

Facing the FACT Act: Abortion and Free Speech (Part I)

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Update: For a discussion of the Supreme Court’s June 26, 2018 decision in [NIFLA v. Becerra](#) holding that the FACT Act likely violated the First Amendment, see [CRS Report R45316](#), Supreme Court October Term 2017: A Review of Selected Major Rulings, coordinated by Andrew Nolan. On October 26, 2018, the parties in NIFLA stipulated to an injunction and dismissal of the case, and the district court permanently enjoined the state and local defendants from enforcing the FACT Act. No. 3:15-cv-02277 (S.D. Cal. Oct. 26, 2018), ECF No. 76.

The original post from January 10, 2018 is below.

On November 13, 2017, the Supreme Court granted a petition to review [National Institute of Family and Life Advocates \(NIFLA\) v. Becerra](#), a case that implicates several distinct and complex First Amendment doctrines. Specifically, the Court will consider whether a California law providing information that certain pregnancy centers must disseminate to clients violates the Free Speech Clause. The Ninth Circuit previously [upheld](#) the California law, deepening a circuit split that raises questions beyond the highly charged context of family planning and pregnancy-related services. Part I of this two-part Sidebar provides an overview of the challenged law, followed by an analysis of how the Supreme Court might categorize the speech at issue. [Part II](#) discusses the potential implications of any Supreme Court decision in [NIFLA](#) for First Amendment jurisprudence and legislatures seeking to regulate in this area.

Background. [NIFLA](#) involves a challenge by an anti-abortion, nonprofit organization and two of its member pregnancy centers (the [NIFLA challengers](#)) to California’s Reproductive Freedom, Accountability, Comprehensive Care, and Transparency (FACT) Act. The [FACT Act](#) imposes two requirements on certain providers of family planning or pregnancy-related services. First, covered state-licensed facilities—generally, outpatient clinics—must notify clients on site that “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,” along with the telephone number of the county social services office. Second, unlicensed covered facilities—generally, those without a state license or a licensed medical provider supervising their operations—must provide a notice on site and in any advertising materials that the facility “is not licensed as a medical facility” and has no licensed medical provider rendering or supervising its services. The Act exempts federal clinics and certain providers that are enrolled in the State’s [Family Planning, Access,](#)

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Care, and Treatment (Family PACT) program. The Act also specifies how covered facilities must display or distribute the notices (e.g., size and language requirements). Finally, the law imposes monetary penalties on any facility that fails to comply within thirty days of receiving a notice of violation.

How the Court characterizes the *NIFLA* case will almost certainly portend its ultimate outcome. As discussed in more detail below, the Court will likely ask whether *NIFLA*, at bottom, is a case about:

- An abortion regulation that the Court should square with its other decisions in that arena;
- Compelled speech on the subject of abortion;
- A law that targets only pregnancy centers that oppose abortion;
- A state’s authority to regulate the medical profession;
- A commercial speech regulation aimed to prevent deception; or
- A restriction on the political speech of a nonprofit advocacy group.

The remainder of Part I of this post provides a glimpse through each lens.

Abortion Regulation? The Supreme Court’s current **abortion jurisprudence**, based largely on a **plurality opinion** in the 1992 case *Planned Parenthood v. Casey*, is centrally concerned with whether a given regulation violates the substantive component of the Fourteenth Amendment’s Due Process Clause by imposing an “undue burden” on a woman’s decision to terminate her pregnancy. Among other things, *Casey* involved a challenge to Pennsylvania’s **informed consent requirement**, which mandated that a doctor provide a patient with certain information before performing an abortion, including notice of the availability of state publications listing agencies that offer alternatives to abortion and information on medical assistance benefits for childbirth. Finding no undue burden, the plurality proceeded to reject a First Amendment challenge as well, **concluding** that while the informed consent requirement “implicated” a doctor’s constitutional right “not to speak,” it did so “only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.”

In the wake of *Casey* and other Supreme Court cases upholding a state’s role in “**regulating the medical profession**,” the **Fifth** and the **Eighth** Circuits, relying on the *Casey* plurality, have rejected First Amendment challenges to informed consent laws where the required disclosures were truthful, not misleading, and relevant to a patient’s decision to have an abortion. In contrast, the **Second** and **Fourth** Circuits have reviewed abortion regulations that compel speech using more rigorous tests derived from other First Amendment contexts. Per the **Fourth Circuit**, “[t]he fact that a regulation does not impose an undue burden on a woman under the due process clause does not answer the question of whether it imposes an impermissible burden on the physician under the First Amendment.” In deciding *NIFLA*, the Ninth Circuit **agreed** with the Fourth Circuit that *Casey* does not supply the applicable First Amendment standard, but held that the FACT Act survives more exacting scrutiny, as explained in more detail below.

Content-Based Restriction? The *NIFLA* challengers **argue** that the Court should strike down the FACT Act as an impermissible “content-based” regulation. This argument is rooted in the Court’s 2015 decision in *Reed v. Town of Gilbert*. In that case, the Court considered a town law that restricted the posting of outdoor signs concerning certain subjects. The Court **held** that such “content-based laws”—which regulate speech based on its subject matter, function, or purpose—“are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” In other words, content-based laws must survive “strict scrutiny,” a standard which, in practice, the government can meet in only **rare cases**. The Ninth Circuit **agreed** with the *NIFLA* challengers that the FACT Act is a content-based regulation, but **reasoned** that “not all content-based regulations are subject to strict scrutiny” **based** on a prior en banc decision. The Ninth Circuit **concluded** that “courts have routinely applied a lower level of scrutiny when states have compelled speech concerning abortion-related disclosures,” **citing** pre-*Reed* decisions from other lower courts.

Viewpoint-Based Restriction? The NIFLA challengers also [argue](#) that the FACT Act, in addition to regulating a particular *subject*, targets their *viewpoint* on abortion. The Supreme Court [considers](#) viewpoint discrimination “an egregious form of content discrimination.” According to the NIFLA [challengers](#), the FACT Act burdens only centers that oppose abortion by [exempting](#) providers in the Family PACT program, which the NIFLA challengers say they cannot join because of their religious opposition to offering certain contraceptive supplies that program participants are required to provide. In contrast, the Ninth Circuit [reasoned](#) that the Act’s “narrow exceptions” do not “disfavor any particular speakers,” but are included in the law for reasons unrelated to any particular viewpoint on abortion.

Professional Regulation? California [argues](#) that the requirement for *licensed* pregnancy centers (providing notice of public programs) “falls well within the First Amendment’s tolerance for the regulation of the practice-related speech of licensed professionals.” Relying on a [prior decision](#), the Ninth Circuit agreed and subjected the requirement to [intermediate scrutiny](#), which—as its name suggests—is a [lower standard](#) than strict scrutiny. The court [considered whether](#) the requirement “directly advances a substantial governmental interest” and “is drawn to achieve that interest.” The Ninth Circuit ultimately [held](#) that California’s requirement met this test [because](#) the state has substantial interests in “safeguarding public health and fully informing Californians of the existence of publicly-funded medical services,” and the requirement is narrowly drawn to reach pregnant women in a time-sensitive situation, without expressing the state’s “preferences regarding prenatal care.”

The Ninth Circuit [declined](#), however, to resolve what level of scrutiny applies to the notice requirement for *unlicensed* pregnancy centers. Instead, the court [held](#) that the requirement to disclose a center’s unlicensed status survives even the strictest test because California has a “compelling interest in informing pregnant women when they are using the medical services of a facility that has not satisfied [state] licensing standards,” and the requirement is “narrowly tailored” because it “merely states” that the facility is unlicensed without expressing any view as to the quality of the services rendered there. The NIFLA challengers [counter](#) that the requirement is not narrowly tailored because it forces them to include the notice prominently in all advertisements in up to thirteen languages, diminishing their organizations’ messages.

Commercial Disclosure? In the proceedings below, California argued that the commercial speech doctrine provides an independent basis for upholding the FACT Act, citing cases such as [Zauderer v. Office of Disciplinary Counsel](#). In [Zauderer](#), the Supreme Court [upheld](#) an Ohio rule requiring attorneys to include additional factual material about their advertised fee arrangements. The Court [held](#) that such “disclosure requirements” do not violate the First Amendment if they are “reasonably related” to the state’s interest in preventing consumer deception. California urged the Ninth Circuit to apply this “rational basis” standard, arguing that both of the FACT Act’s requirements are akin those at issue in [Zauderer](#). However, the Ninth Circuit rejected this argument, [reasoning](#) that commercial speech “does no more than propose a commercial transaction,” whereas the FACT Act “primarily regulates the speech that occurs within the clinic.”

Nonprofit Speech? The NIFLA challengers [argue](#) that the professional and commercial speech doctrines are inapplicable because they offer their services for free. They cite as their primary authority [Supreme Court cases](#) prohibiting states from applying broad restrictions on the solicitation of legal services to groups advancing political, as opposed to pecuniary, objectives. The NIFLA challengers [seek](#) to draw from these cases a broader distinction between services rendered for “pecuniary gain” and those performed as part of an organization’s “public interest advocacy.” The Ninth Circuit, while stopping short of labeling the NIFLA challengers’ services “commercial,” rejected their argument, [reasoning](#) that their nonprofit status “does not change the fact that they offer medical services in a professional context.” California agrees, [arguing](#) that adopting different rules for professionals serving paying and nonpaying clients would “create a vast population vulnerable to abuse and neglect.”

For discussion of the potential implications of the *NIFLA* case, proceed to [Part II](#).

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