was staffed entirely by Conservatives, known as the Pacific Legal Foundation (Decker, 2016). Its first president, Ronald Zumbrun, contended that without a concerted counter-mobilization to the regulatory "left" policies that had been passed, California, and eventually the United States would become ungovernable (Decker, 2016). By 1978, several more nonprofit legal foundations were established with the claim that "federal bureaucracies exceeded their constitutional and statutory authority at the expense of state and local governments" (Decker, 2016).

The Conservative Legal Movement is known to aid sidewalk counselors (Wilson, 2013) in their fight to convince women to forgo abortions and CLM attorneys have mobilized in the courts and in the arena of public opinion, in the hopes of bringing the regulatory state to heel

(Decker, 2016). In what became known as the Conservative Rights Revolution, these legal foundations began to create campaigns aimed at changing legal doctrine through test cases and influencing constitutional legal foundations by questioning the constitutional legitimacy of certain powers that had been given to the government (Decker, 2016). In addition to the mobilization of these cause lawyers, the abortion debate also gained prominence in the forefront of GOP presidential campaigns (Wilson, 2016), whose influence would become greater over time. The Conservative Rights Revolution has proven to be part of a larger narrative that has changed the types of cases that would reach the Supreme Court, as well as the decisions of many similarly natured cases.

Although it was originally thought to ameliorate the conflict between opposing sides of the debate, *Roe* actually provoked more activism. What began as just a "Catholic issue," eventually became more of a central issue for social conservatives (Wilson, 2013) and sparked waves of activism from both anti-abortion activists and abortion rights activists. Anti-abortion groups employed different forms of protest to discourage abortions, tax abortion providers' resources, and disrupt the flow of information to women seeking abortions. These 'street-level tactics' were popular during the 1980s and 1990s to publicize and advance their cause and gain more members, through what he refers to as 'clinic-front activism' (Wilson, 2013), and are still prevalent today. Clinic-front anti-abortion protests grew in intensity and frequency, and abortion providers and other abortion rights activists developed strategies to fight back. To counter such efforts, abortion rights activists turned to using state-based means and direct-action strategies to make gains against their adversaries (Wilson, 2013). Abortion providers and activist groups brought claims to the courts to limit the clinic front protests that would impede access to abortion

clinics, and anti-abortion activists effectively countered with claims that their First Amendment rights were being infringed.

These indirect efforts to overturn *Roe* continued when state legislators tried to regulate certain anti-abortion clinics from disseminating false or misleading information, but the federal courts consistently ruled against them (Wilson, 2016).

As stated by Wilson (2016),

> The anti-abortion movement correspondingly moved away from a seemingly doomed frontal assault on *Roe v. Wade* (1973) and the unpopular clinic-front activism of the 1980s and 1990s and adopted an incremental strategy of fighting abortion at lower jurisdictional and administrative levels.

This incremental strategy would serve to place restrictions on speech inside of abortion clinics, and it has heavily impacted the available resources to women seeking abortions (Faria, 2012; Holtzman, 2017). Among the most influential free speech claimants, are Crisis Pregnancy Centers (CPCs) (Faria, 2012). CPCs, sometimes referred to as pregnancy resource centers, are counseling centers that provide services to pregnant women (Faria, 2012). CPCs have proliferated to provide an alternative to what anti-abortion advocates view as inappropriate family planning advice in traditional women's health centers. What distinguishes them from other reproductive health facilities is that these centers do not employ licensed medical providers, who operate under different ethics rules. CPCs typically receive more funding than abortion clinics (Holtzman, 2017; Waxman, 2004 & Ludden, 2015) and have been found to use potentially deceptive advertising techniques (Holtzman, 2017). The expansive influence of CPCs is part of a greater strategy implemented by conservative politicians in control of state executive

offices, legislatures and courts that are sympathetic to the anti-abortion movement to push their agenda.

Legislators began targeting speech issues that related to information about abortions, pervasively determining whether women can be approached on sidewalks, deciding what types of information women can receive before beginning the abortion process, information that is forcibly read to women during the abortion process, and what information they can receive about their current or future circumstances (Wilson, 2013). The abortion debate is no longer just about a woman's right to choose, it is now a battle about who can control the types of abortion related information that women encounter. Constitutional laws governing these issues seem to be changing significantly in response to these efforts that had initially started as small-scale clinic front activism. It has spurred into a much larger movement that continues to constrict the rights of those seeking an abortion to this day.

Clinic Front Activism

Efforts to regulate information in the context of abortion has implicated a number of free speech doctrines. One of the most prominent ways in which abortion politics is making its way into the domain of free speech is over the questions of compelled speech, and cases involving speech in forums. The Supreme Court divided forums into three types, traditional public forums, designated forums, and nonpublic forums. These all refer to places in which a speaker speaks and each forum provides varying levels of protections for speech (Legal Information Institute, n.d. a). Other relevant free speech categories that are pertinent in this debate deal with viewpoint and content neutrality, as well as time, place, and manner restrictions.

Some state laws have allegedly run afoul of these free speech doctrines and accordingly court cases have been filed to address these issues. As of June 2014, the Guttmacher Institute reported that 15 states and the District of Columbia had clinic access provisions and that the Supreme Court heard or responded to at least 14 cases since the late 1980s (Wilson, 2016). Such cases have referred to regulations about what kinds of information can be shared in particular places, specifically, on questions about the proximity to express anti-abortion ideas outside of an abortion clinic. Federal courts have addressed several cases regarding the time, place, and manner of protesting outside of abortion clinics and the viewpoint/content neutrality of speech. As long as regulations are narrowly tailored and content neutral, the Court decided that such regulations were constitutional (Shiffrin & Choper, 2011). However, there have been instances where the Supreme Court and other federal courts have ruled against such ordinances that otherwise seemed to have met these conditions. They have repeatedly held that restricting where anti-abortion advocates protested, was a violation of the First Amendment, even in circumstances where the access to abortion clinics was obstructed.

Preserving Access to Abortion Clinics

The courts have not always provided asymmetric support for the anti-abortion movement. In the past they have made rulings that favored women's access to reproductive clinics, but in more recent years, doctrine concerning abortion rights in the domain of the First Amendment has evolved. In 1994, the Supreme Court employed an analysis of time, place, and manner restrictions in *Madsen v. Women's Health Center* (1994), in which a Florida court enjoined anti-abortion protesters from protesting outside of a Florida abortion clinic and around the homes of

doctors and clinic workers. The court found that access to the clinic was being impeded, and the activities of protesters were having deleterious physical effects on patients and was discouraging some potential patients from entering the clinic (*Madsen v. Women's Health Center, Inc.,* 1994). The court's holding established several rules about "buffer zones" around the clinic and the homes of clinic employees. The majority ruled to preserve a 36-foot buffer zone around the front entrances of the clinic and driveway, because it did not burden speech more than was necessary to serve a significant government interest. However, it did strike down the 36-foot buffer zone around the sides and back entrances of the clinic (*Madsen v. Women's Health Center, Inc.*, 1994), because patients and staff wishing to reach the clinic did not necessarily have to cross that property. Additionally, the 300-foot buffer zone around staff residences was considered more than necessary to protect the privacy of the home and was not upheld (*Madsen v. Women's Health Center, Inc.*, 1994).

The holding of this case was contingent on the government's stated interest as "a means of protecting unfettered ingress to and egress from the clinic, and ensuring that petitioners do not block traffic on Dixie Way" (Wilson, 2013). The majority of the Supreme Court felt that the interests identified by the Florida Supreme Court to protect a pregnant woman's freedom to seek and access medical services, among other things, was compelling enough to justify this tailored injunction (*Madsen v. Women's Health Center, Inc.,* 1994). This standard governed the Courts' decision to rule against the buffer zone in other surrounding areas of the public, as they placed more restrictions on speech than was necessary because speech around the clinic did not necessarily impede the functioning of the clinic itself. It is important to note that the ordinance is not subject to heightened scrutiny as content or viewpoint-based simply because it restricts only the speech of anti-abortion protesters (*Madsen v. Women's Health Center, Inc.,* 1994).

Applying *Ward v. Rock Against Racism (1989*), there is a three-prong analysis that allows the government to impose reasonable restrictions on protected speech, even in a public forum, provided all the criteria is met. The prongs are (1) the restrictions are justified without reference to the content of the regulated speech, (2) the restrictions are narrowly tailored to serve a significant governmental interest, (3) the restrictions leave open ample alternative channels for communication of the information (*Ward v. Rock Against Racism*, 1989).

The Court held that

> To accept petitioners' claim to the contrary would be to classify virtually every injunction as content-based. An injunction, by its very nature, does not address the general public, but applies only to particular parties, regulating their activities, and perhaps their speech, because of their past actions in the context of a specific dispute. (*Madsen v. Women's Health Center, Inc.*, 1994)

The opinion continued,

> The fact that this injunction did not prohibit activities by persons demonstrating in favor of abortion is justly attributable to the lack of such demonstrations and of any consequent request for relief. Moreover, none of the restrictions at issue were directed at the content of petitioners' anti-abortion message. (*Madsen v. Women's Health Center, Inc.,* 1994)

The decision and modes of reasoning used in *Madsen* have been used in several other cases of similar nature, though some did not apply this precedent in their ruling.

Although not a Supreme Court case, *Terry v. Reno* (1996) made a notable contribution to this debate. Anti-abortion protestors brought suit against the United States Attorney General to challenge the Freedom of Access to Clinic Entrances (FACE) Act of 1994, on the grounds that it

violated their First Amendment rights. The FACE Act prohibited the use or threat of force or physical obstruction against a person seeking to obtain or provide reproductive health services, including abortions (*Terry v. Reno,* 1996). The circuit judge affirmed the ruling of the District Court and joined four of it its sister circuits in sustaining the constitutionality of the FACE Act, and also made clear that the FACE Act did not violate the First Amendment. This judgment was based on the fact that because it regulated conduct, not speech, its prohibition is narrowly tailored to serve a government's legitimate interest in providing safe access to reproductive services (*Terry v. Reno*, 1996).

Some other relevant cases from the Courts of Appeals are as follows. *Lucero v. Trosch* (1997) permitted a 25-foot buffer zone around an abortion clinic but struck down provisions that created a buffer zone 200 feet around residences of clinic staff and within 20 feet of individuals seeking to enter an abortion clinic. *U.S. v. Weslin* (1998) upheld the constitutionality of the FACE Act. *McGuire v. Reilly* (2001) upheld the constitutionality of the Massachusetts Reproductive Health Care Facilities Act, which established floating buffer zones between patients and protesters. In *New York ex rel. Spitzer v. Operation Rescue National* (2001), the Court of Appeals made determinations about violations of the FACE Act and restricted the expansion of certain buffer zones.

Previously discussed cases have referred to what has been established as 'buffer-zones.' *Schenck v. Pro-Choice Network of Western New York* (1997), is similarly concerned, though it creates a distinction between what are known as 'fixed buffer zones' and 'floating buffer zones.' A fixed buffer zone is the area surrounding fixed locations like doors, doorways, parking lot entrances, and driveways where demonstrations were banned. A floating buffer zone refers to the space surrounding people or vehicles that are seeking access to or from facilities where

demonstrations were banned (*Schenck v. Pro-Choice Network of Western New York,* 1997). The Pro-Choice Network of Western New York (PCN) filed suit against anti-abortion organizations and advocates for conspiracy to deprive women seeking abortions or other family planning services, and for the discrimination against and harassment of women seeking such services. The Court validated an injunction to ban demonstrating within a fixed 15-foot radius within the clinics' doorways, parking lot entrances, and driveways (*Schenck v. Pro-Choice Network of Western New York,* 1997). This is consistent with the rulings in *Madsen,* in accordance with the notion that it is gravely important to keep protesters away from the entrances to clinics, to ensure women have unhindered access to family planning services. This fact seems undisputed, that the Court must preserve unhindered access to clinics, although not all courts are ruling within the bounds of this principle.

Permitting the Obstruction of Access to Abortion Clinics

As previously noted, the courts' rulings have not remained constant; the extent of these previously outlined protections is where *Schenck* draws the line (*Schenck v. Pro-Choice Network of Western New York,* 1997). A fixed buffer zone around clinic entrances was found to be constitutional, but the Court found that a ban on demonstrations within a particular vicinity of a person or vehicle seeking access to the clinic "burdened more speech than was necessary to serve the relevant governmental interests" (*Schenck v. Pro-Choice Network of Western New York,* 1997). The governmental interest in *Madsen* was "…protecting unfettered ingress to and egress from the clinic…" (Wilson, 2013). Whereas a 36-foot buffer zone was established in *Madsen,* applying that precedent here, we see that this interest only serves to protect women within 15

feet of the clinic. The floating buffer zone around the women seeking services was struck down, and considered it a violation of First Amendment rights to sanction protesters from approaching and soliciting unwarranted advice to women seeking reproductive services if they were more than 15 feet from a clinic entrance.

Later, in *Hill v. Colorado* (2000), the justices addressed questions about free speech in a public forum. A Colorado statute made it unlawful for any person to knowingly approach a person and get within eight feet of another person without their consent, and to pass out leaflets, display a sign to, or to engage in oral protesting, education or counseling within 100 feet of the entrance to any health care facility (*Hill v. Colorado*, 2000). Similar to *Madsen,* this was a case involving anti-abortion sidewalk counselors, who would try to dissuade women from getting an abortion as they entered abortion clinics. The statute at issue was an effort to protect those who entered the facility from harassment, nuisance, and other unwelcome approaches (*Hill v. Colorado*, 2000). The state court had dismissed the complaint that sought to enjoin the statutes enforcement and found that it upheld the time, place, and manner restrictions of *Ward* (*Hill v. Colorado,* 2000). This case came as a result of the Supreme Court granting petition after the Court of Appeals affirmed the District Court's judgement that the statute did not violate the First Amendment. In determining their ruling, the Supreme Court applied *Schenck*, and concluded that the statute was narrowly drawn to further a significant government interest (*Hill v. Colorado,* 2000). It was upheld \on the grounds that "the State's police powers allow it to protect its citizens' health and safety, and may justify a special focus on access to health care facilities and the avoidance of potential trauma to patients associated with confrontational protests" (*Hill v. Colorado*, 2000).

A notable example of the court ruling to further the goals of the anti-abortion movement is *McCullen v. Coakley* (2014), where the Court struck down a Massachusetts Act that "made it a crime to knowingly stand on a 'public way or sidewalk' within 35 feet of an entrance or driveway to any reproductive health care facility." The area in question was regarded as a 'traditional public forum,' (*McCullen v. Coakley,* 2014), which includes public parks, sidewalks and other areas that are traditionally open to public speech and debate (Legal Information Institute, n.d. a). Although speakers in traditional public forums have the strongest First Amendment protections (Legal Information Institute, n.d. a), according to *Ward*, speech in a traditional public forum is still subject to regulation.

Ward stated that

> The government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information. (*Ward v. Rock Against Racism, 1989*)

The Supreme Court found that the Act passed the time, place, and manner conditions, and that it was not a viewpoint or a content-based restriction. Although the Act was justified without reference to the content of speech, the Court ruled that the Act burdened substantially more speech than necessary to promote their governmental interest. However, the Court did not believe that the Act was narrowly tailored. This case involved similar circumstances as the previously discussed cases involving clinic front activism, although the outcomes were notably different.

In *McCullen*, the government did not have the power to regulate speech on sidewalks, because the regulations were not seen as being narrowly tailored enough and that there were alternative ways to serve their interest (*McCullen v. Coakley*, 2014). Rather than being seen as protesters as they were in *Madsen, Schenck, and Hill*, anti-abortion advocates were referred to as objectors which altered how the circumstances of the case were viewed.

As was held in *McCullen*,

> It deprives objectors of their primary methods of communicating with patients: close, personal conversations and distribution of literature. While the Act allows 'protest' outside of buffer zones, these objectors are not protesters; they seek to engage in personal, caring, consensual conversations with women about alternatives. (*McCullen v. Coakley*, 2014)

The Court selectively categorized the anti-abortion activists as objectors instead of protesters, and were able to use this to undermine the past rulings of *Madsen, Schenck, and Hill.* Whereas buffer zones were previously seen as the government's legitimate interest to maintain public safety on streets and sidewalks and preserve access to adjacent reproductive healthcare facilities (*Schenck v. Pro-Choice Network of Western New York*, 1997), the Court no longer views them as necessary. Instead, the Court now views buffer zones as burdening more speech than necessary and that *different* legislation should be enacted to serve their interest (*McCullen v. Coakley*, 2014).

As the propensity of clinic front protesting lowered and was being met with much resistance from the pro-choice community, the anti-abortion movement found alternative means to influence their agenda. Rather than trying to dissuade women from seeking abortions outside

of abortion clinics, their interest turned to trying to influence women inside reproductive health clinics. As states passed ordinances targeted at preventing protests around abortion clinics, and several were upheld by federal courts, a new wave of resistance surfaced. This included having a much larger emphasis on informed consent, restricting funding, and implementing laws that would restrict healthcare facilities that offered family planning services from talking about abortion.

Crisis Pregnancy Centers

Before we can fully understand the implications of these newer efforts of the anti-abortion movement regarding free speech, we must first understand the sweeping power of Crisis Pregnancy Centers (CPCs) and how they have impacted abortion. CPCs are also known as pregnancy resource centers. Originally founded by Robert Pearson in Hawaii in 1967, CPCs have been around since before *Roe* (Faria, 2012), however, their impact rapidly increased during the 1990s. The growing abortion debate spurred the creation of more of these clinics, in efforts to regulate the types of information that women received about abortion and to deter more women from having abortions (Holtzman, 2017). In fact, Pearson had founded the 'Anti-Choice Pearson Foundation' after *Roe*, and subsequently published an influential manual titled, "How to Start and Operate Your Own Pro-Life Outreach Crisis Pregnancy Center" in 1984 (Holtzman, 2017), which includes a plethora of detailed information about using deceptive tactics and how to gain support for their cause (Stacey, n.d.). CPCs have been widely successful at obtaining state and federal funding, and their influence has grown exponentially since 1967. CPCs are typically associated with Christian charities and are usually under the umbrella of one of three national

groups – Heartbeat International, Care Net, and the National Institute of Family and Life Advocates (Stacey, n.d.). It is important to note that the organizations that sponsor CPCs are the ones leading the efforts to curtail abortion.

Many CPCs seek to dissuade women from getting abortions, and while some express their opposition to abortion, many conceal their views. Seventy-five percent of CPCs surveyed in New York City do not identify themselves as anti-abortion on their websites, and while 37.5% of CPCs explicitly state they do not refer women for abortion services, they still claim to be unbiased and provide accurate information (McIntire, 2015). They participate in targeted advertising in order to maximize their influence, oftentimes placing outdoor advertising near high schools, colleges, and low-income neighborhoods. These tactics are also employed online. Care Net, an organization that supports a network of 900 pregnancy centers in the U.S. and Canada (Care Net, 2006) and Heartbeat International, a worldwide network of more than 2,700 pro-life pregnancy help organizations (Heartbeat International, n.d.) spend more than $18,000 per month on pay-per-click advertising campaigns that target women searching for abortion providers and bring them to their websites and call center, 'Option Line.' Care Net and Heartbeat International also place bids on more than 100 keywords, including "abortion," "morning-after pill," and "women's health clinics" (McIntire, 2015). This is extremely deceptive, as women searching up these terms are often looking to explore *all* their options, and if they search "abortion" and find this hotline, they will not be given accurate information about abortions. Instead, they will find themselves with limited information about their options, and under pressure to carry the pregnancy to term. Critics of CPCs believe that this is very problematic, because it is deceptive to women seeking help (Faria, 2012).

Although they may appear to be a legitimate medical clinic, CPCs are actually exempt from regulatory, licensure, and credentialing oversight that typically apply to health care facilities (Bryant & Swartz, 2018). CPCs can be either licensed or unlicensed, and *both* are known to use deceptive advertising techniques. Unlicensed facilities are often staffed by non-licensed individuals dressed as medical professionals, who deceive "patients" by providing inaccurate information (Holtzman, 2017). Another strategy used by CPCs is to open locations within close proximity to comprehensive health clinics or by giving the impression that they provide medically accurate information (McIntire, 2015). An example of what is known as the "co-location strategy," is the CPC, Problem Pregnancy (PP) of Worcester, Mass., which was originally on the same floor of the same building as the Planned Parenthood (PP) clinic. Upon the relocation of Planned Parenthood, Problem Pregnancy followed and reopened a clinic right across the street of the new Planned Parenthood location (McIntire, 2015). With the same acronym as Planned Parenthood and close proximity, it is reasonable to understand how women can get the two confused.

CPCs have also been found to disseminate inaccurate information about abortion and other reproductive health issues such as psychological trauma, cancer risks, and infertility. Reporters found that "87% of the CPCs investigated in Minnesota advised that abortion will lead to severe mental health problems" and "78% of CPCs investigated in Montana claimed that abortion causes serious psychological damage." They also found that "73% of the CPCs investigated in Minnesota repeated the false claim that there is a link between abortion and an increased risk of developing breast cancer," and "67% of the CPCs investigated in Minnesota highlighted a link between future infertility and abortion, and over 73% of CPCs investigated suggested a link between abortion and future miscarriage" (McIntire, 2015). CPCs tend to try to

persuade pregnant women to choose adoption or motherhood, and employ tactics intended to delay women considering abortion from obtaining the procedure. These clinics also spread falsities including incorrect information about contraception, fetal development, and the risks of abortion (Duane, 2013). NARAL Pro-Choice America found that "67% of the CPCs investigated in North Carolina gave inaccurate information about the risks of abortion, including that it is strongly associated with infertility, pelvic inflammatory disease, future ectopic pregnancies, future preterm births, excessive bleeding, and death" and "89% of CPCs investigated in Montana presented inaccurate information about birth control, including that birth control is the same as abortion, and that condoms don't work…" (McIntire, 2015). Many CPCs do not talk about any contraceptives besides abstinence, and if they do, such information is oftentimes inaccurate. Research from the American Public Health Association has also found that CPCs disseminate false information about sexually transmitted infections (Holtzman, 2017).

Funding for CPCs

Prior to 2000, CPCs barely received any federal funding, although it is evident that this changed with the increased government spending by President George W. Bush (Holtzman, 2017). A 2004 U.S. House of Representatives report prepared for Representative Henry A. Waxman, found that under the Bush Administration, federal support for abstinence-only programs expanded. In fact, the federal government spent approximately $170 million on abstinence-only education programs in the fiscal year of 2005, which is more than twice the amount that was spent in fiscal year 2001 (Waxman, 2004) when Bill Clinton was President. The Special Programs of Regional and National Significance Community-Based Abstinence Education

(SPRANS) is one of the largest federal abstinence initiatives, and through this program, the Department of Health and Human Services provides grants to programs that teach abstinence only curricula. CPCs are eligible for these grants because their primary mission is to promote abstinence, whereas agencies that provide comprehensive sexual education are not eligible for such grants (Stacey, n.d.). Since the creation of SPRANS and the large increase in federal spending on abstinence programs, the number of CPCs has drastically increased.

More than 80% of the abstinence curricula that is used by over two thirds of the SPRANS funded CPCs, contains false and misleading information about women's reproductive health. Interestingly, the curricula that is used in these clinics is not reviewed for accuracy by the federal government (Waxman, 2004), and 87% of CPCs that were contacted in a study from the Waxman report, were found to have provided erroneous medical information to women (Holtzman, 2017). The curriculum explicitly states information that contradicts medical textbooks. Oftentimes, the information shared with clients is outdated, and despite the existence of recent studies that may disprove the data they are using, CPCs do not update the information that they disclose (Waxman, 2004). For example, the dangers of a legal medical abortion are often portrayed as much higher than what they actually are, because CPCs use information from the 1970s. Such information neglects medical advancements that were made in the 1970s through the 1990s that lowered the risk of complications from abortion related procedures. Similarly, CPCs provide information to mislead women, in which they inaccurately voice risks and complications of abortions, even if it is counter to scientific evidence (Waxman, 2004).

CPCs are private nonprofits (Ludden, 2015), though many receive state funding and are eligible to apply for federal funding if it is consistent with the abstinence only curricula. As cited in the Waxman report, SPRANS, Section 510 of the 1996 Welfare Reform Act, and the

Adolescent Family Life Act are the three principal federal funding programs for abstinence only education and collectively provide over $100 million to anti-abortion pregnancy centers (Waxman, 2004). The Guttmacher Institute has also found that some states have line items in their budget, specifically for abortion alternatives. The report found that Texas spent the most, approximately $5 million over two fiscal years (Ludden, 2015). As of November 2016, twenty-seven states have created laws that support CPCs, fourteen states directly fund CPCs, and twenty-one states refer women to CPCs (NARAL Pro-Choice America, 2017).

Impact of CPCs

There seems to be this adverse effect, where states are cutting funding for abortion clinics like Planned Parenthood, and instead are using public dollars to allocate more money to CPCs (Ludden, 2015). Unlike the largely unregulated CPCs, abortion clinics face much higher legal barriers. Abortion clinics are subject to stringent regulations, with the actual practice of abortion being restricted by waiting periods, gestational age limits, and targeted regulation of abortion providers (TRAP) laws, and more (Bryant & Swartz, 2018). Several states also require providers to use medically inaccurate scripts relating to abortion and mandate counseling that fails to protect the free speech of abortion providers (Bryant & Swartz, 2018). As of 2015, there were approximately 2,500 CPCs in the U.S., though the exact number of CPCs is unknown due to many CPCs being affiliated with more than just one pro-life organization. Whether they are a part of a larger organization or operate independently, CPCs outnumber abortion providers by a ratio of at least two to three CPCs to each abortion provider (Holtzman, 2017). Not only are there

substantially less abortion clinics than CPCs currently, abortion clinics are also closing at a rate of 1.5 every single week (Redden, 2015).

Currently, there are some significant restrictions on the access to abortion clinics, and the growing number of CPCs makes finding accurate information about abortion more difficult and impedes access for women seeking help. For example, South Dakota is a highly conservative state and only has one clinic that offers abortion services. Nicole, a woman who unexpectedly became pregnant and sought a medication abortion, had to travel 350 miles to find a clinic to receive an ultrasound due to the unavailability of the local Planned Parenthood Clinic. She found a "Care Net" facility, which advertised itself as offering free ultrasounds, emergency contraception and abortion education. However, when she got there, an employee gave her a forty-five-minute lecture about the harm caused by abortions and went into a lengthy discussion about embryonic development. She specifically talked about how "the baby feels everything (she's) feeling" and that an abortion would affect future pregnancies and even motivate suicidal ideation (Campbell, 2017). These were all attempts to dissuade Nicole from getting an abortion, using vulnerabilities of a new and expectant mother, coupled with false information to convince her from terminating her pregnancy.

Delaying services and providing false information to women seeking abortions leads to higher costs and higher risk to the pregnant woman. It is a time sensitive manner, and women deserve to receive accurate information and be fully informed about their options. In addition to providing false and misleading information to women, CPC staff also provides counseling. They use scare tactics and manipulation as tools to coerce women into carrying their pregnancy to term and make them feel ashamed for contemplating abortion (McIntire, 2015). This was often conducted through verbal communication, where CPC staff would only refer to the fetus as a

"baby" and the woman as a "mom," regardless of the gestational age. It was also found that they used visual depictions of the surgical procedure, "showing fingers, toes, arms, and assembling them together at the end while playing horror movie-type music" (McIntire, 2015). McIntire (2015) also reported that 61% of CPCs investigated in North Carolina pressured women not to have abortions by providing them with baby items and that 73% of the CPC staffers in New York City referred to the fetus as a "baby" or "unborn child" and to abortion as "killing." 89% of CPCs used similar terminology in their written materials. As outlined by Bryant and Swartz (2018), "the safety and well-being of women seeking abortion or any reproductive health care should take precedence over free speech, particularly when exercising that right can harm patients."

Efforts to Regulate CPCs

Some states have recognized the growing strength of CPCs, and the detrimental effects that a lack of regulations would have on women's reproductive health, and their power to make fundamental life decisions. There have been some efforts to curtail their funding and implement strategies to prevent CPCs from disseminating false information and jeopardizing women's health (Campbell, 2017). The difficulty with regulating CPCs is due to the nature of the centers, as they are not recognized medical practices and they do not charge for services. This means that they are exempted from laws and statutes specific to medical clinics, and from the Federal Trade Commission or state regulations that apply to commercial enterprises (Bryant & Swartz, 2018). The spread of misinformation can have adverse health outcomes for women. CPCs often do not disclose that they do not provide abortions or abortion referrals, and they brand themselves as

"medical facilities," even though some do not even employ licensed medical professionals (Duane, 2013). This can interfere with a woman's ability to access certain time-sensitive reproductive services like abortion. The manipulation of women through false information disallows them to make fully informed decisions about their pregnancy and can also prevent them from getting correct information from real medical professionals.

It has been established that CPCs try to deter women from seeking additional medical care from other providers as well. Not receiving adequate prenatal care can increases the likelihood of medical implications and health risks (Holtzman, 2017), and CPCs are negligent of these concerns. The prevalence of this egregious spread of misinformation, and the growing number of CPCs has increased the urgency for pro-choice agencies to push for regulations on CPCs. Efforts to combat this lack of regulation are found in the form of ordinances that regulate the information that CPCs can share. Ordinances also aim to dictate what information clinics can be required to disclose, which are often referred to as "compelled abortion disclosures" (Zick, 2015). Opponents of abortion condemn these ordinances on the grounds that they violate the First Amendment.

Disclosure ordinances are categorized into three types. A "status disclosure" requires CPCs to disclose if they are licensed medical facilities, and if they have a licensed medical provider. A "government message disclosure" mandates a CPC to disclose if the government has a recommendation for where women should seek care. And a "service disclosure" requires CPCs to disclose if they provide or give referrals for abortions and contraceptives, and other similar services (Holtzman, 2017). Baltimore, Montgomery County, New York City, Austin, and San Francisco have passed such disclosure laws; although only the San Francisco law and one provision of the New York City ordinance have been implemented (Holtzman, 2017). The other

laws were met with significant resistance and have not survived strict scrutiny. The courts have treated these regulations with suspicion, especially those restricting the types of information CPCs can or cannot disclose (Campbell, 2017). CPCs have largely been protected by courts, most often on the grounds that they are seen as noncommercial entities (Campbell, 2017). Federal courts have increasingly provided support to disproportionately favor the anti-abortion movement, especially when disclosure ordinances were in question.

Docket Control

The upsurge in the passage of disclosure ordinances has led to increased scrutiny regarding their legality. As these ordinances relate to what information medical clinics or clinicians need to disclose to the public or are allowed to disclose to their patients, they have vast First Amendment implications. Efforts to regulate information into the context of abortion have implicated a number of free speech doctrines, namely viewpoint and content neutrality, time, place, and manner restrictions, political speech, commercial speech, professional speech, and government speech. The overarching questions that ties these cases together is what speech relating to abortion can or cannot be compelled, and how much protection is afforded to different types of speech. These very cases will be used to show how federal court rulings have seemingly deviated from established First Amendment doctrine in a number of ways.

Existing Free Speech Doctrine

On the basis of viewpoint and content neutrality, there have been several cases that designate the proper restrictions. *United States v. O'Brien* (1968) established a test to determine the First

Amendment protections afforded to certain types of symbolic speech that the government tries to regulate. This test would be used to distinguish between content-based regulations and neutral regulations (*United States v. O'Brien*, 1968). The Court had established that even in instances of nonspeech elements, such as conduct, some government regulations may be constitutional.

Justice Warren held that

> We think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest. (*United States v. O'Brien*, 1968)

So long as the speech in question was a matter of expressive conduct, this *O' Brien* test is applicable. This formula is used to examine whether the speech regulation is related to content and if it was narrowly tailored. If the government regulation did not uphold these criteria, it was found to be a violation of the First Amendment.

Additionally, *Police Department of the City of Chicago v. Mosley* (1972) explicitly dealt with viewpoint neutrality in the context of forums. The Supreme Court invalidated an ordinance that banned all picketing within 150 feet of a school building from one hour before it opens until 1 hour after it closes. It provided an exemption for "peaceful picketing of any school involved in a labor dispute" (*Police Department of the City of Chicago v. Mosley*, 1972). In this case, a federal postal employee, Mosley, had frequently picketed a high school in Chicago. He carried a sign that read "Jones High School practices black discrimination. Jones High School has a black

quota.," and it was always peaceful and orderly (*Police Department of the City of Chicago v. Mosley,* 1972). Justice Warren's view was that the ordinance described impermissible picketing in terms of subject matter, and not simply time, place, and manner.

The Court held

> Under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views…Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone. (*Police Department of the City of Chicago v. Mosley,* 1972)

It is important to note, however, that this does not mean *all* picketing is permissible. In their holding the Court also acknowledged that they have continually recognized that reasonable "time, place, and manner" regulations *may be necessary* to further significant governmental interests.

The standards set forth in *O'Brien* and *Police Department of the City of Chicago* were further upheld in *Texas v. Johnson* (1989), where the court held that the government may not prohibit the expression of any idea based solely on the notion that society finds the idea offensive or disagreeable. This reiterated the precedents set forth in the aforementioned cases, that regulations must serve a substantial government interest, and that unpopular ideas cannot be silenced as per the First Amendment.

In the unanimous decision of the case of *Reed v. Town of Gilbert, Arizona* (2014), Justice Thomas outlined that

> A law is content based, and therefore triggers strict scrutiny, (1) if ‘on its face [the law] draws distinctions based on the message a speaker conveys’ or on the topic of the speech, or (2) if the law ‘cannot be justified without reference to the content of the regulated speech.’ (Gowan, 1990)

Under these standards, regulations based on viewpoint or subject-matter would qualify a law as content based, and thus require it to pass the strict scrutiny rules. This means that no government can regulate any form of expression based solely on its content or the viewpoint that it holds.

When it comes to political speech and commercial speech, there is a high level of contention about their relative levels of protection afforded by the First Amendment. The general notion is that political speech is entitled to more protection than commercial speech, and there is postulation around whether CPCs should be considered commercial for the purposes of the First Amendment. Courts have largely ruled that such ordinances regulate non-commercial free speech and are unconstitutional because the ordinances are neither sufficiently specific nor tailored to serve an important government interest. Molly Duane, Editor in Chief of the Cardozo Law Review, provides a counter argument that claims disclosure ordinances aimed at regulating CPCs are reasonably related to the state's interest in protecting the public from CPCs' harms, and are thus constitutional. She also contends that even if the speech is considered non-commercial, the compelled speech mandated by CPCs should be found constitutional (Duane, 2013).

The holdings of *West Virginia State Board of Education v. Barnette* (1943) and *Wooley v. Maynard* (1977) referred to situations of compelled speech that fell in the category that is recognized as political speech.

West Virginia State Board of Education (1943) held that

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

This afforded a significant amount of protection to political speech by the First Amendment. *Wooley* would also uphold this on the notion that "First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster…, an idea they find morally objectionable" (*Wooley v. Maynard*, 1977). The court cannot compel anyone to disclose their political opinions or force them to represent ideals counter to their beliefs, although this is not the case for all kinds of speech.

Whereas political speech is afforded a vast amount of protection, commercial speech has much more stringent protections. For many years, the Supreme Court recognized commercial speech as speech that proposes an economic transaction, and as such, was not afforded protection by the First Amendment. However, this changed in *Bigelow v. Virginia* (1975), in which the appellant- the managing editor of a weekly newspaper published in Virginia, had published a New York City organization's advertisement that would arrange low-cost placements for women with unwanted pregnancies in accredited hospitals and clinics in New York (where abortions were legal and there were no residency requirements) (*Bigelow v. Virginia*, 1975). The appellant was convicted of violating a Virginia statute making it a misdemeanor, by the sale or circulation of any publication, to encourage or prompt the processing of an abortion. The Virginia Supreme Court affirmed the conviction and held that the appellant lacked a First Amendment interest because his activity "was of a purely commercial nature" (*Bigelow v. Virginia*, 1975). The United States Supreme Court, however, vacated that judgement and Justice Blackmun held that

"speech is not stripped of First Amendment protection merely because it appears in the form of a paid commercial advertisement…" (*Bigelow v. Virginia,* 1975).

Justice Blackman also stated in his opinion,

> Viewed in its entirety, the advertisement conveyed information of potential interest and value to a diverse audience—not only to readers possibly in need of the services offered, but also to those with a general curiosity about, or genuine interest in, the subject matter or the law of another State and its development, and to readers seeking reform in Virginia. The mere existence of the Women's Pavilion in New York City, with the possibility of its being typical of other organizations there, and the availability of the services offered, were not unnewsworthy. Also, the activity advertised pertained to constitutional interests. Thus, in this case, appellant's First Amendment interests coincided with the constitutional interests of the general public. (*Bigelow v. Virginia*, 1975)

The Court later determined that they would have the power to reasonably regulate speech concerning articles of commerce (Linder, 2018). In the case of *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* (1976), the Court struck down a Virginia statute that would make advertising the prices of prescription drugs "unprofessional conduct." The Court contended that society may have a strong interest in the free flow of commercial information, and that is indispensable; "if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how the system ought to be regulated or altered" (*Virginia State Board of Pharmacy v. Virginia Citizens Consumer* Council, 1976). To this end, publicly sharing this information was the best way to

allow people to make informed decisions. The Court found that the state had an interest in protecting the professionalism of the pharmacy industry, but not at the expense of public knowledge. This was similar to the ruling in *Bigelow*, in which the Court recognized the inherent importance of conveying information that was of potential interest and value to the general public (*Bigelow v. Virginia*, 1975).

While these decisions reinforced one another and clearly established First Amendment protection for commercial speech, they were later altered in future cases. *Bigelow* and *Virginia State Board of Pharmacy* notably recognized some protection, they were vague about how much protection was offered. As David Gowan (1990) puts it, the "court has dealt inconsistently with several important aspects… the court neither articulated a coherent theory explaining why commercial speech should or should not be protected, nor defined commercial speech in a way that predictably classifies different types of speech." This holds true as shown in the case of *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* (1980), where the court came up with a four-prong test to determine when commercial speech can be restricted. This *did not* address the area of debate about what distinctively designates speech as commercial, or what defines a commercial entity.

After determining whether the expression is protected by the First Amendment, the analysis is as follows:

> (1) It at least must concern lawful activity and not be misleading, (2) Ask whether the asserted governmental interest is substantial (if both inquiries have positive answers), (3) Determine whether the regulation directly advances the governmental interest asserted,

and (4) Determine whether it is not more extensive than is necessary to serve that interest. (*Central Hudson Gas & Electric Corp. v. Public Service Commission of New York,*1980)

These circumstances are important to note when discussing the speech of CPCs, because in some cases the court may rule that a disclaimer introducing the subject of abortion regulates non-commercial speech, as CPCs provide services for free and based on strongly-held religious beliefs, not for economic gain (Duane, 2013). However, as there are concerns about the credibility of information, the relative governmental interest in regulating speech, and the extent of the restrictions, CPCs can fall under the category of commercial entities.

Another area of contention within the courts regarding free speech and abortion has to do with the protections of professional speech. The Court acknowledged that expression concerning purely commercial transactions was subject to governmental regulation, though the Court does not believe that such speech is entirely exempt from First Amendment protections. *Ohralik v. Ohio State Bar Association* (1978) established some standards for the First Amendment protections granted to people working in a professional capacity (*Ohralik v. Ohio State Bar Association*, 1978). This case was about in-person solicitation by a lawyer, in what Justice Powell regarded as a business transaction, so the regulation in question was subject to a lower level of scrutiny. He stated "it falls within the State's proper sphere of economic and professional regulation. While entitled to some constitutional protection, appellant's conduct is subject to regulation in furtherance of important state [interests]" (*Ohralik v. Ohio State Bar Association*, 1978). This was reiterated in *Zauderer v. Office of Disciplinary Counsel* (1985) where the court ruled against an attorney for not disclosing pertinent information to potential future clients. The Court held that "First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed." It also

acknowledged that as long as the disclosure requirements are reasonably related to a government interest to prevent the deception of consumers, then those regulations are justified (*Zauderer v. Office of Disciplinary Counsel*, 1985).

Government speech is also an important aspect of the First Amendment when considering its afforded protections within the context of abortion. *National Endowment for the Arts (NEA) v. Finley* (1998), outlines the Court's position on this, which relates to government subsidies and the ability of government to endorse certain types of speech.

In *NEA*, the Court held that,

> …Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake. So long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities. (*National Endowment for the Arts v. Finley,* 1998)

The Supreme Court has recognized that the government would be ineffective in the execution of their duties if unable to favor or disfavor certain points of view in enforcing a program (Legal Information Institute, n.d. b). As a consequence to the reliance on the government speech doctrine, the Supreme Court has been found to reject "First Amendment challenges to regulations prohibiting recipients of government funds from advocating, counseling, or referring patients for abortion" (Legal Information Institute, n.d. b).

As the abortion debate has continued to grow in intensity since *Roe,* its legality has been challenged through various different channels. Arguing legislation on the merits of free speech has become very prominent, and the federal courts have played an active role in this iterative process. The role of the Supreme Court in regulating abortion using free speech doctrine can be

categorized into three different groups. First, the Supreme Court has exercised their authority to control which cases made it to the Supreme Court, and this has permitted many lower court rulings that favor anti-abortion coalitions to stand. Second, there is also a collection of cases that are demonstrative of the Supreme Court making rulings that are favorable to the anti-abortion movement by selectively using established doctrine to support those positions. Third, there are cases that reflect how the Supreme Court has accepted certain cases and created favorable doctrine to defend those positions.

Denying Appeals

The Supreme Court enjoys discretion over its docket, unlike the circuit courts, which have to review all appeals. In the context of abortion, there are several instances in which the Supreme Court has exercised this authority to deny hearing a case, and consequently decisions of the lower court stand that often favor the anti-abortion movement.

This can be seen in *EMW Women's Surgical Center, P.S.C. v. Beshear* (2019), which relates to the constitutionality of the Kentucky Ultrasound Informed Consent Act, referred to as House Bill 2 (H.B. 2) (Kentucky Legislative Research Commission, 2017). The Act relates to full disclosures in public safety and declaring emergencies in situations regarding abortions (Kentucky Legislative Research Commission, 2017).

The text of H.B. 2

> Requires a physician, while performing a pre-abortion ultrasound, to (i) describe the ultrasound in a manner prescribed by the state; (ii) display the ultrasound image so that the patient may see it; and (iii) auscultate (make audible) the fetal heart tones. The

> physician must display and describe the image even when the patient objects, even when complying with the statute would harm the patient, and even when the patient seeks to avoid the state-mandated speech by covering her eyes and ears. (Kentucky Legislative Research Commission, 2017)

EMW Women's Surgical Center, P.S.C. contended that H.B. 2 violated their First Amendment rights by compelling ideological speech. The Commonwealth countered with the argument that the law is well within their authority to regulate medical practice (*EMW Women's Surgical Center, P.S.C. v. Beshear*, 2019).

In its lower case, *EMW Women's Surgical Center, P.S.C. v. Beshear* (2017), the District Court held that H.B. 2 of Kentucky's Ultrasound Informed Consent Act was unconstitutional. Here, the court adopted a previous approach from the Fourth Circuit that applied intermediate scrutiny. This case was *Stuart v. Camnitz* (2014), a case in which abortion providers contended that a North Carolina statute that required physicians to perform an ultrasound, display the sonogram, and describe the fetus to women seeking abortions even if she actively averted her eyes or refused to hear, was a violation of the First Amendment. As stated in Judge Hale's opinion in *EMW Women's Surgical Center* (2017), "the North Carolina law reviewed by the Fourth Circuit is nearly identical to Kentucky's law…"

In *Stuart* (2014), the Court of Appeals affirmed the ruling of the District Court, and held that

> This compelled speech, even though it is a regulation of the medical profession is ideological in intent and in kind. The means used by North Carolina extend well beyond those states have customarily employed to effectuate their undeniable interests in ensuring informed consent and in protecting the sanctity of life in all its phases.

The court therefore ruled that this compelled speech provision violates the First Amendment (*Stuart v. Camnitz,* 2014). The law in question involved compelled speech and regulations on the medical profession, so the District Court applied intermediate scrutiny, the standard that is routinely used for certain commercial speech regulations (*Stuart v. Camnitz*, 2014). The District Court in *EMW Women's Surgical Center, P.S.C.* (2017) also applied intermediate scrutiny, which requires the state to prove that "the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest" (*EMW Women's Surgical Center P.S.C. v. Beshear,* 2017).

The District Court ruled in favor of EMW Women's Surgical Center, P.S.C. in that

> Like the Fourth Circuit, the Court recognizes that states have substantial interests in protecting fetal life and ensuring the psychological well-being and informed decision-making of pregnant women. *See Stuart*, 774 F.3d at 250. However, H.B. 2 does not advance those interests and impermissibly interferes with physicians' First Amendment rights. (*EMW Women's Surgical Center, P.S.C. v. Beshear*, 2017)

Conversely, on appeal by the Commonwealth, the Court of Appeals reversed and remanded this decision. Here, Judge Bush opined that the District Court was wrong in applying intermediate scrutiny and that H.B. 2 was not subject to heightened scrutiny in the first place. The court also contented that H.B. 2 did not compel speech in violation of the First Amendment. Instead of adopting the ruling in the Fourth Circuit in *Stuart*, the Court of Appeals turned to a ruling in the Fifth Circuit, which upheld a Texas speech and display ultrasound law (*Texas Medical Providers Performing Abortion Services v. Lakey*, 2012). This choice to adopt *this* approach is negligent to

the fact that within a year of *Lakey,* in *Nova Health Systems v. Pruitt* (2012), the Supreme Court of Oklahoma found Oklahoma's speech and display ultrasound law to be unconstitutional.

In *Texas Medical Providers Performing Abortion Services v. Lakey* (2012), the Court of Appeals also asserted its authority to favor anti-abortion rulings. In this case, physicians and abortion providers filed suit against the Commissioner of the Texas Department of State Health Services and the Texas Medical Board alleging that four provisions of Texas House Bill 15 (H.B. 15), violated the First Amendment.

The provisions of H.B. 15 related to informed consent of an abortion

> Required the physician who is to perform an abortion to perform and display a sonogram of the fetus, make audible the heart auscultation of the fetus for the woman to hear, and explain to her the results of each procedure and to wait 24 hours, in most cases, between these disclosures and performing the abortion. (*Texas Medical Providers Performing Abortion Services v. Lakey*, 2012)

It also permitted a woman to decline to view or hear the heartbeat, but was only able to decline to receive an explanation of the sonogram images if her pregnancy was certified as falling into one of three statutory exceptions (*Texas Medical Providers Performing Abortion Services v. Lakey*, 2012). While the District Court granted a preliminary injunction, on appeal, the Fifth Circuit ruled that the provisions requiring certain disclosures did not violate the First Amendment and contented that any further appeals in the matter would be heard by that panel.

In *EMW Women's Surgical Center v. Beshear* (2019), the Court cited *NIFLA v. Becerra* (2018) in their decision, noting that "speech is not unprotected merely because it is uttered by professionals" (*EMW Women's Surgical Center v Beshear*, 2019). The Sixth Circuit also

contended that since "*NIFLA* clarified that no heightened First Amendment scrutiny should apply to informed consent statutes" like in *Casey, "*even though an abortion-informed-consent law compels a doctor's disclosure of certain information, it should be upheld so long as the disclosure is truthful, non-misleading, and relevant to abortion" (*EMW Women's Surgical Center, P.S.C. v. Beshear*, 2019). This was countered in the Reply Brief, where it was asserted that "before *NIFLA,* the Fifth Circuit construed *Casey* to authorize compulsory display-and-describe laws because they mandate 'truthful, nonmisleading and relevant disclosures'" (Brief of Respondent 920 F.3d 421, 2019). The Fourth Circuit expressly disagreed with that holding *precisely because* it believed the compulsory display-and-describe laws "resemble neither traditional informed consent nor the variation found in the Pennsylvania statute at issue in *Casey*" (Brief of Respondent 920 F.3d 421, 2019). After *NIFLA,* the decision below agreed with the Fifth Circuit's reading of *Casey* and explicitly disagreed with the Fourth's (Brief of Respondent 920 F.3d 421, 2019). In response to the adverse ruling of the Court of Appeals, EMW Women's Surgical Center filed for a rehearing en banc. Unsurprisingly, that motion was denied in June 2019. Following this decision, EMW Women's Surgical Center petitioned for a writ of certiorari in September 2019. As forecasted by the ruling that the Supreme Court made in *NIFLA,* which was cited in the previous ruling of the Court of Appeals in *EMW Women's Surgical Center, P.S.C.,* the Supreme Court denied the petition in December 2019.

According to the Petition for a Writ of Certiorari in *EMW Women's Surgical Center, P.S.C. v. Meier*[3], this act falls under the category of compulsory display-and-describe laws and

[3] The Court of Appeals held that Attorney General Andrew Beshear was not the proper party to the case. The court also remanded with instructions for Attorney General Beshear to be dismissed from the case, for summary judgment to be entered in favor of Secretary Adam Meier on the first claim for relief stated in the complaint, and for further proceedings consistent with this opinion (EMW Women's Surgical Center, P.S.C., 2019).

the petitioners claim this law violates the First Amendment rights of the physicians by requiring them to convey specific content to patients who are unwilling, against their medical judgment Petition for Certiorari filed 920 F.3d 421, 2019). In the Reply Brief for Petitioners, they state "…H.B. 2 and other compulsory display-and-describe laws are invalid precisely because they are not informed-consent laws, but rather coercive speech mandates untethered from any plausible understanding of informed consent" (Brief of Respondent 920 F.3d 421, 2019).

It is evident that the federal courts have inconsistently ruled on similar issues. Despite these inconsistencies, the Court of Appeals structured their argument to defend the position it wanted to have. Whereas the Supreme Court had the discretion to accept this case and rule on the controversial matter, it chose not to. Instead, the contentious ruling of the Sixth Circuit stood, upholding the anti-abortion position on inconsistent merits. This is reflective of not just the Supreme Court using its discretionary powers over the docket to deny certain cases and let lower rulings stand, this is also indicative of the federal courts interpreting cases in meticulous ways in order to defend anti-abortion positions.

Selective Interpretations

There is also a number of cases in which federal courts selectively use established doctrine to defend anti-abortion positions. In *Mother & Unborn Baby Care of North Texas v. Texas* (1988), the State had brought suit against this anti-abortion clinic, alleging that it violated the Deceptive Trade Practices Act. Evidence that was adduced at trial reflected that women were in fact misled to believe that their clinic offered abortion services based on their advertisements, although instead of being told about all of their options, they were shown graphic pictures and videos of

abortion procedures and counselors were trying to persuade them against having an abortion (*Mother & Unborn Baby Care of North Texas v. State of Texas*¸ 1988). Compounded with their operational titles 'Problem Pregnancy Center,' 'Pregnancy Problem Center,' and 'Abortion Action Affiliates' instead of their actual name 'Mother & Unborn Baby Care of North Texas, Inc.,' their functionality was synonymous with Robert Pearson's manual on operating CPCs. The Court of Appeals of Texas affirmed the decision of the lower court and held that the anti-abortion group, which advertised in yellow pages under abortion information and services and medical clinics headings and which provided pregnancy testing, anti-abortion counseling, arrangement of financial assistance, aid in adoption procedures and help in obtaining legal aid, was engaged in "trade" or "commerce" within meaning of Deceptive Trade Practices Act (*Mother & Unborn Baby Care of North Texas v. State of Texas*¸ 1988). The appellants filed a petition for a writ of certiorari to the Supreme Court, but surprisingly, their motion was denied.

As mentioned previously, whether a CPC is considered commercial is a contentious issue. *Mother & Unborn Baby Care of North Texas* favored the pro-choice movement and it made a notable contribution to the free speech and abortion debate because it set a precedent that recognized this CPC as a commercial entity. However, as outlined in cases such as *NIFLA, EMW Womens Surgical Center, P.S.C. v. Meier, EMW Womens Surgical Center, P.S.C. v. Beshear,* and several others, that precedent, along with many others was abandoned. Federal courts were selectively applying prior precedents in order to defend certain anti-abortion positions.

This is later shown in *Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists (ACLA)* (2001), in which anti-abortion organizations were engaging in behavior that publicly disclosed names and addresses of abortion providers through posters and internet web sites, and offered rewards to persons who were able to stop providers from

continuing to perform abortions. The ACLA had sent copies of these files that included identifying information of abortion providers to an anti-abortion activist. The files were then posted to a website that struck out the names of those who had been murdered and grayed out the names of those who were already wounded. As cited in the opinion, "by publishing the names and addresses, ACLA robbed the doctors of their anonymity and gave violent anti-abortion activists the information to find them" (*Planned Parenthood of Columbia/Willamette Inc. v. American Coalition of Life Activists, 2001a).* Judge Kozinski held that actions of these organizations could not be construed as direct threats that organizations or their agents would physically harm providers who did not stop performing abortions, and thus were protected speech under First Amendment[4] (*Planned Parenthood of Columbia/ Willamette, Inc. v. American Coalition of Life Activists,* 2001a). The ACLA argued the matter on a political-speech theory, asserting that such speech typically enjoys greater protection than professional or commercial speech.

Specifically, the ACLA argued that the First Amendment required reversal because

> Liability was based on political speech that constituted neither an incitement to imminent lawless action nor a true threat, and that classic political speech cannot be converted into

[4] A rehearing en banc was granted. The opinion from this case shall not be cited as precedent by or to this court or any district court of the Ninth Circuit except to the extent adopted by the en banc court [4] (*Planned Parenthood of Columbia/ Willamette, Inc. v. American Coalition of Life Activists,* 2001b).

The en banc court held that the actions of the anti-abortion organizations in publicly disclosing information about abortion providers was not protected under the First Amendment. It also held that the district court would be given discretion to evaluate punitive damages (*Planned Parenthood of Columbia/ Willamette, Inc. v. American Coalition of Life Activists,* 2002).

> non-protected speech by a context of violence that includes the independent action of others. (*Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists,* 2001a)

Although the speech in question arguably has professional and possibly commercial implications, the Court chose to recognize it as political speech. In his opinion, Judge Kozinski cited *National Association for the Advancement of Colored People (NAACP) v. Claiborne Hardware Company* (1982), "the Supreme Court held that, despite his express call for violence, and the context of actual violence, Ever's statements were protected, because they were quintessentially political statements made at a public rally, rather than directly to his targets" (*NAACP v. Claiborne Hardware Company*, 1982). He acknowledged the speech in question could be "interpreted as inviting violent retaliation" or "intending to create a fear of violence." He asserted, however, that the defendants did not authorize, ratify or directly threaten violence, so even "if their statements merely encouraged unrelated terrorists, then their words are protected by the First Amendment" (*Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition of Life Activists*, 2001a). *Brandenburg v. Ohio* (1969) and *Hess v. Indiana* (1973) were also interpreted in such a way to support this ruling, although an argument can be made that the speech at issue in *Planned Parenthood of Columbia/Willamette, Inc.* did incite imminent lawless action, was likely to produce such action, and was directed at a specific group.

Federal courts have consistently used selective interpretations to hand out decisions consistent with the goals of the anti-abortion movement. This phenomena is further demonstrated in *Greater Baltimore Center for Pregnancy Concerns v. Mayor and City Council of Baltimore* (2018). Here, the Fourth Circuit selectively applied doctrine that would not consider the speech of the Center commercial speech. Whereas *Mother & Unborn Baby Care of North Texas* should

have been applied, the Fifth Circuit cited itself from *Greater Baltimore Center for Pregnancy Concerns v. Mayor and City Council of Baltimore* (2013), in which they held that "courts rely on three factors to identify such commercial speech…" (that falls out of the "core notion" of commercial speech that requires a commercial transaction) "…(1) is the speech an advertisement; (2) does the speech refer to a specific product or service; and (3) does the speaker have an economic motivation for the speech." The Greater Baltimore Center for Pregnancy Concerns is a non-profit Christian organization provides women with free services, "including counseling, bible study, pregnancy tests, sonograms, and education on child care, life skills, and abstinence. It also provides prenatal vitamins, diapers, clothing, books, and other assistance" (*Greater Baltimore Center for Pregnancy Concerns v. Mayor and City Council of Baltimore*, 2018).

Although Greater Baltimore Center for Pregnancy Concerns advertised pregnancy related services, it did not expressly broadcast its religious opposition to abortion in those ads. This is similar to the circumstances in *Mother & Unborn Baby Care of North Texas,* in which the organization in question provided pregnancy services and used deceptive advertising techniques. Greater Baltimore Center for Pregnancy Concerns was also affiliated with Care Net and Heartbeat International (*Greater Baltimore Center for Pregnancy Concerns v. Mayor and City Council of Baltimore*, 2018), which are known Pro-Life Organizations that have been found to disclose misinformation and mislead women seeking reproductive services. Despite this common functionality between organizations, conversely, here the Court ruled that the speech in question is not commercial.

The ordinance in question required that any limited-service pregnancy center post a disclaimer in its waiting room. A limited-service pregnancy center was defined as any entity

whose primary purpose was to provide pregnancy related services and/or information and did not provide or refer for abortions or birth control. The proposed disclosure was to say that the clinic "does not provide or make referral for abortion or birth control services" (*Greater Baltimore Center for Pregnancy Concerns v. Mayor and City Council of Baltimore,* 2018). Given these facts, the Fourth Circuit's ruling that "the City has considerable latitude in regulating public health and deceptive advertising. But Baltimore's chosen means here are too loose a fit with those ends, and in this case compel a politically and religiously motivated group to convey a message fundamentally at odds with its core beliefs and mission" (*Greater Baltimore Center for Pregnancy Concerns v. Mayor and City Council of Baltimore,* 2018), is unfitting. Additionally, *Wooley* was arguably misapplied in this case as justification against the disclosure. While *Wooley* holds that governments cannot compel anyone to foster an idea they find morally objectionable, or represent ideals counter to their beliefs, a disclosure that mandates Greater Baltimore for Pregnancy Concerns to disclose a factual statement about the services it does or does not provide does not fall under this protected speech. The Fifth Circuit made sure to meticulously apply past doctrine, interpret it in such a way that it could defend the anti-abortion position, and excluded past precedent counter to its ideals.

Centro Tepeyac v. Montgomery County (2013) and *Evergreen Association v. City of New York* (2014) are also examples of this behavior. Both of these cases involved ordinances that required pregnancy service centers to make mandatory disclosures. In *Centro Tepeyac,* a limited service pregnancy resource center challenged the validity of one of these ordinances, and the Fourth Circuit upheld the district court's decision to issue an injunction against the enforcement of the ordinance (*Centro Tepeyac v. Montgomery County*, 2013). The District Court acknowledged that this was a matter of a content-based regulation, and therefore was ordinarily

subject to strict scrutiny. However, the District Court ruled that this speech was neither professional nor political (*Centro Tepeyac v. Montgomery County*, 2013), which disregarded a significant amount of past precedent that restricted such speech. The ordinance was split into two parts, the first disclosing that "the Center does not have a licensed medical professional on staff" and the second that "the Montgomery County Health Officer encourages women who are or may be pregnant to consult with a licensed healthcare provider" (*Centro Tepeyac v. Montgomery County*, 2013).

In applying strict scrutiny, the District Court ruled that the ordinance was not narrowly tailored enough, and thought that it may constitute "unneeded speech." This claim was based on the notion that the government's compelling interest to ensure citizens the ability to obtain appropriate medical care *might* be met through the first part of the compelled statement that the center does not have licensed medical professionals on staff (*Centro Tepeyac v. Montgomery County*, 2013). This is important to note because the District Court only enjoined the second part of the ordinance, but the mandated disclosure about not having medical staff was upheld. It is evident, however, that the Supreme Court did not consider this in their ruling in *NIFLA*, which set the federal precedent for a series of ongoing cases in 2018 and is still applicable today.

Evergreen Association was about whether the New York City Council and the Mayor of New York City could impose regulations and requirements on pregnancy service centers regarding the services they provide or do not provide (*Evergreen Association v. City of New York*, 2014). This ordinance had three components, "(1) whether or not they "have a licensed medical provider on staff who provides or directly supervises the provision of all of the services at such pregnancy service center;" (2) "that the New York City Department of Health and Mental Hygiene encourages women who are or who may be pregnant to consult with a licensed

provider;" and (3) whether or not they "provide or provide referrals for abortion, emergency contraception, or prenatal care" (*Evergreen Association v. City of New York,* 2014). The court ruled that the government message about encouraging pregnant women to consult with a licensed provider, and the service disclosure that requires pregnancy service centers to disclose whether they provide certain services are insufficiently tailored to withstand scrutiny. Conversely, they ruled that the status disclosure, which requires pregnancy centers to disclose whether they have licensed medical providers on staff, satisfied strict scrutiny (*Evergreen Association v. City of New York,* 2014). Regarding the service disclosure, the court cites *NAACP*, which indicates that they too interpret this speech as political, not professional nor political. This is indicative of the extensive protections afforded to their speech in these cases, as a result of viewing speech in this way.

Creating Favorable Doctrine

The third category is one in which the Supreme Court asserts its authority to create favorable doctrine in order to uphold the anti-abortion positions. The Court's position generally was that factual information that was of interest to the public and individual clients was valued over the free speech concerns of disclosure ordinances. However, in *Webster v. Reproductive Health Services* (1989), this was not the case. In *Webster*, state-employed health professionals and private nonprofit corporations providing abortion services, challenged the constitutionality of a Missouri statute regulating the performance of abortions (*Webster v. Reproductive Health Services*, 1989).

The statute:

> (1) sets forth "findings" in its preamble that "[t]he life of each human being begins at conception," and that "unborn children have protectable interests in life, health, and well-being," (2), and requires that all state laws be interpreted to provide unborn children with the same rights enjoyed by other persons, subject to the Federal Constitution and this Court's precedents, specifies that a physician, prior to performing an abortion on any woman whom he has reason to believe is 20 or more weeks pregnant, must ascertain whether the fetus is "viable" by performing "such medical examinations and tests as are necessary to make a finding of [the fetus'] gestational age, weight, and lung maturity," (3) prohibits the use of public employees and facilities to perform or assist abortions not necessary to save the mother's life, and (4) makes it unlawful to use public funds, employees, or facilities for the purpose of "encouraging or counseling" a woman to have an abortion not necessary to save her life. (*Webster v. Reproductive Health Services,* 1989)

Whereas the District Court and the Court of Appeals ruled to strike down the statute, the Supreme Court reversed and instead held that none of the challenged provisions violated the Constitution. The Court upheld governmental regulations that withheld public funds for nontherapeutic abortions but allowed payments for medical services related to childbirth, and they recognized that a government's decision to favor childbirth over abortion through the allocation of public funds does not violate *Roe.* In fact, the restrictions in question were viewed as being restrictive only to the extent that she chooses to use a physician affiliated with a public hospital and that nothing in the Constitution requires States to enter or remain in the abortion business or entitles private physicians and their patients access to public facilities for the

performance of abortions (Webster v. Reproductive Health Services, 1989). Again, we see here that the Court was permitting the impediment to women's access to abortions.

Specifically regarding the free speech aspects in part 4, Chief Justice Rehnquist stated in his opinion that

> The controversy over § 188.205's prohibition on the use of public funds to encourage or counsel a woman to have a nontherapeutic abortion is moot… § 188.205 is not directed at the primary conduct of physicians or healthcare providers, but is simply an instruction to the State's fiscal officers not to allocate public funds for abortion counseling, appellees contend that they are not 'adversely' affected by the section and therefore that there is no longer a case or controversy before the Court on this question. Since plaintiffs are masters of their complaints even at the appellate stage, and since appellees no longer seek equitable relief on their § 188.205 claim, the Court of Appeals is directed to vacate the District Court's judgment with instructions to dismiss the relevant part of the complaint with prejudice." (*Webster v. Reproductive Health Services,* 1989)

This set of rulings effectively permitted the government to not only restrict abortion itself, but also directly regulate information that can be shared about abortion. Interestingly, although similarly concerned, *National Endowment for the Arts v. Finley* (1998) does not reference *Webster* in its ruling. However, we can attribute the rulings of more recent abortion cases related to government funding to the precedent set forth here in *Webster.*

This brings us to the discussion of government speech, and how it has specifically impacted abortion. *Rust v. Sullivan* (1991) explicitly outlines the implications of compelled speech that is subsidized by the government. The ruling of this case set the precedent that

"…when the government appropriates public funds to establish a program it is entitled to define the limits of that program" (*Rust v. Sullivan,* 1991). This means that governments are entitled to favor a particular viewpoint over another, even if that speech is not inclusive of certain ideas, so long as the goals of the program are known. In such an instance, the law that limits speech would not be considered viewpoint discrimination, rather it would be merely choosing to fund one activity to the exclusion of the other (*Rust v. Sullivan,* 1991), which is protected by the First Amendment. Switching gears to discuss how this case was related to abortion, *Rust* ruled in favor of the anti-abortion movement. The main concern in the case was regarding the dissemination of information in health facilities that are funded by Title X. The act in question would disallow health care providers from providing counseling or referral for abortion, engaging in activities that promote abortion, and had to be organized in a way that they were physically and financially separate from abortion.

The challenged regulations implemented the statutory prohibition of such activities (*Rust v. Sullivan,* 1991). Like several previously discussed cases, this case also fell in the area of public forum analysis. This speech was different, however, because it was defined as 'government subsidized speech.' The petitioners argued that the regulations violated their First Amendment rights to discuss abortion related services because the regulation was based on viewpoint. The Court thought otherwise and found that it is constitutional for the government to fund one activity, to the exclusion of the other. The Court found that these restrictions were considered necessary to "ensure that the limits of the federal program were observed (*Rust v. Sullivan*, 1991), and that it did not impose viewpoint discrimination. An argument can be made that the nature of this case was the reason it reached the Supreme Court. Had the subject matter of the speech in question not been about such a contentious topic as abortion, this would have been

settled in a lower court. This case came 19 years after *Roe*, and the abortion debate is still widely contested. The aforementioned cases laid the foundation for the rulings of some more recent cases that have free speech and abortion implications. However, despite past rulings that were oriented towards valuing the public's interest in disclosing information and preventing the deception of consumers, legal doctrine has now shifted to do the very opposite.

Analysis:

The abortion debate is continually growing in intensity, as are the laws surrounding it. As the scales are tipping towards the anti-abortion movement, abortion laws are becoming more stringent, and the role of the complacent federal judiciary is growing. This is demonstrated by the overwhelming number of cases concerning abortion that have First Amendment implications and are reaching federal courts. It seems likely that the number of these cases will increase over time as the anti-abortion movement continues to gain traction. These doctrinal shifts have occurred in three patterns: (1) the Supreme Court has used its discretionary powers over its docket to deny hearing cases, which consequently permits lower decisions that favor anti-abortion coalitions to stand; (2) federal courts make rulings that are favorable to the anti-abortion movement by selectively using established doctrine to support those positions; and (3) federal courts have created favorable doctrine to defend anti-abortion positions.

Roe was thought to have put an end to the debate, however as demonstrated through recent doctrinal shifts, this ruling severely deepened the issue more. Both pro-choice and anti-abortion organizations have opted to argue their position through several different channels. The initial intersection of free speech and abortion came in a wave of "clinic-front activism"

(Wilson, 2016), and although this activism largely occurred during the 1980s and 1990s, it is still widely used today. As the pervasiveness of clinic-front activism subsided, however, a new form of activism grew in intensity. This new wave of activism included creating new laws and regulations to limit abortion as a procedure itself, as well as regulations on medical providers who provide abortions. Some of these regulations included speech mandates for providers and funding regulations. Federal courts have seemingly taken a larger role in regulating the types of information that can and must be disclosed by clinics, and this is where complacency becomes a substantial issue in terms of preserving access to abortions.

While many court rulings remain rather consistent with each other over the years, in the realm of abortion politics, there seems to be quite a deviation in rulings. There are critical concerns over why these fluctuating decisions are problematic as the outcomes of these cases are a matter of public health and can put the health of many women at risk (Gostin, 2001). The government inherently has a compelling interest to uphold the free flow of information to its people, especially in circumstances concerning health (Gostin, 2001). So, the question is, why has this suddenly changed within the scope of abortion? Instead of preserving access to abortion and abortion related information, many federal court rulings have been found to decrease access to legitimate reproductive health resources and has fostered the spread of misinformation to women seeking family planning services. These shifting decisions and changes in doctrine are indicative of a much larger issue than simply whether abortion should be legal or not. It is suggestive of a deeper narrative that involves conservative legal foundations playing politics by proxy and using the courts as the arbiter. The caveat, however, is that as conservative legal coalitions grow, they are influencing the federal judiciary and it is clear the scales are tipped in favor of the anti-abortion movement.

Regulations on compelled speech and mandated disclosures of information are treated differently by federal courts, and this is concerning because it has been shown to negatively impact women seeking abortions. There is a driving force behind the courts, a conservative legal coalition that has exerted a great deal of influence on the appointment of justices (Decker, 2016). The composition of federal courts affects the outcome of cases, and recently these outcomes have disparately been in favor of anti-abortion goals. Not only have these decisions impacted abortion, but they also have First Amendment implications that arguably change how free speech precedents are viewed. Conservative legal foundations have effectively pervaded the federal judiciary and successfully changed legal doctrine.

Compelled Speech v. Disclosure Ordinances

If left unregulated, any particular business has the capacity to dominate in its given field. In the context of abortion, Crisis Pregnancy Centers make up a business that is nearly completely unregulated. Compare this with abortion clinics, which are arguably over-regulated, so much so that sometimes there is o*nly* one licensed abortion clinic in an entire state (EMW Women's Surgical Center, n.d.). Unlike the high number of legal barriers that abortion clinics face, CPCs are actually exempt from regulatory, licensure, and credentialing oversight (Bryant & Swartz, 2018). The problem is that this lack of regulation for CPCs poses a health risk for women, because they functionally operate as a medical clinic, yet are not legally bound like one. Fair regulations are necessary to preserve the legal and ethical rights of people to be fully informed so that they can make fully informed decisions. As it has been shown, however, regulations are *not* being implemented as they should be, and depending on who and what is being regulated, the federal courts are treating them differently.

Federal courts have consistently ruled against disclosure ordinances that compel CPCs to disclose factual information about the services they provide and the employees that they hire. This is contrasted with judicial behavior that upholds an abundance of laws that compel speech of abortion providers, that is untrue, and oftentimes have overturned lower court rulings in order to support said law. All of the cases that have been discussed thus far are a part of the bigger picture that represents just how recent court rulings against disclosure requirements on CPCs jeopardizes the health of many pregnant women seeking family planning services.

The most common argument for compelled speech mandates are that they aim to improve informed consent, and that it is within the state's legal parameters to regulate medical practices. As demonstrated in this paper, these mandates are excessively burdensome to abortion providers and based on past First Amendment precedents, are unconstitutional. There are five elements of informed consent which includes a discussion of "the nature of the decision/procedure, reasonable alternatives to the proposed intervention, the relevant risks, benefits, and uncertainties related to each alternative, assessment of patient understanding, and the acceptance of the intervention by the patient" (Bord, 2014). In *Planned Parenthood Arizona,* the bill in question was said to have amended Arizona's informed consent law. It required abortion providers to tell the woman seeking the procedure that it was possible to reverse the effects of a medication abortion. What is concerning, is the fact that there was barely any evidence that suggested an abortion could be reversed (Sneed, 2015). This mandate does not satisfy any of the outlined criteria of informed consent, especially if the nature of the compelled speech is unfounded. And although *Planned Parenthood Arizona*, which was tried at the District Court, found this law to be unconstitutional, several other states passed these laws and have *not* been found to be unconstitutional (Kruesi, 2018).

Similarly concerned is *Planned Parenthood Arizona is EMW Women's Surgical Center, P.S.C. v. Beshear* (2019). The difference here, is that the law in question required abortion providers to display and describe ultrasound images in a manner prescribed by the state, to the pregnant woman and make her listen to the fetal heart tones. The physician would be required to adhere to these procedures even when the patient objected or covered her eyes (Kentucky Legislative Research Commission, 2017). Based on the informed consent criteria, this law clearly does not meet the fifth element, "acceptance of the intervention by the patient," nor is this an assessment of patient understanding. Physicians even went so far as to say conducting such a protocol against a patient's will, was against their medical judgement (Petition for Certiorari filed 920 F.3d 421, 2019). The District Court would agree with that analysis, as they ruled that the law was a violation of the First Amendment. Not only was the ruling of this court consistent with the informed consent elements, but it also applied past First Amendment precedents. They adopted the ruling of the Fourth Circuit Appellate court in *Stuart*, as the circumstances were nearly identical (*EMW Women's Surgical Center, P.S.C. v. Beshear*, 2019). The Court of Appeals, however, decided to reverse this ruling, instead citing a Fifth Circuit decision, *Lakey*. Again, this was in instance where the District Court granted a preliminary injunction of the law, but the appellate court reversed and found the law to be constitutional. This is interesting because within a year, the Supreme Court of Oklahoma found Oklahoma's speech and display ultrasound law to be unconstitutional in *Nova Health Systems v. Pruitt* (2012).

In addition to citing *Lakey*, Judge Bush cited *NIFLA,* contending that neither his court nor the circuit court had the benefit of that recent Supreme Court decision. *NIFLA* refused to apply heightened scrutiny, and instead asked whether the disclosure requirements were "reasonably related to the State's interest in preventing deception of consumers" (*NIFLA v. Becerra,* 2018).

The Court did not apply strict scrutiny because it concluded that the speech in question was considered "professional speech" (*NIFLA v. Becerra,* 2018), rather than commercial speech. The Sixth Circuit relied on these premises, in its finding that "even though an abortion-informed-consent law compels a doctor's disclosure of certain information, it should be upheld so long as the disclosure is truthful, non-misleading, and relevant to an abortion," which had *Casey* implications (*EMW Women's Surgical Center, P.S.C.. v. Beshear,* 2019). Judge Bush relies heavily on *Casey,* in his opinion for this case. What is so perplexing is that at the District level, in *EMW Women's Surgical Center, P.S.C. v. Beshear* (2017), Judge Hale acknowledges that the *largest* area of contention goes back to *Casey* and how a *single* paragraph is interpreted. In fact, the interpretation of that paragraph alone is a large contributing factor to the adverse rulings among the circuit courts. It is interesting that such a controversial paragraph is relied on so heavily, despite its contradictory interpretations. Furthermore, *NIFLA* directly contradicts *Casey* and it so blatantly applies *Casey's* precedents inconsistently, so it is concerning about the level of weight to give this ruling.

Looking to *Casey* and *Gonzales*, we see that abortion jurisprudence enables State efforts to persuade a woman to forego an abortion in favor of childbirth (Blumenthal, 2008).

In *EMW Women's Surgical Center, P.S.C.* (2017), it states

> 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 over abortion.

This finding did not take into account that *Gonzales* did not discern which level of scrutiny to apply. At the appellate level, that specific section in *Casey* was combined with NIFLA, and that is how the court determined if heightened scrutiny should be applied. But the District Court had concluded that "a heightened intermediate level of scrutiny is ... consistent with Supreme Court precedent and appropriately recognizes the intersection here of regulation of speech and regulation of the medical profession in the context of an abortion procedure" (EMW Women's Surgical Center, P.S.C. v. Beshear, 2017).

Even if heightened scrutiny were not applied, and we looked toward the standard used in *NIFLA* about whether the disclosure requirements were reasonably related to the State's interest in preventing deception of consumers (*NIFLA v. Becerra*, 2018), finding the speech and display ultrasound law in EMW Womens Surgical Center, P.S.C. to be constitutional, but the disclosure requirements in *NIFLA* a violation of the First Amendment, is questionable. It can reasonably be postulated that the Court erred in its ruling. The FACT Act served to require CPCs to disclose whether they were a licensed medical clinic and to make known that there are different options for family planning, which include abortions (*NIFLA v. Becerra,* 2018). This clearly upholds a state's legitimate interest in preserving the informed consent of these women, but the Court ruled otherwise. So, this begs the question of why? The answer is that the federal courts are influencing doctrine to favor anti-abortion positions, and these are not just cherry-picked examples. There is a substantial number of cases that are reflective of how the federal judiciary is being used as a conduit to make unfair doctrinal changes.

A Complacent Federal Judiciary

Contrast how these compelled speech mandates on abortion providers are treated, with how the federal courts have responded to disclosure ordinances on CPCs. *NIFLA* is a prime example of these inconsistent holdings of the Court, but there are countless others. While states have been enacting "informed consent" mandates specific to abortion for decades (Richardson & Nash, 2006), the Court has recently taken on a growing role in regulating the flow of abortion related information. By February 2008, thirty-three states had informed consent abortion laws in effect, and twenty-nine of these states can be interpreted as being aimed at discouraging women from seeking abortions (Blumenthal, 2008). These laws were all admissible under the law, mandating that women be provided vast amounts of information to dissuade women from abortions, but as shown in *NIFLA*, providing truthful information about the services a clinic provides is unconstitutional. This is also reflected in the previously mentioned ordinances in Baltimore, New York City, and the FACT Act in California. *Casey* has been used to uphold more 'anti-abortion' laws, and newer court rulings that use *Casey*, are being used to override any disclosure ordinances aimed at maintaining a flow of accurate information. As anti-abortion laws are increasingly being upheld, the rights of physicians and the rights of women seeking abortions are being impeded.

The government inherently has a compelling interest to uphold the free flow of information. This can be extrapolated from *Bigelow* and *Virginia Citizens Consumer Council.* It is abundantly clear that the federal courts selectively apply doctrine depending on what the purported outcome is, which unjustly restricts the information that gets shared. In *Bigelow,* the Court held that "… the advertisement conveyed information of potential interest and value to a diverse audience consisting of not only readers possibly in need of the services offered…"

(*Bigelow v. Virginia,* 1975). In *Virginia State Board of Pharmacy*, Justice Blackmun contended that "society also may have a strong interest in the free flow of commercial information. Even an individual advertisement, though entirely "commercial," may be of general public interest" (*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc*., 1976).

Justice Blackmun additionally clarified that we must

> Assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. (*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc*., 1976)

Bigelow and *Virginia State Board of Pharmacy* are integral to understanding the broader implications on cases involving abortion and informed consent. Compounded with *Casey's* holding that the State cannot compel an individual simply to speak the State's ideological message, but that 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, it warrants further discussion about whether that should apply to CPCs who for all intensive purposes functions as a medical clinic. It also emphasizes the Court's view on providing truthful and non-misleading information, which sheds light on the courts blatant disregard of these standards when dealing with the misinformation that is distributed by CPCs.

These two cases are particularly demonstrative of the subjectivity of the federal courts when determining what free speech rules apply. These distinctions are based on how speech is categorized, whether it is political, professional, governmental or commercial. For purposes of abortion and free speech, the area of most controversy is between political and commercial

speech. The general notion is that political speech is entitled to more protection than commercial speech, and there is postulation about whether CPCs should be considered commercial for the purposes of the First Amendment (Duane, 2013; Campbell, 2017). CPCs often argue on the pretenses that they are not a commercial entity because they are not recognized medical practices and they do not charge for services (Bryant & Swartz, 2018). Conversely, abortion providers and state governments seeking to regulate the speech of CPCs typically make the argument that the speech of CPCs should be considered commercial. *Mother & Unborn Baby Care of North Texas* set forth a precedent that CPCs would be considered commercial entities, and therefore would be subject to more stringent regulations. Surprisingly, the Court of Appeals of Texas ruled in favor of the State, on the grounds that the clinic was deceptively advertising and fell within meaning of the Deceptive Trade Practices Act (*Mother & Unborn Baby Care of North Texas,* 1988). This appears to be one of the few cases where the courts did not strike down regulations imposed by the State. In nearly every other case involving abortion that have free speech implications, the courts seemingly drift away from this reading of the law and instead adopt rulings from *West Virginia State Board of Education v. Barnette* (1943) and *Wooley v. Maynard* (1977), which concern the vast protections of political speech. *NIFLA* cited these cases to support the designation that the speech of CPCs is political and not commercial. If the precedent set forth in *Mother & Unborn Baby Care of North Texas,* the outcomes of *EMW Women's Center, P.S.C., Planned Parenthood of Columbia/Willamette, and NAACP v. Clairborne*, could certainly have different outcomes than they do.

As an additional point to *Virginia State Board of Pharmacy* (1976), Justice Blackmun supported the notion that untruthful speech, commercial or otherwise has *never* been protected for its own sake. If this were the precedent that the courts followed to determine the protections

afforded to false and misleading speech, the courts would have undoubtedly had a consistent finding that the regulations on the speech of CPCs were constitutional. It has been empirically proven that CPCs are disseminating false and/or misleading information (Holtzman, 2017); "over 80% of the abstinence-only curricula, used by over two-thirds of SPRANS grantees in 2003, contain false, misleading, or distorted information about reproductive health" (Waxman, 2004). Whether the speech of CPCs was found to be commercial or not, this would be true. This was stated in 1975, but clearly it has been overlooked time and time again as being irrelevant to cases regarding the speech of CPCs. Rather than relying on past precedents and making rulings in a consistent manner, the courts have been ruling counter to this idea. They continuously strike down any efforts at regulation on this speech and continue to have competing interpretations of what type of speech it is, yet always come to the same conclusion— regulations on misinformation spread by CPCs are not permitted.

This phenomena about selectively interpreting precedent and causing doctrinal changes can also be evaluated through the lens of *Zauderer*, in which it is explicitly stated that "First Amendment interests implicated by disclosure requirements are substantially weaker than those at stake when speech is actually suppressed" (*Zauderer v. Office of Disciplinary* Counsel, 1985). *NIFLA* provided a compelling state interest, similar to that outlined in *Zauderer*, in which there was pertinent information that ought to be shared with the public, but the Court ruled the opposite way. The Court had ruled that the FACT Act burdened more speech than necessary (*NIFLA v. Becerra, 2018)*, though it is unclear how a matter of disclosure requirements that simply would share what services a clinic provided and who worked there, suppresses speech.

Unfortunately, these rulings on the dissemination of information are not the only things that are impeding on the informed consent of women. There is also the matter of federal courts

allowing obstruction to women's access to reproductive clinics that offer abortions. Some rulings have protected women entering clinics, while others have allowed the protesters to bombard these women with unwanted comments about their choices. In *Madsen* and *Schenck,* the court upheld a "fixed buffer zone" which predominantly referred to areas surrounding entrances to clinics, where women would be protected from protesters. This was counteracted when the Court struck down any restrictions on speech in surrounding areas of the clinic, not including the entrance, and in *Schenck,* where the Court found that women were not protected from the unsolicited comments from protesters until they were within 15 feet of a clinic entrance.

Similarly, *Hill* permitted a buffer zone of eight feet to be between a person seeking ingress or egress to a clinic and a protester, and within 100 feet of the entrance to any health care facility. Fourteen years after *Hill,* in 2014, the ruling of *McCullen* had a drastically different outcome. Here, the Court rejected a statute that disallowed protesters to knowingly stand within 35 feet of an entrance or driveway to any reproductive health care facility. This ruling was interesting considering all these cases had similar circumstances. They were all instances where the State was trying to prevent obstruction to women's access to abortion clinics. Contrary to these similarities, although some earlier rulings have allowed for government regulation, more recent cases rejected any sort of buffer zones and the outcomes were tipped in favor of anti-abortion protesters.

These inconsistencies between decisions of the Supreme Court can also be found in the direct attacks against *Roe.* If you look to the outcome of *Stenberg v. Carhart* (2000), the Court's ruling on an abortion procedure resulted in a progressive outcome. Seven years later, however, in *Gonzales v. Carhart* (2007) a case with nearly identical evidence, the Court made a more conservative decision which restricted abortion. The reason for this was conflicting evidence, in

which adjudication took a large role in deciding cases, because courts and lawmakers alike used medical expertise and evidence to constrain judicial decision making (Ahmed, 2015). It is evident that conflicting evidence can alter judicial decisions, though according to the federal courts, this is an unimportant aspect in the role of women making informed decisions. Efforts to impose disclosure ordinances are meant to put limits on anti-abortion organizations from providing vulnerable women seeking family planning services with false information regarding abortion. Federal Courts however are enabling this behavior to misinform women in an effort to dissuade them from having abortions. These indeterminate outcomes are the results of abortion politics, oftentimes letting political agendas cloud judgement which is inadvertently putting both reproductive freedoms and the health of pregnant women at risk.

Conclusion

The abortion debate is no longer just about a woman having the right to choose. Now, it is about what restrictions can be placed on both abortion procedures and abortion related information. These restrictions extend to abortion providers and addresses the things that they are allowed to tell patients, as well as things that they are legally obligated to say. The debate also reaches anti-abortion organizations and the types of information that they share with the public. However, as the speech of abortion providers has become excessively regulated, limitations on the speech of Crisis Pregnancy Centers and other anti-abortion organizations are relatively nonexistent. The scales are tipping towards the anti-abortion movement and regulations on compelled speech and disclosure ordinances are not being implemented fairly. This is a growing concern as this is a subject involving the health of so many women. Preserving the behaviors of CPCs to share false

information with women about abortion is putting many women at risk. And the federal courts are seemingly turning a blind eye to these outcomes that disproportionately favor the anti-abortion movement or they are actively engaging in changing legal doctrine. Appellate Courts are routinely overturning the rulings of District Courts in order to satisfy anti-abortion positions. This is being done by selectively using past precedent to support specific standpoints, creating new precedents in order to back up said standpoints, and finally the Supreme Court plays a role by using its discretionary functions to control what cases are heard. These behaviors have been well documented within the scope of this paper, and they have been shown to exert a great deal of influence on newer cases that are brought with abortion and free speech implications. Free Speech riles are not being applied consistently and it is causing a monumental shift in doctrine surrounding abortion. The severity of this issue is clear, the objectivity of the judiciary has been eroded and what was once a fair arbiter in the judicial system is now complacent in a game of ideology, in which different parties are playing politics by proxy and the judiciary is partial to one side.

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